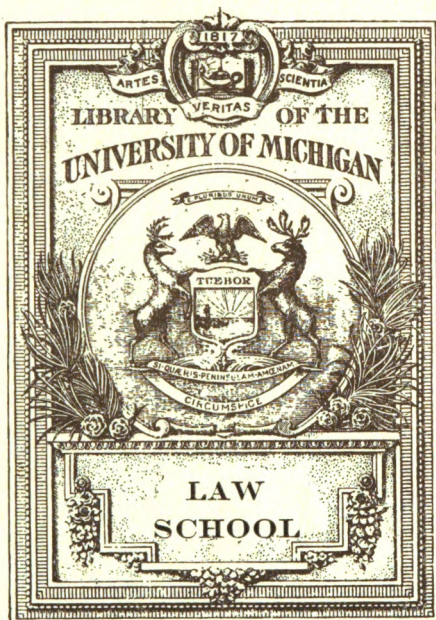

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A PRACTICAL TREATISE
ON
JURIES,
THEIR POWERS, DUTIES, AND USES,
IN ALL
ACTIONS AND PROCEEDINGS,
BOTH
CIVIL AND CRIMINAL,
UNDER
THE COMMON LAW,
AND UNDER
THE STATUTES OF THE UNITED STATES AND
OF THE STATE OF NEW YORK.

WITH FORMS.

BY
HUGO HIRSH,
OF THE NEW YORK BAR.

NEW-YORK :
GEORGE S. DIOSY, PUBLISHER,
80 NASSAU STREET.
1879.

TO THE
HON. HENRY A. MOORE,

COUNTY JUDGE OF KINGS COUNTY, N. Y.

SIR:

In the dedication of this work to you, I am fully conscious that the book, more than yourself, will be honored by the association. The record which you have made as an eminent jurist, as an instinctive judge of human nature, and as a faithful public servant, constitutes a character of which any man might justly feel proud; and while these traits, which are a benefaction in common to the public, cannot be too highly extolled, there are others which shine less in the public eye, but are equally worthy of admiration and praise—I mean those qualities of the heart which have always put you in complete sympathy with the younger members of the bar. To such qualities I am indebted for good counsel, advice and encouragement, and for the interest you have manifested in this work.

Hoping your life of usefulness may be spared, and your voice of encouragement for the youthful and struggling may be heard for many and many years to come,

With profound respect, I am, your obliged friend,

HUGO HIRSH.

September, 1879.

[iii]

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PREFACE.

THE original plan of this work was less comprehensive than it is; but when we entered into the labor of searching for authorities on the subject of which we desired to treat, we became sensible of the fact that there was a necessity for a work of this nature, not only for the citizen but also for the legal profession, who were laboring under the great disadvantage of being deprived of the compilation of the jury law and all the matters incidental and relating to jurors. What was originally intended for the instruction of the citizen alone, as to his duties as juror, and his rights and privileges as such, has therefore increased the bulk and the value of the volume, and will meet all the demands of the profession so far as the author is able to make it. No practical and thorough work of this kind has ever been published in this country; and we feel that we can, with justice, invoke for this volume the confidence of the citizen and the lawyer.

The complaint is constantly made that the jury system is bad, and that it is time we had a change, &c. This complaint is ill-founded and misapplied. It is but necessary to notice the many years this system of trial has been in use, and the improvement in

the laws and institutions of the countries which have adopted it, to be convinced that it should be continued in full force and vigor ; that it should be improved as far as possible, *but not changed or abolished*. The complaint, if any, should be made against the juror, not the system.

The citizen should bear in mind that the duty of the juror appeals to his highest intellectual reasoning powers and faculties, and that, as juror, he has to deal with some of the most profound and important moral and economical problems of the social and business community.

To the members of the legal profession we will but say, that if there were nothing in this volume but the compilation of the various statutes—with notes—relating to the many different kinds of jury which we have in this country, no apology for the publication of this work would be necessary ; but, as they will see, it contains considerably more than that to recommend it to a place in their libraries, being a practical work on the subject, *containing the entire common law and the statutes of the State of New York and United States, including all amendments of 1879*.

The chapters on challenges and verdicts, new trials, &c., will certainly be of great assistance to them, as the authorities cited therein are very comprehensive, and include the latest on the subjects to date (1879).

The chapter relating to trial by jury in special matters and proceedings will be found particularly valuable, as it contains a compilation of all the laws pertaining thereto, and the authorities upon those subjects.

The Appendix of Forms attached will be a great accommodation to many ; for, judging from our own experience in the matter, the task of looking through many books and libraries, at times, to find a proper or convenient form required for a particular special proceeding, is a source of considerable trouble and annoyance.

The attention of the profession is also called to the sections of the New Code of this State, as yet *unadopted*, and familiarly known as the Nine Chapters, which have been inserted by way of notes to those parts of this work to which they apply, thus showing the proposed changes in the law.

For the accommodation of the presiding judges of criminal courts we have inserted the several statutory requirements relating to the *charges to grand juries*.

Regarding the first chapter of this book, treating of the "Origin and Progress of Trial by Jury," it may not be amiss for us to remark that it alone has caused much research and study. This subject was heretofore left enveloped in probabilities and obscurity ; as few authors had given it the attention it intrinsically deserved, or devoted to it the time and labor required to establish a clear, definite and satisfactory conclusion.

During the preparation of this work we have frequently been asked our opinion of and upon our present jury system, and whether we could suggest anything that would tend to its improvement. In answer to these inquiries we can but say that we consider the jury system in this country unequalled in any other country in its rules, usages and safeguards.

We believe that the doctrine of unanimity is one of the fundamental safeguards of this system, and should be rigorously upheld. We believe, furthermore, that our jury *system* is not in need of any improvement, but that the *juror* is. That this improvement should consist of the *education* of those who will hereafter become jurors, in their duties, rights, &c., as such.

With confidence that the bench and the bar will appreciate the utility of this volume, we submit it to them.

H. H.

BROOKLYN, N. Y., *September*, 1879.

TABLE OF CONTENTS.

CHAPTER I.

ORIGIN AND PROGRESS OF TRIAL BY JURY, . . . §§ 1 to 59.

CHAPTER II.

QUALIFICATIONS AND EXEMPTIONS OF TRIAL (OR PETIT) JURORS,
§§ 60 to 86.

CHAPTER III.

MODE OF SELECTING, DRAWING, AND PROCURING THE ATTENDANCE
OF TRIAL (OR PETIT) JURORS. PENALTIES FOR NON-AT-
TENDANCE. FORMATION OF JURIES, . . . §§ 87 to 245.

CHAPTER IV.

CHALLENGES TO JURORS, . . . §§ 246 to 510.

CHAPTER V.

DUTIES OF TRIAL OR PETIT JURORS, . . . §§ 511 to 557.

CHAPTER VI.

THE VERDICT AND ITS INCIDENTS. SETTING ASIDE VERDICT,
§§ 558 to 705.

CHAPTER VII.

MODE OF SELECTION, DUTIES, QUALIFICATIONS, AND CHARGING OF
GRAND JURORS, . . . §§ 706 to 774.

[ix]

TABLE OF CONTENTS.

CHAPTER VIII.

**JURORS IN UNITED STATES COURTS IN CIVIL AND CRIMINAL ACTIONS
AND PROCEEDINGS, §§ 775 to 819.**

CHAPTER IX.

**JURIES IN JUSTICES' COURTS AND COURTS OF SPECIAL SESSIONS,
§§ 820 to 856.**

CHAPTER X.

**SPECIAL JURIES IN SPECIAL MATTERS AND PROCEEDINGS (INCLUDING
CORONER'S JURY), §§ 857 to 972.**

	PAGE
APPENDIX OF FORMS, 301
INDEX TO FORMS, 331
TABLE OF CASES, 335
INDEX, 855

A

PRACTICAL TREATISE

ON

JURIES.

CHAPTER I.

ORIGIN AND PROGRESS OF TRIAL BY JURY.

SECTION 1. Trial by jury is sometimes called trial *per pais*, that is, trial by *the country*. The law expression "may be inquired by the country" means that the case may be referred to a jury for their investigation and decision.

The law expression "he puts himself upon the country" means that the plaintiff or defendant is willing to have the case tried by a jury.

§ 2. There are many, yet various opinions, concerning the precise date of the origin of trial by jury; and many learned authors have been unable to determine the exact time when it was first reduced to a definite form or system. Blackstone asserts with *certainty* that trial by jury was in use among the earliest Saxon colonies. Evidences of trial by jury, are found in the records of the nations which adopted the feudal system of government; for their tribunals were usually composed of "twelve men good and true," chosen from the peers or equals of the parties, plaintiff and defendant, to the action.

§ 3. In the feudal nations there were two prominent courts; namely, the *King's* court, and the *Lord's* court.

2 ORIGIN AND PROGRESS OF TRIAL BY JURY.

The lords, who were vassals of the king, were tried in the *King's court* by a jury of Lords; thus by a jury of their peers or equals.

The vassals or subjects of these lords were tried in the *Court of Lords* by a jury of such subjects or tenants; hence by a jury of *their* peers or equals.

§ 4. The preservation of such a system appears to be one of the main objects of Magna Charta, the great Charter of English rights and liberties, which was wrung from King John by his barons assembled in arms on the 19th of June, 1215; for the 29th chapter of that Charter requires that "No freeman shall be taken or imprisoned, or disseised, or outlawed, or banished, or any ways destroyed, nor will we pass upon him, nor will we send upon him unless by the lawful judgment of his peers, or by the law of the land." *

§ 5. According to Forsyth, who, many years ago, wrote an extensive work on the "History of Trial by Jury," the English jury is of *indigenous* growth, and was not copied or borrowed from any of the tribunals that existed on the continent, but that the rise of the jury system may be traced as a gradual and natural sequence from the modes of trial in use amongst the Anglo-Saxons and Anglo-Normans before and after the Norman conquest.

§ 6. The jury was, originally, such that its verdict was nothing more than the conjoint testimony of a fixed number of persons testifying to facts within their own knowledge. The jurors, even to the reign of Elizabeth, were required to be of the neighborhood in which the cause of the trial originated; and any juror not belonging to such locality or vicinage was liable to be challenged on that ground.

§ 7. In the Assize as established in the reign of Henry II. we first find the jury in its distinct *form*.

The earliest record extant of a trial by a regularly con-

* Nullus liber homo capiatur, vel imprisonetur, aut utlagetur, aut exoletur, aut aliquo modo destruat; nec super eum ibimus, nec super eum mittimus, nisi per legale iudicium parium morum vel per legem terræ.

stituted *jurata* (or jury) is that of an action of ejectment between Edward I. and the bishop of Winchester in 1290, respecting the right to the custody of the Hospital of St. Julian at Southampton. The verdict was rendered for the king. The following are the names of the jurors in that case: Thomas Peveril, Henry Attecruche, John de Langell, John Pers, Thomas de Vyneter, Walter de Letford, Nicholas Gese, Adam le Horder, Hugh Sampson, Henry le Lung, John Wrangy, John Page.

§ 8. Among the Anglo-Saxons and others from whom the inhabitants of the British island derived much information concerning laws, government, justice, trial, etc., it was customary to divide the people into gilds, hundreds, and shires or counties.

The gilds, which were commonly called tithings, consisted of ten families whose members became responsible for the good conduct of one another. The head of this portion of the community was called "Toethings ealdor," and acted as arbitrator for the settlement of disputes relating to matters of a small or trifling nature.

§ 9. As no regularly organized police was employed, the gild, or the men of the gild, served to some extent in the capacity of police; they arrested the person accused of transgression and brought him to justice. If they believed him innocent they were to acquit him by their oaths, but if he was found guilty and then sentenced, they were to pay what was termed "wergeld," which was the allowance to the party injured, and "wite," which was compensation to the state as penalty for the violation of peace and law.

§ 10. The members of the gild, as well as the several gilds or tithings, were usually bound to one another by the "Peace-Pledge," or as some prefer, the "Frank-Pledge" or "Free-Pledge," which was their mutual bail or guaranty for the preservation of *peace, law, justice* and *concord*. The members of the gild were entitled to compensation from the wrong-doer, or from the tithing to which he belonged, for any injury inflicted on any member of their gild. The payment of these damages might be made in money or in cattle. If the transgressor refused to pay the

4 ORIGIN AND PROGRESS OF TRIAL BY JURY.

legal compensation, which was generally regulated according to the nature of the offense, and the offender's wealth, he thus left himself liable to the vengeance or "feud" of the injured parties and their friends. "Buy off the spear or bear it," was the ordinary maxim for the determination of this question.

§ 11. The division by hundreds consisted of ten gilds, or one hundred families, mutually bound to act in the same manner as the members of the tithing. The head man, called the "Hundreds ealdor," was the presiding officer of the Hundred-court, which was held once a month, and which had jurisdiction in civil and criminal questions.

§ 12. The "*Scir*" division comprised all the Hundreds within the limits of the Shire or County. The Shire court was held twice a year, and had jurisdiction in matters affecting several of the Hundreds. The head man who convened and presided over this court was called "Ealdor-man," "Scir-gerefa," "Shire-reeve" or "Sheriff." According to Bouvier, a "reeve" was "a ministerial officer appointed to execute process, keep the King's peace, and put the laws in execution. He witnessed all contracts and bargains, brought offenders to justice and delivered them to punishment; took bail for such as were to appear at the County court, and presided at the court of folecmote."

§ 13. Originally the whole of the free male adults of a district might attend and form the monthly or half-yearly court.

In early times the jurors acted not only as witnesses, but as judges, and decided the case. Compurgators, usually twelve in number, were witnesses to prove the character of the person accused. The opposite party might summon compurgators to contradict those sworn on the other side. The first party might then call in more; as many as a thousand were, on one trial, called by the opposing parties. Hallam says that "perjury was the dominant crime of the Middle Ages, encouraged by the preposterous rules of compurgation and by the multiplicity of oaths in the ecclesiastical law."

§ 14. According to some of the best authorities, the nations from which England may have received considerable light on the question of jury trial were the Greeks, the Romans, the Normans, the Danes, the Lombards, the Franks, the Norwegians, the Swedes and the Scandinavians.

§ 15. There are many points of similarity between the tribunals or systems of justice as found in those nations, and the tribunals of justice in England; still these tribunals are *not identical*. Chief Justice NEILSON, of the City Court of Brooklyn, and many others equally competent, maintain that trial by jury is to be ascribed chiefly to the Romans who ruled Britain during a period of more than 400 years, from B. C. 55 to A. D. 410.

§ 16. The Romans usually established, as far as practicable, their own laws and customs among their subjects. The Normans ruled England from A. D. 1066 to 1115—a period of less than one hundred years. Many of the laws which they brought were *similar* to those existing in England. No real progress was made in the time of William the Conqueror towards the institution of trial by jury; although he separated the civil from the ecclesiastical courts. His successors, who continued in power about sixty-seven years, contributed but little—some say nothing—to establish the jury system.

§ 17. The justices in eyre, or itinerant justices, when officially visiting the counties, caused to be summoned before them twelve knights, or other good and lawful men, for every hundred, and charged them upon their oaths to inquire respecting crimes and offenses committed within their respective hundreds, that they might be prepared to present to the court the suspected or accused persons at the time appointed. The *Grand Inquest*, which consisted of these knights, or good and lawful men, authorized to make inquiry concerning every hundred in the county, was entered (or mentioned) for the first time in the “*Liber Assisarum*” in the forty-second year of the reign of Edward III.

§ 18. The presentments made by the knights, being

at first supplemental to those of the hundredors, gradually superseded the latter in jurisdiction and practice. From this grand inquest originated the present grand jury system.

§ 19. It has been said of the coroners that they are of so great antiquity that their commencement is not known. The name coroner is found in a charter which was granted by the Anglo-Saxon king Athelston in 925. Coroners held certain pleas or powers, from the *Crown*, and could pass judgment in criminal cases; but this power was taken from them by chapter 17 of Magna Charta.

The earliest statute defining the mode of taking a coroner's inquest is that entitled "De Officio Coronatoris," A. D. 1276.

§ 20. In the reign of George IV. it was enacted that jurors need be only good and lawful men of the body of the county. The jurors are now summoned from the body of the county, but cannot base their verdict upon any special knowledge which they may possess relating to the matter in dispute. Jurors at the present time are to decide according to the evidence furnished by the persons who have the knowledge of the facts and who testify as witnesses on the trial.

§ 21. With regard to the trial of civil causes in England in those which are carried on in the superior courts at common law, questions of fact are to be determined by the verdict of a jury. And by a late statute, parties may, if they both choose, try issues of fact before a judge without a jury. The jury also assess the amount of damages where a wrong is proved or admitted. In courts of equity the judges sometimes direct a disputed question of fact to be tried by a jury.

§ 22. The practice in the Court of Chancery of sending questions of fact to be tried before a jury, existed as early as the year 1400. The right of the jury to judge of the motive or intent, as a question of fact, was not practically settled until 1792, when Mr. Fox's libel bill was passed; not fully perfected until 1843, when Lord Campbell's bill was adopted.

§ 23. A prisoner, on trial for a capital offense, could not claim the aid of counsel or of witnesses to be examined on oath in his behalf before the reign of William and Mary.

And it was not till 1836 that the bill was passed allowing counsel to prisoners in all criminal cases.

§ 24. Many were the struggles between the people and the crown in regard to jury trials. Some of the most notable state trials were, Sir Nicholas Throckmorton's in the year 1554; William Penn's and William Mead's in 1670; Alice Lisle's in 1685; Richard Baxter's in 1685, and the seven Protestant Bishops in 1688.*

* Sir Nicolas Throckmorton was tried in the year 1554 on a charge of high treason. Sir Thomas Bromley was Lord Chief Justice, and presided. Sergeant Stanford and the attorney-general were counsel for the Crown. Whetston was foreman of the jury. After hearing the case the jury acquitted the prisoner. The Chief Justice tried, by intimidation, to make the jurors change their verdict, but they remained firm, and the foreman answered: "We have found him *not guilty*, agreeable to all our consciences." The court then sent the jurors to prison. Four of them, for the sake of being released, said they had done wrong; they were discharged. The remaining eight were brought before the Star-Chamber and received harsh treatment. Three of them were condemned to pay a fine of £2,000 each; the rest were obliged to pay a fine of £200 each, yet, through their firmness and conscientiousness the prisoner was acquitted.

William Penn and William Mead were tried in the year 1670, on a charge of "having unlawfully and tumultuously assembled and congregated a great concourse and tumult of people, and having preached and spoken to those assembled in Gracechurch street, London." The mayor, recorder and aldermen conducted the trial. After two or three witnesses testified that William Penn did preach to the people, and that William Mead was with Penn at the preaching, the recorder submitted the case to the jury, who were *commanded* to find a verdict of guilty. They disagreed; four were against conviction, and eight were for conviction. The four who dissented were threatened by the court. The jury were then sent back to consider their verdict, and to find against the prisoners. They returned, however, with a verdict of "Guilty of speaking in Gracechurch street," which was no legal offense. They were again commanded to retire and consider their verdict. They took pen, ink and paper, and after a short consultation, returned with a written verdict acquitting William Mead, and finding William Penn

§ 25. The trial of the seven bishops, together with the whole Revolution of 1688, in the reign of James II., served to sweep away the compulsion, fears, coercion and injustice

"Guilty of speaking and preaching to an assembly met together in Gracechurch street." The court became furious, and commanded the jury, for the fourth time, to retire and consider their verdict. The court then adjourned to the next day, Sunday, when they met and summoned the prisoners and jury to appear. The jury did not change their verdict. They were again commanded to retire and consider their verdict. They obeyed, but returned on the following day with a verdict acquitting both prisoners.

When the clerk asked the jury, "Is William Penn guilty?" they answered, "Not guilty;" and when the clerk asked, "Is William Mead guilty?" they answered "not guilty." The jury were then condemned by the court to pay a fine of forty marks each, and to imprisonment until the fine be paid. They were subsequently released from custody on a writ of *habeas corpus*, and their imprisonment was adjudged illegal.

Mrs. Alice Lisle was tried in the year 1685 on a charge of high treason for having afforded shelter to one Hicks, a dissenting minister. Jeffreys, who was a leading agent of cruelty and injustice in the service of the King, James II., presided as judge at the trial of this lady, who was then past seventy years of age. Jeffreys charged the jury to bring in a verdict of guilty. They brought in a verdict of "not guilty." The judge in a great fury sent them out again to consider their verdict. They again brought in a verdict of "Not guilty." Then the judge in a towering rage threatened the jury with attain, and commanded them to retire again and consider their verdict. At length, over-awed by fear, they brought in a verdict of "Guilty." Mrs. Lisle was executed. In the following reign her attainder was reversed by an act reciting, "that she had been convicted by a verdict injuriously extorted and procured by the menaces and violences, and other illegal practices of George Jeffreys, Chief Justice of the King's Bench."

Richard Baxter, a Nonconformist minister, was tried in 1685, on a charge of seditious libel, for having explained some passages of Scripture in a sense that was not favorable to Roman bishops and others. Jeffreys presided as judge at this trial, and, after treating the prisoner and his counsel with much insolence, charged the jury to find a verdict of guilty. The jurors, who were subservient tools of the government, decided according to the unjust demands of Jeffreys and James II., rather than according to evidence, justice, and conscience, and brought in a verdict of guilty. Baxter, instead of being, as was first decided, whipped through the streets at the

which had been employed to force juries to decide unjustly, and served to give jurors the independence, liberty, authority and right which they now possess, and which enable

tail of a cart, was condemned to pay a fine of £500. His fine was subsequently remitted, and he was finally permitted to continue his preaching.

The celebrated trial of the seven Protestant Bishops was held in the year 1688. They were charged with seditious libel. King James II. issued a Declaration of Indulgence, and required the clergy to publish it in the churches on Sunday. The main object of this indulgence was to release many of his co-religionists—Roman Catholics—from certain tests and liabilities, that he might appoint them at his pleasure to public offices, to be instruments of injustice in his service. Many of the leading non-Catholic clergy clearly understood that by publishing this declaration they would be apparently sanctioning a prerogative which had been pronounced illegal, and that they would thereby become ridiculous and obnoxious in the eyes of the people who still continued loyal to the decisions of Parliament, and who still desired the stability of the English government. The king virtually claimed for himself, in the exercise of such dispensing power, the absolute right and authority of changing and repealing the laws of the land, and disregarding the acts of Parliament according to his own will, caprice, prejudice or pleasure. Such arbitrary power, if granted to the king, tended to a subversion of the government. Burnett, in his history of the reign of James II., says that the king's power or prerogative of dispensing in such a manner "*had often been declared illegal in Parliament.*"

Seven bishops presented a petition to the king in which they set forth their reasons for objecting to publish the Declaration of Indulgence. The following were the seven who drew up, signed and presented the petition:

SANCROFT, Archbishop of Canterbury.
 LLOYD, Bishop of St. Asaph.
 KEN, Bishop of Bath and Wells.
 TURNER, Bishop of Ely.
 LAKE, Bishop of Chichester.
 WHITE, Bishop of Peterborough.
 TRELAWNEY, Bishop of Bristol.

They declared that they could not, in honor, prudence, justice or conscience publish the Declaration.

Macaulay, in his History of England, says: "That the Declaration of Indulgence was unconstitutional is a point on which both the great English parties have always been entirely agreed." "No

10 ORIGIN AND PROGRESS OF TRIAL BY JURY.

them, if they desire, to decide justly, impartially, according to evidence and conscience.

The Bill of Rights of that year, article I., section 11, expressly declares that jurors ought to be duly impaneled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders.

§ 26. Lord Erskine says that "trial by jury is the best security of every order of the State."

Lord Brougham makes the following statement concerning the jury system: "I certainly retain the opinion which I always had in common with all the profession, that the best tribunal for investigating contested facts is a jury of twelve men."

constitutional question had ever been decided more deliberately, more clearly, or with more harmonious consent." "That he, James II., could by one sweeping edict authorize all his subjects to disobey whole volumes of laws, no tribunal had ventured, in the face of the solemn parliamentary decision of 1673, to affirm."

The seven bishops, however, were, by the king's command, first summoned to appear before the council or king's court, and were then imprisoned in the Tower. On the 29th of June they were tried in the court of King's Bench on the charge of "having written and published a false, malicious, and seditious libel." Westminster Hall, Old and New Palace Yard, and all the neighboring streets, to a great distance, were thronged with people. Such an auditory had never before, and has never since been assembled in the court of King's Bench. The audience listened with as much anxiety as if the fate of every one of them was to be decided by that verdict. The masses of the people, to the remotest parts of the land, were in sympathy with the prisoners. The foreman of the jury was Sir Roger Langley, a baronet of an honorable family. With him were associated, as jurors, a knight and ten esquires. One of the jurors, Michael Arnold, who was brewer to the king's palace, said: "I am sure to be half-ruined, whatever I do; for if I say not guilty, I shall brew no more for the king; and if I say guilty, I shall brew no more for anybody else." Every effort was made by the king's agents to have the prisoners convicted. The jury were obliged to remain out all night. Such was their extreme thirst that the water brought in the morning for them to wash with, was lapped up to the last drop. After long deliberation they brought in a verdict of "Not guilty." The joy of the people throughout the kingdom, on learning that the prisoners were acquitted, was beyond the power of description.

Cockburn, present Chief Justice, said, in *Winsor v. Queen* (118 *Eng. Com. L.* 170), "Our ancestors insisted on unanimity as of the essence of the verdict, but were unscrupulous how that unanimity was obtained. Whether the minority gave way to the majority or the reverse appeared to them a matter of indifference. It was a contest between the strong and the weak, the able-bodied and the infirm, as to who best could bear hunger and thirst, and all the discomforts incident to the confinement. In our day we look upon trial by jury, and the principle upon which jurors ought to find their verdicts, in a different way. We desire unanimity, it is true, but the unanimity, not of coercion, but of conviction."

§ 27. The Scottish jury was feudal in its institution, having probably been directly imported from France, and its character as a testifying, rather than an adjudging body, lasted down to a comparatively late period. But the general spirit of the English system has had an influence over the tendency of its neighbor.

§ 28. In the reign of Charles II. the courts endeavored, in criminal cases, to take out of the hands of the jury the plain question of "guilty" or "not guilty," by settling beforehand a train of facts whence guilt might be *presumed*, and requiring the jury to find whether these facts were or were not established. It was not until the trial of Carnegy of Finhaven for the murder of Lord Strathmore in 1728, that they re-established their privilege to give a general finding of guilty or not guilty.

§ 29. The class of persons of whom juries are to consist has varied at different periods, and the specific qualifications of the juryman is at present peculiar to each of the United Kingdoms.

§ 30. In Scotland there is no coroner's inquest. In ordinary criminal prosecutions there is no grand jury, and the ordinary jury or assize, consisting of fifteen, give their verdict by a *simple majority*. In questions of treason the English system was, much to the discontent of the country, introduced immediately after the Union.

§ 31. The Court of Session, consisting, like the penal

jury, of fifteen members, represented the old judicial committees of parliament or the grand jury of the nation. Their methods of procedure had down to a very late period several elements of a popularly deliberative character, distinguishing them in an emphatic manner from the rigid legal technicalities of the English common law courts. In the year 1815, it was determined that the English system of jury trial should be brought into Scotland, and a separate court of commissioners was appointed to carry it into effect. In 1830, after what was deemed a sufficient trial of the system in this separate form, it was made a portion of the ordinary jurisdiction and procedure of the Court of Session.

§ 32. But jury trial in civil cases was inconsistent with the traditional spirit of the Scottish legal tribunals, and has, therefore, not been popular. A people not trained to a traditional veneration for every feature of the system could not see a logical conformity in making twelve men swear that they would do justice to their consciences, and then coercing them by confinement and starvation until they had agreed to be all of one mind. In 1854, the stringency of the rule of unanimity was accordingly relaxed by a provision, that after six hours' deliberation a verdict returned by nine of the twelve jurymen should be effectual (17 and 18 *Vict.* cap. 59).

§ 33. The arrangement for substituting the decision of a judge for the verdict of a jury in a civil action, when parties consent that an issue be so tried, was introduced by an act of 1850.

§ 34. In Ireland, trial by jury is substantially the same as in England, and an act to consolidate and amend the laws relating to juries was passed in 1833 (4 *Will.* IV.).

§ 35. In France, trial by jury owes its formation and establishment mainly to the Revolution of 1789. Prior to that period, criminal charges were tried by judges who decided both law and fact; the preliminary proceedings were conducted in secret. This system of secret procedure was borrowed from the Inquisition, and was acceptable to the judges and lawyers, who were, for the most part,

ecclesiastics. The people, however, dreaded and detested this secret, inquisitorial system so much, that it did not become general throughout the nation before the year 1539, when it was finally established by a royal ordinance. This system, which was made an engine of grievous injustice and horrible torture, both moral and physical, continued in force down to the year 1780. It was effectually overthrown, and trial by jury in criminal cases was established, by a law of the Constituent Assembly on September 16, 1791.

The jury of accusation, or grand jury, which was then established, was abolished by the Code Napoleon, in 1808.

In relation to the trial by jury some modifications and changes took place in the Code Napoleon, from the time of its introduction in 1808, to the Revolution of 1848.

§ 36. A law of May, 1830, regulates the mode of voting in coming to a conclusion as to verdict. Every juror receives a slip of paper, marked with the stamp of court, from the foreman, and on this he writes, without letting his colleagues know what he has written, his decision in the case; he then hands that slip folded to the foreman, who is to deposit it and all the others, in a box kept for that purpose. The foreman then draws out the slips of paper and writes the result without stating the number of votes, except when there is a majority of only one for conviction. These slips must then be burned in the presence of the jury. Since the year 1831, a majority of two-thirds is required to render a verdict.

§ 37. Trial by jury was introduced into Belgium, in 1830, at the time of the Revolution, when that country separated from Holland. It was received in the kingdom of Greece, in 1834, and is expressly retained by one of the articles of the New Constitution granted in 1843.

§ 38. It was partially adopted by Portugal in 1832, and more firmly established by a law of 1837.

§ 39. Trial by jury was established in Geneva, by a law of January, 1844. The system there recognizes the distinction between a verdict of guilty under *extenuating*

14 ORIGIN AND PROGRESS OF TRIAL BY JURY.

circumstances, and a verdict of guilty under *very extenuating* circumstances.

§ 40. Trial by jury was adopted many years ago, by the government of Sardinia.

§ 41. On May 23, 1850, the Archbishop of Turin, M. Franzoni, was tried by a jury and found guilty of an offense against the laws of the State, for having published a circular in which he commanded the clergy not to recognize the jurisdiction of the secular tribunals.

§ 42. Trial by jury as a popular right and benefit, was one of the results of the great revolutions or convulsions which agitated the continent, during a period of more than half a century, from 1789 to 1848.

§ 43. When the French, in 1789, became masters of the provinces bordering on the Rhine, they introduced trial by jury in criminal cases. The people having experienced the advantages of this system, were generally in favor of its continuation and extension. In many of the Rhine provinces, however, which were subsequently united to Prussia, and throughout Germany, so strong was the feeling of hostility to the French name, to French dominion and institutions, that this tribunal was in danger of being swept away. Prussia, however, appointed a commission of five well-qualified persons to investigate the working of the jury system, and the wishes of the people on the subject in these provinces. The commissioners, after long and serious inquiry, reported unanimously in favor of its continuation. The Prussian government submitted to that decision, and trial by jury was preserved.

§ 44. Rhenish Hesse and Bavaria retained the same mode of trial.

§ 45. In Prussia proper, the Constitution of December, 1848, guaranteed the introduction of trial by jury into the courts of criminal justice. This guarantee was redeemed by the government in January, 1849, by the promulgation of a law establishing and regulating this tribunal. Political offenses, however, were withdrawn from the cognizance of juries in the Prussian dominions by a law of April 15, 1851.

§ 46. In Bavaria and Hesse the jury system in criminal cases was adopted in 1848. It was adopted in Wurtemberg and Baden in 1849.

§ 47. An imperial decree abolished trial by jury throughout the Austrian Empire, January 15, 1852.

§ 48. Trial by jury began in Russia August 8, 1866.*

§ 49. After the settlement of the American Colonies, and among the first movements in the assertion of their

* Previous to 1871, all the so-called political criminals in Russia were tried by Senators—the Czar's representatives.

In 1869, a revolutionary society was discovered, and many arrests were made. The preliminary inquest lasted till April of 1871, when about eighty persons were submitted to trial by jury—the first public trial of political offenders in Russia. All the proceedings of the trial were published in the newspapers, and were read and discussed throughout the country. According to the verdict a few persons were sent to Siberia to hard labor, several were exiled, and some were condemned to brief imprisonment, but the large majority (over three-fourths) were found not guilty. The public were pleased with the new way of trial. But to the Czar its result was unsatisfactory, and in order to modify the mistake of the jury, a secret order was issued that denied those who had been acquitted not only the privilege of service in any public capacity, but of teaching in colleges and schools, private or official, and even of working in factories; and, furthermore, provided for their deportation to secluded hamlets in distant provinces, where they were kept under the surveillance of the police.

In many ways the new form of trial by jury proved troublesome to the government, and how to make it satisfactory became a momentous question. On several occasions, after the great trial of 1871, when prisoners were acquitted, they were rearrested by gendarmes as they left the court, and sent to the "Unknown lands." This method of action was a failure in the case of Vera Zasulitch, for her friends had made preparations to thwart it. The government then resorted to other expedients, and sought to impanel such juries as could be trusted to give verdicts in its interest. Under this new arrangement, those charged with political heresy or with Nihilism in 1876 and 1877, in Odessa, Kiev, Kazan, Charkow, and other places, were tried or condemned; and thus the government found means to stifle the new way of trial without abolishing it.

We may understand the operations of the Russian courts during the past three years by recalling the trials of 1877 in St. Petersburg.

rights as freeborn English subjects, the claim to common law rights soon became a topic of universal concern and national vindication. In October, 1765, a convention of delegates from nine colonies assembled at New York and made and published a declaration of their rights, in which they insisted that the people of the colonies were entitled to all the inherent rights and liberties of English subjects, of which the most essential were the exclusive power to tax themselves and *trial by jury*. The memorable declaration of rights of the first Continental Congress in October, 1774, and in which was a representative of all the colonies except Georgia, it was explicitly adopted: "that the respective colonies were entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law; that they were entitled to the benefit of such of the English statutes as existed at the time of their colonization, and which they had by experience found to be applicable to their several local and other circumstances; that they were likewise entitled to all the immunities and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws."

§ 50. Upon the formation of the several State constitutions after the colonies had become independent States, and at the time of their adoption they contained the same declarations in substance; and where express constitutional provisions on this subject appeared to be wanting, the same principles are asserted by declaratory legislative acts, and Chancellor Kent says: "they must be regarded as fundamental doctrines in every State government."

The articles of confederation did not touch the subject.

§ 51. In the ordinance of Congress of July, 1787, for the government of the territory of the United States, north-west of the river Ohio, out of which so many of the western States have since been formed, it was declared, among other things, to be an unalterable article of compact between the original thirteen States and the people and States in the said

territory, that the inhabitants thereof should always be entitled to the benefit of *trial by jury*.*

§ 52. Trial by jury, in both civil and criminal cases, is a right granted to the people of the United States by the Constitution, adopted in 1789.

The Constitution, by section 2, article III., provides that "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where said crime shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."

§ 53. Article V. of the Amendments to the Constitu-

* Judge Miller, associate justice of the United States Supreme Court, in his address before the Bar Association of the State of New York (as reported in the Albany Law Journal, November 28, 1878, vol. 18, p. 40), spoke upon the subject of trial by jury as follows: "No institution which we have inherited from our ancestors has been as little disturbed by legislative action as trial by jury; and none seems so firmly fixed in the affections of the people, with all its accessories."

After saying that some of the incidents of the system are revolting, he continues: "If a cultivated Oriental were told for the first time that a nation which claims to be in advance of all others in its love of justice and its methods of enforcing it, required as one of its fundamental principles of jurisprudence that every controversy between individuals and every charge of crime against an offender should be submitted to twelve men, without learning in the law, often without any other learning, and that neither party to the contest could prevail, until all the twelve men were of one opinion in his favor, he would certainly be amazed at the proposition. . . . Still it is probably wise that no man shall be convicted of an infamous crime until twelve fair-minded men are convinced of his guilt. I am also forced to admit, however, that even in civil cases my experience as a judge has been much more favorable to jury trials than it was as a practitioner. And I am bound to say that an intelligent and unprejudiced jury, when such can be obtained, who are instructed in the law with such clearness, precision and brevity as will present their duty in bold relief, are rarely mistaken in regard to facts which they are called upon to find."

After speaking of the origin of the system and the qualifications of jurors, he suggests that there is a fair field open for judicious legislation upon the question of unanimity in civil cases, as well as in the number of the jury, which he considers too large.

tion provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

§ 54. Article VI. of the Amendments provides that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

§ 55. Article VII. of the Amendments provides that "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." (See Bankruptcy and Admiralty, *post.*)

§ 56. Throughout the United States, in all trials by jury, the unanimity of the jurors as to their verdict is generally considered essential. There are, however, some differences relative to juries in the States. The qualifications of jurors vary in the States.

§ 57. The persons who make up the jury-lists are called sheriffs in Louisiana and other States, select-men in the New England States, trustees in Ohio, supervisors in New York.

§ 58. In many countries, for a long time after the introduction of trial by jury, accusation was certain condemnation, especially when the prisoner was accused of any

wrong against the rulers or government. The members of the jury were frequently government officials, and, as such, were often extremely servile and pliant agents of injustice.

In some countries the prisoner was tortured and otherwise cruelly treated for the purpose of forcing him to criminate himself—to confess his guilt when he was really innocent; and the jurors were, in many cases, imprisoned for acquitting the accused according to evidence and justice, and according to their own conscience.

§ 59. It may be a matter of surprise to some to learn the fact that jury trial is more prevalent in America than in England at the present time. For more than a century, in England, the practice of exposing persons charged with minor offenses to trial and “summary conviction” by one or two justices of the peace has been growing more and more prevalent. The number of offenses which are now thus summarily triable in England, according to Mr. Archibald, is no less than three hundred and sixty-three.

CHAPTER II.

QUALIFICATIONS AND EXEMPTIONS OF TRIAL JURORS.

PART I.

GENERAL PROVISIONS.

SECTION 60. In order to be qualified to serve as a trial juror in a court of record, a person must be :

I. A male citizen of the United States, and a resident of the county.

II. Not less than twenty-one, or more than sixty years of age.

III. Assessed for personal property belonging to him, in his own right, to the amount of \$250 ; or the owner of a freehold estate in real property, situated in the county, belonging to him in his own right, of the value of \$150 ; or the husband of a woman who is the owner of a like freehold estate, belonging to her in her own right.

IV. In the possession of his natural faculties and not infirm or decrepit.

V. Free from all legal exceptions ; of fair character ; of approved integrity ; of sound judgment ; and well-informed.*

§ 61. But a person who was assessed, on the last assessment-roll of the town, for land in his possession, held under a contract for the purchase thereof, upon which improvements, owned by him, have been made, to the value of \$150, is qualified to serve as a trial juror, although he does not possess either of the qualifications specified in subdivision third of the last section, if he is qualified in every other respect.†

* *New Code*, § 1027 ; 2 *R. S.* 411, § 13 (2 *Edm.* 428).

This and subsequent sections of the code relating to jurors are remodeled and their application enlarged.

† *New Code*, § 1028 ; 2 *R. S.* 411, § 14.

§ 62. Each of the following officers is disqualified to serve as a trial juror :

I. The governor; the lieutenant-governor; the governor's private secretary.

II. The secretary of state; the comptroller; the state treasurer; the attorney-general; the state engineer and surveyor; a canal commissioner; an inspector of state-prisons; a canal appraiser; the superintendent of public instruction; the superintendent of the bank department; the superintendent of the insurance department; and the deputy of each officer specified in this subdivision.

III. A member of the legislature, during the session of the House of which he is a member.

IV. A judge of a court of record, or a surrogate.

V. A sheriff, under-sheriff, or deputy-shériff.

VI. The clerk or deputy-clerk of a court of record.*

§ 63. Each of the following persons, although qualified, is entitled to exemption from service, as a trial juror, upon his claiming exemption therefrom :

I. A clergyman, or a minister of any religion officiating as such, and not following any other calling.

II. A resident officer of, or an attendant, assistant, teacher, or other person, actually employed in a State asylum for lunatics, idiots, or habitual drunkards.

III. The agent or warden of a State prison; the keeper of a county jail; or a person actually employed in a State prison or county jail.

IV. A practicing physician or surgeon, having patients requiring his daily professional attention.

V. An attorney or counselor at law, regularly engaged in the practice of the law as a means of livelihood.

VI. A professor or teacher in a college or academy.

VII. A person actually employed in a glass, cotton,

It is not enough that a juror *possesses* the amount of personal property required by law; *he must be assessed for it.* *Valton v. N. L. F. Life Ins. Co., 17 Abb. Pr. 268.*

* *New Code, § 1029.*

This section is new and covers a number of cases which had been unprovided for by previous statutes.

linen, woolen, or iron manufacturing company, by the year, month, or season.

VIII. A superintendent, engineer, or collector on a canal, authorized by the laws of the State, which is actually constructed and navigated.

IX. A master, engineer, assistant engineer, or fireman, actually employed upon a steam vessel making regular trips.

X. A superintendent, conductor, or engineer, employed by a railroad company, other than a street railroad company; or an operator or assistant operator, employed by a telegraph company, who is actually doing duty in an office or along the railroad or telegraph line of the company by which he is employed.

XI. An officer, non-commissioned officer, musician, or private of the national guard of the State, performing military duty; or a person who has been honorably discharged from the national guard, after five years' service, in either capacity.

XII. A person who has been honorably discharged from the military forces of this State, after seven years' faithful service therein. But in order to entitle a person to exemption under this subdivision, his service must have been performed before the twenty-third day of April, eighteen hundred and sixty-two, either as general or staff-officer, or as an officer, non-commissioned officer, musician, or private, in a uniformed battalion, company, or troop of the militia of the State, and armed, uniformed and equipped, according to law; or a portion thereof, during that period and in that capacity, and the remainder, since the twenty-third day of April, eighteen hundred and sixty-two, as a member of the national guard of the State.

XIII. A member of a fire company, or fire department, duly organized according to the laws of the State, and performing his duties therein; or a person who, after faithfully serving five successive years in such a fire company, or fire department, has been honorably discharged therefrom.

XIV. A person otherwise specially exempted by law.*

§ 64. The evidence of the right to exemption, as prescribed in the last section, is as follows:

I. Under subdivision second thereof, the certificate of the superintendent or other principal officer of the asylum.

II. Under subdivision third thereof, the certificate of the warden, or other principal officer of the State prison, or the sheriff of the county, as the case requires.

III. Under subdivision eleventh thereof, where the applicant is a non-commissioned officer, musician or private in a company or troop of the national guard, the certificate of the commanding officer of the company or troop, accompanied with proof, by affidavit, of the genuineness of the signature thereto.

IV. Under the last clause of subdivision eleventh, or under subdivision twelfth thereof, in the discretion of the court, the discharge of the person from military service, if it shows the facts entitling him to exemption.

V. Under the first clause of subdivision thirteenth thereof, where the applicant is under the rank of foreman, the certificate of the foreman, or other chief officer of the company to which the applicant belongs, accompanied with proof, by affidavit, of the genuineness of the signature thereto.

VI. Under the last clause of subdivision thirteenth

* *New Code*, § 1030, as amended in 1879; 2 *R. S.* 415, § 33, subd. 4 to 8, incl., and § 34, subd. 1 (2 *Edm.* 432), and *Laws of* 1861, c. 215 (3 *Edm.* 725), and special acts.

Subdivision 7 of this section is limited to those who manufacture from the raw material, and a person employed in the manufacture of machinery from pig and old iron does not come within this exemption. *People ex rel. Blake v. Holdridge*, 4 *Lans.* 511.

A partner interested in the profits of such business is exempt. *Ib.*

A statute exempting members of a fire company from jury duty, in general does not operate to discharge them from service as talesmen. The object of the law is to afford them leisure for the performance of their duty as firemen; and when their presence in court demonstrates that their services are not required in the line of their employment, the reason of their exemption ceases. *State v. Willard*, 79 *South Carolina*, 660.

thereof, the certificate of the chief engineer of the fire department of the city or village where the service was performed, or of the mayor or president of the city or village.

A certificate, specified in this section, must be dated within three months before the time of presenting it, and filed with the clerk of the court to which it is presented.*

§ 65. The court must discharge a person from serving as a trial juror in either of the following cases:

I. Where it satisfactorily appears that he is not qualified.

II. Where it satisfactorily appears that he is exempt, and he claims the benefit of the exemption.

Where a person is discharged for either of the causes specified in this section, the clerk must destroy the ballot containing his name.†

§ 66. Upon satisfactory proof of the facts, a court, at the term to which a person is returned as a trial juror, must excuse him from serving during the whole, or a portion of the term, in either of the following cases:

I. Where he is a justice of the peace, or executes any other civil office, the duties of which are, at the time, inconsistent with his attendance as a juror.

II. Where he is a teacher in a school, actually employed and serving as such.

III. Where, for any other reason, the interests of the public, or of the juror, will be materially injured by his attendance; or his own health, or the health of a member of his family, requires his absence; or he is temporarily incapacitated, for any reason, from properly discharging the duties of a juror.

Where a person is excused, in either of the cases specified in this section, the ballot containing his name must be returned to the box from which it was taken.‡

* *New Code*, § 1031; 2 *R. S.* 415, § 33, subd. 4 (2 *Edm.* 432) and special acts.

† *New Code*, § 1032; 2 *R. S.* 415, § 33, subd. 1 to 3 incl., and § 34.

‡ *New Code*, § 1033; 2 *R. S.* 415, § 34, with omissions and additions.

§ 67. Section ten hundred and twenty-nine (§ 62, *ante*) of this act applies throughout the State. The remainder of this article does not apply to the city and county of New York, or to the county of Kings.*

PART II.

PROVISIONS RELATING TO NEW YORK COUNTY.

§ 68. In order to be qualified to serve as a trial juror, in a court in the city and county of New York, a person must be:

I. A male citizen of the United States, and a resident of that city and county.

II. Not less than twenty-one, nor more than seventy years of age.

III. The owner, in his own right, of real or personal property of the value of \$250; or the husband of a woman who is the owner in her own right of real or personal property of that value.

IV. In the possession of his natural faculties, and not infirm or decrepit.

V. Free from all legal exceptions, intelligent, of sound mind and good character, and able to read and write the English language understandingly.†

§ 69. A person dwelling or lodging in the city and county of New York for the greater part of the time between the first day of October and the thirtieth day of June next thereafter, is a resident of that city and county, for that jury year, within the meaning of the last section; and it is not necessary that he should have been assessed or should have voted there.‡

* *New Code*, § 1034.

† *New Code*, § 1079; *Laws of 1870*, c. 539, §§ 4 and 5, and part of § 6, amended; and see § 60, *ante*, and § 79, *post*.

‡ *New Code*, § 1080; *Laws of 1870*, c. 539, § 4; *Laws of 1847*, c. 495, § 1.

§ 70. Either of the following persons, although qualified, is entitled to an exemption from service as a trial juror upon his claiming an exemption, as prescribed in this article :

I. A clergyman or a minister of any religion, officiating as such, and not following any other calling.

II. A practicing physician, surgeon, or surgeon-dentist, having patients requiring his daily professional attention, and not following any other calling.

III. An attorney or counselor at law, regularly engaged in the practice of the law as a means of livelihood.

IV. A professor or teacher in a college, academy, or public school, not following any other calling.

V. The holder of an office under the United States, or the State, or the city or county of New York, whose official duties at the time prevent his attendance as a juror.

VI. A consul of a foreign nation.

VII. A captain, engineer, or other officer actually employed upon a vessel making regular trips; or a licensed pilot actually following that calling.

VIII. A superintendent, conductor, or engineer, employed by a railroad company other than a street railroad company, or a telegraph operator, employed by a telegraph company, who is actually doing duty in an office or along the railroad or telegraph line of the company by which he is employed.

IX. A grand juror, or a sheriff's juror for the year, selected pursuant to law.

X. An officer, non-commissioned officer, musician or private actually serving in a brigade, regiment, battalion, company, or troop of the national guard of the State, uniformed and equipped according to law, and faithfully performing his duty, by making the parades and attending the drills, inspections and reviews required by law; or a general or staff officer actually performing duty as such; or a person who has been honorably discharged from the national guard after five years' service in either capacity.

XI. A person who has been honorably discharged from the military forces of the State, after seven years' faithful

service therein. But in order to entitle a person to exemption under this subdivision his service must have been performed before the twenty-third day of April, eighteen hundred and sixty-two, either as a general or staff officer, or as an officer, non-commissioned officer, musician, or private in a uniformed battalion, company, or troop of the militia of the State, and armed, uniformed, and equipped according to law, or a portion thereof, during that period and in that capacity, and the remainder since the twenty-third day of April, eighteen hundred and sixty-two, as a member of the national guard of the State.

XII. A person who, after faithfully performing the duties of a fireman, in a fire company or fire department duly organized according to the laws of the State, for five successive years, has been honorably discharged therefrom.

XIII. A person who is physically incapable of performing jury duty by reason of severe sickness, deafness, or other physical disorder.

XIV. A person holding office under the fire or police department of the city, or otherwise specially exempted by law.*

§ 71. The evidence of the right to exemption, as prescribed in the last section, is as follows :

I. Under subdivision tenth thereof, where the applicant is a member of a company or troop, the certificate of the captain, or other commanding officer thereof, dated within three months of the time of presenting it, or the commissioner of jurors may, in his discretion, receive the certified list, specified in the next section, as sufficient evidence thereof. Where the applicant is a regimental officer or a staff officer, the evidence of the right to exemption is the certificate of the major-general, or other officer commanding the first division.

II. Under subdivision tenth thereof, where the applicant has been discharged, or under subdivision eleventh or twelfth, the certificate of discharge ; and where it does not

* *New Code*, § 1081, as amended in 1879; *Laws of 1870*, c. 532, § 6, as amended by *Laws of 1872*, c. 535, with special acts. See notes to § 63, *ante*.

show all the facts, the affidavit of the applicant, or of another person acquainted with the facts.

III. Under subdivision thirteenth thereof, the certificate of a reliable physician or the affidavit of the applicant, or both, or any other evidence satisfactory to the commissioner.

IV. Under any other subdivision thereof, an affidavit of the applicant, or an affidavit satisfactory to the commissioner of another person in his behalf, stating the facts entitling the applicant to exemption. Each certificate specified in this section must be accompanied with satisfactory proof by affidavit, of the genuineness of the signature thereto; and each affidavit and certificate must be filed with the commissioner of jurors, and must be kept open by him at all reasonable times to public inspection.*

§ 72. The captain or other commanding officer of each company or troop in the first division of the national guard, must deliver to the commissioner of jurors, on or before the first day of July in each year, and at any other time when he may require it, a list certified by him, containing the full name and residence of each member and officer of his company or troop, who is uniformed and equipped, and faithfully performs his duty as prescribed in subdivision tenth of the last section but one. No other name shall be inserted in the list. The list must be filed in the commissioner's office. The major-general or other officer commanding that division must, when necessary, issue orders to carry this section into effect. He must also furnish to the commissioner of jurors when so required, a list certified by him, containing the name and residence of each officer or other member of that division not comprised in the lists of the companies and troops. An officer who neglects or refuses to perform the duty specified in this section, or who includes in a list certified by him the name of a person who is not described in this section, or who gives a false certificate in a case specified

* *New Code*, § 1082; *Laws of 1870*, c. 539, §§ 7 and 8; and additions.

in the last section, forfeits the sum of fifty dollars for each offense.*

§ 73. The jury year in the city and county of New York commences on the first day of October. A person who has actually served as a trial juror in a court of record of the State, within that city and county, twelve days within a jury year, is entitled to be discharged by the court, except that he shall not be discharged until the close of a trial, in which he is serving, when the twelve days expire. A person discharged, as prescribed in this section, is thereafter during the same jury year exempt from jury service in any county of the State. Where the certificates of one or more clerks of the courts, made as prescribed in section ten hundred and eighty-nine of this act, show that a person is entitled to a discharge, as prescribed in this section, the commissioner of jurors must, upon request, certify to the fact. A person cannot serve as a trial juror, in courts of record, at more than two terms in a jury year.†

§ 74. The judge holding a term, may in his discretion excuse a trial juror from service at that term for not more than three days at a time, where the exigencies of his business require his temporary exemption. The judge may also discharge for the term one or more jurors notified and attending, whose further attendance is not required for the trial of issues at that term. Or he may discharge, until a day certain, one or more jurors notified and attending, whose attendance will not be required for the trial of issues until that day; each juror so discharged until a day certain must attend at the opening of the court on that day and thereafter, until he is discharged, without further notice. If he fails so to do, he is liable to the same punishment, and the same proceedings must be taken as if he had failed to attend at the time fixed in the notice given to him.‡

* *New Code*, § 1083; *Laws of 1870*, c. 539, § 31, amended; see § 151, *post*, for provision relating to collecting penalty.

† *New Code*, § 1084; *Laws of 1870*, c. 539, § 2, as amended by *Laws of 1874*, c. 460.

‡ *New Code*, § 1085; *Laws of 1870*, c. 539, part of § 1 added to and amended.

§ 75. Except as prescribed in the last section, a court or a judge shall not excuse a person liable to serve as a trial juror and duly drawn and notified, unless it is shown by the oath of the juror, or if he is unable to attend, by the oath of another person acquainted with the facts, that he is then necessarily absent from the city and will not return in time to serve, or that the interests of the public or of the juror will be materially injured by his attendance, or that he is physically unable to serve; or that his wife or a near relative of himself or his wife has recently died or is dangerously sick. Where a person liable to serve is excused in a case specified in this section, or where a person notified to attend a term as a trial juror is entitled to and claims an exemption, he can be excused only by the judge holding the term which he has been notified to attend. Such an excuse does not extend beyond that term.*

§ 76. A person who has been notified to attend as a trial juror, and who applies to be excused as prescribed in the last section, must bring the notice, if he has received it, into court and present it in open court to the judge, or if he cannot personally attend he must send it by a person capable of making the necessary proof in relation to his claim to be excused. A note of the excuse and of the reason therefor, attested by the judge, who must append his signature or his initials thereto, must also be made upon the notice to attend, or if the juror has not brought it into court, upon a separate piece of paper, which must be transmitted to the commissioner of jurors by the clerk, as part of the return, made as prescribed in section ten hundred and eighty-nine of this act.†

§ 77. A person serving as trial juror, elsewhere than in a court of record, is excused from jury duty in a court of record only during the time of his actual service elsewhere.‡

* *New Code*, § 1086; *Laws of 1870*, c. 539, part of § 1 added to and amended.

† *New Code*, § 1087; *Laws of 1870*, c. 539, § 23, amended.

‡ *New Code*, § 1088; *Laws of 1870*, c. 539, § 8.

§ 78. The clerk of each court of record in the city and county of New York must, within ten days after the close of each term for which trial jurors have been drawn, or after the discharge of the trial jurors, if they are discharged before the close of the term, return to the commissioner of jurors the certified copy of the minute of the drawing of the jurors received from the sheriff, and the sheriff's return thereto, or a copy of each paper certified by the clerk, together with each notice or other paper attested by a judge, as prescribed in the last section but one. The clerk must also deliver to the commissioner therewith his certificate, specifying distinctly and in detail as follows:

I. The name and residence of each juror who attended and served, the number of days the juror attended for the purpose of serving, and the number of days he actually served.

II. The name and residence of each juror who was excused or discharged, with the reason therefor.

III. The name and residence of each person notified who did not attend or serve.

IV. The name and residence of each person fined, and the date and amount of his fine, unless the fine has been remitted, as prescribed in section eleven hundred and nine of this act.

The return and certificate must be filed in the commissioner's office, and shall not be altered or corrected, except in pursuance of an order of the court. If a clerk fails to make a complete return and certificate, as prescribed in this section, he is guilty of a contempt of the court; and the commissioner of jurors must institute the appropriate proceedings to punish him accordingly.*

PART III.

PROVISIONS RELATING TO TRIAL JURORS IN THE COUNTY OF KINGS.

§ 79. In order to be qualified to serve as a trial juror in a court of record in the county of Kings, a person must be:

* *New Code*, § 1089; *Laws of 1870*, c. 539, § 16, amended and remodeled.

I. A male citizen of the United States, and a resident of that county.

II. Not less than twenty-one, nor more than sixty years of age.

III. The owner, in his own right, of real property of the value of one hundred and fifty dollars, or of personal property of the value of two hundred and fifty dollars; or the husband of a woman who is the owner, in her own right, of real or personal property of that value.

IV. In the possession of his natural faculties, and not infirm or decrepit.

V. Free from all legal exceptions; intelligent, of sound mind and good character, and able to read and write the English language understandingly.*

§ 80. Either of the following persons, although qualified, is entitled to an exemption from service as a trial juror upon his claiming an exemption, as prescribed in this article:

I. A clergyman, or a minister of any religion officiating as such and not following any other calling.

II. A practicing physician, surgeon, or surgeon dentist, having patients requiring his daily professional attention and not following any other calling.

III. An attorney or counselor at law, regularly engaged in the practice of the law as a means of livelihood.

IV. A professor or teacher in a college, academy, or public school, or in a private school for the instruction of pupils in the usual branches of education, not following any other calling.

V. The holder of an office under the United States, or the State, or the county, or the city of Brooklyn, or a town of the county, whose official duties at the time prevent his attendance as a juror.

VI. A captain, engineer, or other officer actually

* *New Code*, § 1126; *Laws of 1858*, c. 322, part of § 7, and part of § 10; see also §§ 60 and 68, *ante*.

employed upon a vessel making regular trips, or a licensed pilot, actually following that calling.

VII. A superintendent, conductor or engineer employed by a railroad company other than a street railroad company, or a telegraph operator employed by a telegraph company, who is actually doing duty in an office or along the railroad or telegraph line of the company by which he is employed.

VIII. An officer, non-commissioned officer, musician or private actually serving in a brigade, regiment, battalion, company, or troop of the national guard of the State, uniformed and equipped according to law, and faithfully performing his duty by making the parades and attending the drills, inspections and reviews required by law; or a general or staff officer, actually performing duty as such, or a person who has been honorably discharged from the national guard, after five years' service in either capacity.

IX. A person who has been honorably discharged from the military forces of the State, after seven years' faithful service therein. But in order to entitle a person to exemption under this subdivision, his service must have been performed before the twenty-third day of April, eighteen hundred and sixty-two, either as a general or staff officer, or as an officer, non-commissioned officer, musician, or private in a uniformed battalion, company or troop of the militia of the State, and armed, uniformed and equipped according to law, or a portion thereof, during that period and in that capacity, and the remainder since the twenty-third day of April, eighteen hundred and sixty-two, as a member of the national guard of the State.

X. A person who, after faithfully performing the duties of a fireman in a fire company or fire department, duly organized according to the laws of the State, for five successive years, has been honorably discharged therefrom, or who is at the time an officer or member of a fire company, duly organized according to the laws of the State and faithfully performing his duty therein.

XI. A person who is physically incapable of performing jury duty by reason of severe sickness, deafness, or other physical disorder.

XII. A person belonging to the army or navy of the United States or to the police force or fire department of the city of Brooklyn.

XIII. A person otherwise specially exempted by law.*

§ 81. The evidence of the right to exemption, as prescribed in the last section, is as follows :

I. Under subdivision eight thereof, where the applicant is a member of the national guard below the rank of brigadier-general, the certificate of the commanding officer of the brigade, regiment, battalion, company or troop, to which the applicant belongs, dated within three months of the time of presenting it.

II. Under subdivision eighth, ninth or tenth thereof, where the applicant has been discharged, the certificate of discharge, accompanied, where it does not show all the facts, with the affidavit of the applicant or of another person acquainted with the facts.

III. Under subdivision tenth thereof, where the applicant is an officer or member of a fire company, the certificate of the foreman or other chief officer of the company to which the applicant belongs, dated within three months of the time of presenting it.

IV. Under any other subdivision thereof, an affidavit of the applicant, or an affidavit satisfactory to the commissioner of another person in his behalf, stating the facts entitling the applicant to exemption.

Each certificate specified in this section must be accompanied with satisfactory proof, by affidavit, of the genuineness of the signature thereto ; and each affidavit and certificate must be filed with the commissioner of jurors, and must be kept open by him, at all reasonable times, to public inspection.†

§ 82. A person shall not be required to serve as a trial juror more than six days at any term for which his name is

* *New Code*, § 1127, as amended in 1879; *Laws of 1858*, c. 322, § 10, amended to correspond with § 70, *ante* ; see notes to § 63, *ante*.

† *New Code*, § 1128; *Laws of 1858*, c. 322, § 10, and *Laws of 1866*, c. 321, § 1, amended to correspond with § 71, *ante* ; see § 79, subd. 4, *ante*.

drawn, as prescribed in this article, unless the court for good cause otherwise specially directs, except that he shall not be discharged until the close of a trial, in which he is serving at the time when the six days expire. A person shall not be required to serve as a trial juror except by the special order of the judge presiding at or holding the term, or as otherwise specially prescribed in this article, unless at least three days' previous notice to attend has been served upon him, as prescribed in section one thousand one hundred and forty-six of this act.*

§ 83. The judge presiding at or holding a term, may in his discretion excuse a trial juror attending thereat from service during the whole or a portion of that term in either of the following cases:

I. Where he has actually served as a trial juror in a court of record in the county within six months before the commencement of the term and since the second Monday of August preceding the commencement thereof.*

II. Where he has actually served in the county as a grand juror pursuant to law since the first Monday of September preceding the commencement of the term.

III. Where the interests of the public or of the juror will be materially injured by his attendance, or his own health or the health of a member of his family requires his absence, or his wife or a near relative of himself or his wife has recently died.†

§ 84. The clerk of each court of record in the county of Kings must, within one week after the close of each term for which trial jurors have been drawn, or after the discharge of the trial jurors, if they are discharged before the close of the term, return to the commissioner of jurors the panel of trial jurors, with the sheriff's return received from the sheriff, as prescribed in section one thousand one hundred and forty-eight of this act, or a copy of each of those papers certified by the clerk. The clerk must also

* *New Code*, § 1129; *Laws of 1858*, c. 322, § 22.

† *New Code*, § 1130; *Laws of 1858*, c. 322, § 11, amended.

36 QUALIFICATIONS AND EXEMPTIONS OF JURORS.

deliver to the commissioner therewith, a certificate specifying distinctly and in detail as follows :

I. The name and residence of each juror who attended and served, and the number of days he actually served.

II. The name and residence of each juror who was excused or discharged, with reason therefor.

III. The name and residence of each person notified who did not attend or serve.

IV. The name and residence of each person fined, and the date and amount of his fine.

The return and certificate must be filed in the office of the commissioner, who may also record therefrom upon the list originally made by him, the date and amount of service performed by each person as therein set forth.*

§ 85. *Competency of jurors in actions for and against counties :*

On the trial of every action in which a county shall be interested, the electors and inhabitants of such county shall be competent witnesses and jurors.†

§ 86. *Competency of jurors in actions for and against towns :*

On the trial of every action in which a town shall be a party or be interested, the electors and inhabitants of such town shall be competent witnesses and jurors, except that in suits and proceedings by and against towns, no inhabitant of either town shall be juror.‡

* *New Code*, § 1131; *Laws of 1858*, c. 322, § 26, remodeled; see § 78, *ante*.

† 1 *R. S.* 6th ed., § 4, p. 926.

‡ 1 *R. S.* 6th ed., § 4, p. 848; *Diveny v. Elmira*, 51 *N. Y.* 506.

CHAPTER III.

MODE OF SELECTING, DRAWING, AND PROCURING THE ATTENDANCE OF TRIAL JURORS; PENALTIES FOR NON-ATTENDANCE; FORMATION OF JURIES, &C.

§ 87. The supervisor, town clerk and assessors of each town must meet on the first Monday of July, in the year one thousand eight hundred and seventy-eight, and in each third year thereafter, at a place within the town appointed by the supervisor, or, in case of his absence, or of a vacancy in his office, by the town clerk, for the purpose of making a list of persons to serve as trial jurors for the then ensuing three years. If they fail to meet on the day specified in this section, they must meet as soon thereafter as practicable.*

§ 88. At the meeting specified in the last section, the officers present must select from the last assessment-roll of the town, and make a list of the names of all persons whom they believe to be qualified to serve as trial jurors, as prescribed in the last article (see chapter II.).†

§ 89. Duplicate lists of the names of the persons so selected, showing the place of residence and other proper additions of each of them, as far as those particulars can be conveniently ascertained, must be made out and signed by the officers, or a majority of them. Within ten days after the meeting, one of the lists must be transmitted by those officers to the county clerk, and filed by him; and the other must be filed with the town clerk.‡

* *New Code*, § 1035; 2 *R. S.* 411, §§ 12 and 18 (2 *Edm.* 428).

The statute respecting the selecting, drawing and summoning of jurors is intended to secure a due and uniform distribution of jury duty, and is merely directory (*Friery v. People*, 2 *Abb. Ct. of App. Dec.* 230).

† *New Code*, § 1036; 2 *R. S.* 411, first part of § 13.

‡ *New Code*, § 1037; 2 *R. S.* 412, § 15 (2 *Edm.* 429).

§ 90. On the first Monday of August, after the lists have been transmitted to him, the county clerk must prepare suitable ballots, by writing the name of each person thus selected, as contained in the lists, with his place of residence and other additions on a separate piece of paper. The ballots must be uniform, as nearly as may be, in appearance; and the clerk must deposit them in the box kept for that purpose.*

§ 91. Before depositing the ballots, the county clerk must destroy each ballot remaining in either of the boxes kept by him, and containing the name of a resident of a town for which a new list has been transmitted. If, for any reason, the list from a town is not received by the clerk by the first Monday of August, it or a new list, to be made as prescribed for making the original list, must be transmitted as soon thereafter as practicable; and the county clerk must prepare new ballots, and destroy the old ballots containing the names of residents of that town, immediately after the receipt by him of the list therefrom.†

§ 92. Each person whose name is contained in a list so transmitted, must, unless he is excused or discharged, serve as a trial juror for three years from the first Monday of August of that year, and thereafter until another list from his town is received and filed.‡

§ 93. Each ward of the city of Albany, or Utica, is considered a town, for the purposes of this article; and the supervisor and assessor of that ward must execute the duties of the supervisor, town clerk and assessors of a town, as prescribed in the foregoing sections of this article; except that a duplicate of the list of jurors, made by them, must be filed in the office of the clerk of the city. In each of the other cities of the State, the like duties must be performed by the officers, and in the manner prescribed by law. A city wherein two or more assessors are elected for the entire city is considered a town for the purposes of this article, except where the officers, who are to perform

* *New Code*, § 1038; 2 *R. S.* 412, § 16 and part of § 20.

† *New Code*, § 1039; 2 *R. S.* 412, §§ 20, 40.

‡ *New Code*, § 1040; 2 *R. S.* 412, § 17.

the duties of the supervisor, town clerk or assessor, as prescribed in this article, are specially designated by law.*

§ 94. On a day designated by the county clerk, not less than fourteen, nor more than twenty days before the day appointed for holding each term of the circuit court; or of the court of oyer and terminer, where a circuit court is not appointed to be held at the same time; or of the county court, except a term designated for the hearing and decision of motions, and trial and other proceedings without a jury; or of the court of sessions, where a term of the county court is not appointed to be held at the same time; or of a mayor's or recorder's court, at which issues are triable by a jury; or on the day to which the drawing is adjourned, as prescribed in section one thousand and forty-five of this act (§ 97, *post*), the clerk of the county in which the term is to be held must draw the names of thirty-six persons, and any additional number ordered according to law to serve as trial jurors at the term.†

§ 95. At least six days before the drawing, the county clerk must publish a notice thereof in a newspaper published in the county, if there is one; or, if there is none, he must affix a notice thereof on the outer door of the building where the term for which the jurors are to be drawn is appointed to be held. He must also, at least three days before the time appointed for the drawing, cause notice thereof to be served upon the sheriff of the county, and upon the county judge, or, in case of his absence, upon the special county judge, or, in a county where there is no special county judge, upon a justice of sessions.‡

§ 96. At the time so appointed, the sheriff of the county, or his under-sheriff and the county judge, or, if notice has been served upon another officer, in the absence of the latter, as prescribed in the last section, either the

* *New Code*, § 1041; 2 *R. S.* 412, § 23, with last two sentences added.

† *New Code*, § 1042; 2 *R. S.* 412, § 24, remodeled and amended.

The drawing of a jury by a *de facto* officer is regular (*Carpenter v. People*, 64 *N. Y.* 483; *Dolan v. People*, *Id.* 485).

‡ *New Code*, § 1043; 2 *R. S.* 412, § 25, amended and remodeled.

county judge or that officer, or both, must attend at the clerk's office of the county to witness the drawing of the jurors.*

§ 97. If the sheriff or under-sheriff, and either the county judge, or, in a case specified in the last section, an officer in place of the county judge, do not appear, the clerk must adjourn the drawing of the jurors to the next day. Thereupon, the clerk must forthwith cause to be served upon the absent sheriff or county judge, or two or more justices of the peace of the county, notice to attend the drawing on the adjourned day.†

§ 98. If the sheriff or under-sheriff and the county judge, or if the sheriff, under-sheriff or county judge, together with two justices of the peace of the county, appear at the adjourned day, but not otherwise, the clerk must proceed in the presence of the officers so appearing to draw the jurors.‡

§ 99. The drawing must be conducted as follows :

I. The clerk must shake the box containing the ballots so as thoroughly to mix them.

II. He must then, without seeing the name contained in any ballot, publicly draw out of the box one ballot, and continue to draw, in like manner, one ballot at a time until the requisite number has been drawn.

III. A minute of the drawing must be kept by one of the attending officers, in which must be entered the name contained in each ballot drawn before another ballot is drawn.

IV. If, after drawing the requisite number, the name of a person has been drawn who is dead, or insane, or who has permanently removed from the county to the knowledge of an attending officer, an entry of that fact must be made in the minute of the drawing, and the ballot containing that person's name must be destroyed, whereupon another ballot must be drawn in its place, and the name contained therein must be entered, in like manner, in the minute of the drawing.

* *New Code*, § 1044; 2 *R. S.* 412, § 26, amended and remodeled.

† *New Code*, § 1045; 2 *R. S.* 412, § 27, amended and remodeled.

‡ *New Code*, § 1046; 2 *R. S.* 412, § 28, amended and remodeled.

V. The same proceedings must be had as often as necessary until the requisite number of jurors has been obtained.

VI. The minute of the drawing must then be signed by the clerk and the other attending officers, and filed in the clerk's office.

VII. A list of the names of the persons so drawn, showing the place of residence, and other proper additions of each of them, and specifying for what court and term they were drawn, must be made and certified by the clerk and the other attending officers, and delivered to the sheriff of the county.*

§ 100. The sheriff must, at least six days before the day appointed for holding the term, serve upon each person named in the list, personally, or by leaving it at his residence with a person of proper age and discretion, a written notice to attend the term. He must file the list with the clerk of the court, at or before the opening of the term; with a return indorsed thereupon, or annexed thereto under his hand, naming each person notified and specifying the manner in which he was notified.†

§ 101. The county clerk or the sheriff must furnish a copy of the list of trial jurors, drawn to attend a term, to any person applying to him therefor, and paying the fees allowed by law.‡

§ 102. After the adjournment of the term at which trial jurors have been returned, as prescribed in the last section but one, the clerk must deposit the ballots, containing the names of those who attended and served, in another box, kept by him. The ballots containing the names of those who did not appear and serve, which have not been destroyed, as prescribed in article first of this title, must be returned to the box from which they were taken.§

§ 103. If, at the time of drawing trial jurors for a term, there is not a sufficient number of ballots remaining

* *New Code*, § 1047; 2 *R. S.* 412, § 29.

† *New Code*, § 1048; 2 *R. S.* 412, § 30, amended.

‡ *New Code*, § 1049; 2 *R. S.* 412, § 31.

§ *New Code*, § 1050; 2 *R. S.* 412, § 36.

in the first box, the clerk, after drawing all the ballots therein, must draw the necessary number from the second box, containing the names of those jurors who have before served, as prescribed in the last section ; and must continue to draw from that box until new lists of jurors are transmitted by the town officers.*

§ 104. The county clerk must keep, in addition to the two boxes specified in the last two sections, a third box, in which he must deposit duplicate ballots, containing the names, with the proper additions of all persons selected and returned as trial jurors, who reside in the city or town, where a trial term of a court of record is appointed to be held pursuant to law.†

§ 105. The ballots kept in the third box must be destroyed by the clerk, and new ballots must be deposited therein by him at the same time, and under like circumstances, as prescribed in this article with respect to the destruction of the old ballots and the depositing of new ballots in the first box.‡

§ 106. If a sufficient number of trial jurors, duly drawn and notified, do not attend, or cannot be obtained to form a jury, the court may in its discretion direct the sheriff to draw from the third box, in the presence of the court, the names of as many persons as the court deems sufficient for that purpose.§

§ 107. The sheriff must forthwith notify each person so drawn and make a return, as prescribed in title fifth of this chapter, where talesmen are required to attend : and the provisions of that title apply to each person so notified.||

§ 108. A justice of the supreme court, appointed to hold a term of the circuit court, or to preside at a term of the court of oyer and terminer, may, by an order under his

* *New Code*, § 1051; 2 *R. S.* 412, § 39.

† *New Code*, § 1052; *Laws of 1861*, c. 210, § 1, amended (4 *Edm.* 649).

‡ *New Code*, § 1053. This section is new, and provides for that which the act of 1861 omitted.

§ *New Code*, § 1054; *Laws of 1861*, c. 210, part of § 2.

|| *New Code*, § 1055; *Laws of 1861*, c. 210, § 3, and see § 202, *post*.

hand, direct that such a number of jurors as he deems necessary, not exceeding twenty-four, be drawn for that term, in addition to the thirty-six jurors to be drawn, as prescribed in the foregoing sections of this article. A county judge may in like manner direct the drawing of a like additional number of jurors for a term of the county court, or of the court of sessions, to be held in his county.*

§ 109. An order, made as prescribed in the last section, must be delivered to the clerk of the county in which the term is to be held, at least twenty days before the day appointed for the commencement thereof; and the clerk must forthwith file it. This article applies to the additional jurors so required to be drawn.†

§ 110. At a term of the circuit court, or court of oyer and terminer, or of the county court, or court of sessions, an order may be made by the court, requiring the clerk of the county to draw, and the sheriff to notify any number of trial jurors, specified in the order, which the court deems necessary to attend that term, or a term thereafter to be held, either by original appointment or by adjournment, at the commencement thereof, or on a particular day specified in the order.‡

§ 111. The clerk must thereupon forthwith bring into court all the boxes, wherein ballots containing the names of trial jurors are deposited, as prescribed in this article; and must, in the presence of the court, publicly draw from such box or boxes as the court directs, the number of trial jurors specified in the order. The clerk must make and certify two lists of the persons so drawn; and must file one list in his office, and deliver the other to the sheriff. The sheriff must thereupon immediately notify each person so drawn to attend, as specified in the order.§

§ 112. The county judge may, at the time of drawing

* *New Code*, § 1056; 2 *R. S.* 417, § 41 (2 *Edm.* 434); *Laws of 1874*, c. 52, § 1 (9 *Edm.* 856).

† *New Code*, § 1057; 2 *R. S.* 417, § 42.

‡ *New Code*, § 1058; *Laws of 1871*, c. 16, part of § 1 (7 *Edm.* 732).

§ *New Code*, § 1059; *Laws of 1871*, c. 16, § 1, amended.

trial jurors to attend a term of the county court, or court of sessions, make an order designating a particular day during the term when the jurors must attend, or two or more particular days, upon each of which a portion of the jurors must attend. The sheriff must thereupon notify them to attend, as specified in the order.*

§ 113. The deputy county clerk possesses, in the absence of the county clerk from his office, or from the sitting of a term of the court, the powers conferred by this article upon the county clerk.†

§ 114. This article does not apply to the city and county of New York, or to the county of Kings.‡

Penalties for Non-Attendance.

§ 115. A person duly notified, as prescribed in this title, to attend a term of a court of record, as a trial juror, who, without reasonable cause neglects to attend, according to the notice, shall be fined a sum not less than ten dollars, nor more than twenty-five dollars, for each day that he so neglects to attend.§

§ 116. Where it appears, by the return of the sheriff, that the delinquent was personally notified to attend, the fine may be imposed by the court, at the term which he was required to attend. But where it appears by the return that he was notified by leaving the notice at his residence, the court must cause an order to be entered in its minutes, requiring him to show cause, on the first day of the next term of the court, why a fine should not be imposed upon him.||

§ 117. If the order is made at a term of a circuit court, it may, in the discretion of the court, direct the

* *New Code*, § 1060; *Laws of 1861*, c. 8, § 1 (4 *Edm.* 648), omitting § 2.

† *New Code*, § 1061; this section is new.

‡ *New Code*, § 1062; this section is new.

§ *New Code*, § 1072; 2 *R. S.* 415, § 32 (2 *Edm.* 432) amended.

|| *New Code*, § 1073; 2 *R. S.* 483, § 16 (2 *Edm.* 505) revised.

delinquent to show cause on the first day of the next term of the county court of the same county.*

§ 118. The clerk must immediately deliver two certified copies of the order to the sheriff of the county, who must serve one copy on the delinquent personally, and return the other, with his proceedings thereon, to the term at which the delinquent is required to show cause.†

§ 119. If the sheriff returns the copy of the order as personally served, or if the delinquent attends, in obedience thereto, the court must, unless good cause is shown to the contrary, impose the proper fine; otherwise it must make a further order, requiring the delinquent to show cause at the next term, why the fine should not be imposed. The proceedings under such an order are the same as under the first order. Similar orders must be made, from term to term, and similar proceedings taken until the delinquent is personally served or attends in obedience thereto.‡

§ 120. But if it appears from the return of the sheriff, or from any other evidence, that the juror is dead, or insane, or has permanently removed from the county; or if a satisfactory excuse is rendered by any person in his behalf for his default, the court may, in its discretion, discontinue the proceedings.§

* *New Code*, § 1074; 2 *R. S.* 483, § 17.

† *New Code*, § 1075; 2 *R. S.* 483; §§ 18 & 19, amended.

‡ *New Code*, § 1076; 2 *R. S.* 483, § 20.

§ *New Code*, § 1077; 2 *R. S.* 483, § 21, substituting "county" for "State."

Where a fine has been imposed by a court of record, upon a grand or trial juror, or upon any officer, or other person, without being accompanied with an order for the immediate commitment of the person so fined, until the fine is paid, the clerk of the court, immediately after the close of the term at which the fine was imposed, must prepare a schedule, containing in separate columns, the following matters:

1. The name of each person fined.
2. His place of residence, where it appears, from the papers on file or before the court, to be within the county.
3. The amount of the fine imposed upon him.
4. The cause for which the fine was imposed.

§ 121. This article does not apply to the city and county of New York, or to the county of Kings.*

The clerk must subjoin to the schedule a certificate, to the effect that it contains a true abstract of the orders imposing fines, and must annex it to the warrant specified in the next section (*New Code*, § 2293).

The clerk must immediately issue a warrant under the seal of the court, directed to the sheriff of the county, and commanding him to collect from each of the persons named in the schedule annexed to the warrant, the sum therein set opposite that person's name; and to pay over the sum collected to the treasurer of the county. The warrant is the process of the court, by which the fines were imposed (*New Code*, § 2294).

If a delinquent resides in another county, a separate warrant for the collection of the fine imposed upon him, with an appropriate schedule annexed thereto, must be issued, in like manner, to the sheriff of the county where he resides (*New Code*, § 2295).

The sheriff to whom a warrant is issued must collect each fine out of the personal property of the person fined, as prescribed in chapter thirteenth of this act, for the collection, by levy upon and sale of personal property, of an execution issued out of a court of record; and he is entitled to like fees thereupon. If sufficient personal property of a delinquent cannot be found, to pay the fine and the fees, the sheriff must arrest the delinquent, and detain him in custody until he pays the same, as upon an execution against the person, issued in an action out of the supreme court; and he is entitled to like fees thereupon (*New Code*, § 2296).

The sheriff must return the warrant, with his proceedings thereupon, at the term of the court; or, where the fine was imposed, in any county except New York, by the supreme court, the circuit court, the court of oyer and terminer, or the court of sessions, at the term of the county court held next after the expiration of sixty days from the receipt thereof. If he fails so to do, the district attorney must take the same proceedings to compel a return as may be taken by a judgment creditor, where a sheriff omits to return an execution, issued out of the supreme court (*New Code*, § 2297).

Where it appears, by the return, that a fine remains uncollected, and it does not appear that the sheriff has the delinquent in custody, the district attorney must, if he has good reason to believe that the sheriff might, with due diligence, have collected the fine, or arrested and detained the delinquent, commence an action against the sheriff, in the name of the people. Otherwise he must

* *New Code*, § 1078.

§ 122. Trial jurors (in New York county) must be selected by the commissioner of jurors, who must alone decide upon their qualifications and exemptions, except as otherwise expressly prescribed in this article. But this section does not impair the right to challenge a particular juror at the trial. The commissioner may issue to a person entitled to an exemption a certificate of that fact, which exempts the person to whom it is granted from jury duty during the time limited therein. He must keep a record of all proceedings before him or in his office. He is entitled to, and must collect, for the benefit of the city, for a copy of a paper furnished by him, the same fees as the clerk of a court of record.*

§ 123. The commissioner of jurors may, from time to time, appoint and at pleasure remove one or more assistants, clerks in his office, and messengers, and may fix their

direct the clerk to issue a new warrant, or to include the fine in the schedule annexed to the next warrant to be issued by him. A new warrant may, from time to time, be issued, or the fine may be included in the schedule annexed to a subsequent warrant, until it is collected (*New Code*, § 2298).

Where the clerk issues a warrant as prescribed in this title, he must include in the schedule thereto annexed the name of each person who has been fined, prior to the issuing thereof, and whose fine remains then wholly or partly unpaid, and not remitted by the court (*New Code*, § 2299).

An action may be maintained, in behalf of the people, against a sheriff, to whom a warrant is directed and delivered, as prescribed in this title, to recover damages for any omission of duty with respect to the same, in a case where a judgment creditor might maintain an action against a sheriff, to whom an execution issued out of the supreme court is directed and delivered. In such an action, the people are entitled to recover the same damages which a judgment creditor would be entitled to recover if the order imposing the fine was a judgment of the supreme court (*New Code*, § 2300).

This title does not apply to a case where special provision for the collection of a fine is otherwise made by law (*New Code*, § 2301).

[The sections contained in this note have not yet been adopted.]

* *New Code*, § 1090; *Laws of 1870*, c. 539, §§ 7 and 24, and *Laws of 1847*, c. 495, §§ 2 and 11, amended.

compensation. He may designate, in writing, an assistant, to attend, in his place, the drawing of jurors for a particular term; the commissioner, or each assistant whom he designates for the purpose, by a certificate filed in the office of the county clerk, may administer an oath or affirmation in relation to any matter embraced within the provisions of this article.*

§ 124. The president and commissioners of the department of taxes and assessments, the police commissioners and all other public officers in the city of New York, must render to the commissioner of jurors all the assistance in their power to enable him to procure the names of persons liable to serve as trial jurors.†

§ 125. The board of aldermen of the city of New York must take care that suitable rooms and other accommodations are provided for the use of the commissioner of jurors. If, by the first day of March in any year, suitable rooms have not been provided for his use for the year commencing on the first day of May next ensuing, he may lease suitable rooms for that year, and may pay the rent out of the money received by him for fines and penalties. But a lease so made shall not take effect until a majority of the members of the board specified in section eleven hundred and fourteen of this act (§ 146, *post*) indorse thereupon a certificate signed by them, to the effect that, in their opinion, such a lease is necessary, in consequence of the omission to make other suitable provision, as prescribed in this section; that the rooms leased are required for the proper performance of the duties of the commissioner; that the rent payable therefor by the terms of the lease is, in their opinion, reasonable; and that the lease is, in all other respects, fair, just, and proper. The proper and necessary expenses of the commissioner's office, including the reasonable compensation of his assistants, clerks and messengers, necessary printing and advertising, books, sta-

* *New Code*, § 1091; *Laws of 1870*, c. 539, part of § 24, amended.

† *New Code*, § 1092; *Laws of 1870*, c. 539, § 18, as amended by *Laws of 1873*, c. 335, §§ 39 and 87.

tionery, and other articles required for the convenient discharge of his duties, may be paid by him out of the money received by him for fines and penalties. If there is a deficiency, the board of aldermen must provide for the payment thereof by the comptroller of the city of New York out of the city treasury.*

§ 126. The commissioner must commence the preparation of lists of trial jurors in the month of May in each year. For that purpose, the names of the persons liable to serve as trial jurors must be entered in suitable books, alphabetically, with the occupation, place of business and residence of each, as far as those particulars can be conveniently ascertained. After the first day of June, he must publish a notice, for at least ten days, in not less than six of the newspapers published in the city, that claims for exemptions will be heard by him. He may insert in, or append to the notice, copies of such portions of the statutes, relating to jurors, as he deems expedient. He must hear and determine all claims for exemption, and must keep a record of the persons exempted and of the period of time for which the exemption of each is allowed.†

§ 127. The commissioner may cause to be personally served on any person within the city a notice requiring him to attend at the commissioner's office, at a specified time, not less than twenty-four hours after service of the notice, for the purpose of testifying concerning his own liability, or the liability of any other person to serve as a juror. A person so notified must attend and testify accordingly. If he fails to attend, as specified in the notice, for any cause except physical inability, or if he refuses to be sworn, or to answer any legal and pertinent question put to him by the commissioner, he forfeits fifty dollars for each failure or refusal. One or more successive notices may be served upon the same person, where he fails to attend as required by a former notice, and he is liable to the same penalty for each failure so to attend. But the commissioner may, in

* *New Code*, § 1093; *Laws of 1870*, c. 539, § 25, amended.

† *New Code*, § 1094; *Laws of 1870*, c. 539, parts of §§ 7 and 9.

his discretion, dispense with the personal attendance of a person so notified, where another person cognizant of the facts is produced and testifies in his stead; and where a person has so attended twice, he cannot be required to attend again, in the same jury year.*

§ 128. On or before the first day of October in each year, the commissioner must return to the clerk of the city and county of New York, to be filed in his office, certified copies of the lists, prepared by him, of the persons liable to serve as trial jurors in the courts of record for the ensuing jury year. He may from time to time thereafter strike from the lists kept by him the name of a person who is found by him to be exempt or disqualified. In that case he must record the reason why the name is stricken off.†

§ 129. When the certified copies of the lists have been returned, as prescribed in the last section, the ballots for trial jurors used in the previous year must be returned by the county clerk to the commissioner, who must destroy those which are not required for the current jury year. The ballots for the current jury year must be prepared by the commissioner, who may use for that purpose so many of the ballots prepared for the previous year as he deems expedient. The ballots so prepared must be delivered by the commissioner to the county clerk, and deposited by the county clerk, or his deputy, in a box, as prescribed in article second of title third of this chapter. The commissioner may, from time to time thereafter, return certified copies of additional lists, containing the names of persons liable to serve as trial jurors, which were omitted from the former lists; and ballots containing those names must be prepared in like manner, and used for the residue of the jury year.‡

§ 130. The number of trial jurors to be drawn for each term, and each separate part of a term of a court of record in the city, at which issues of fact are triable by jury, must be fixed by a general order of the court, or, if it

* *New Code*, § 1095; *Laws of 1870*, c. 539, part of § 9, amended.

† *New Code*, § 1096; *Laws of 1847*, c. 495, § 3, amended.

‡ *New Code*, § 1097; *Laws of 1847*, c. 495, part of § 3, amended.

is not so fixed for a term, or a separate part of a term, by a written order of the judge appointed to hold the same. The order, or a certified copy thereof, must be filed in the office of the county clerk. If the number has not been fixed in either mode at the time of the drawing, one hundred trial jurors must be drawn for each term, or for each part, if the term consists of two or more separate parts.*

§ 131. On a day designated by the county clerk, not less than fourteen nor more than twenty days before the day appointed for holding in the city a term of a court of record, at which issues of fact are triable by jury, the commissioner of jurors, in person, or by an assistant designated by him, the sheriff of the city and county of New York, in person, or by his under-sheriff, and one or more judges of courts of record residing in the city, must attend at the office of the county clerk, to witness and assist in the drawing of trial jurors for the term.†

§ 132. At least six days before the drawing, the county clerk must publish notice thereof in at least three newspapers published in the city. He must also cause written notice thereof to be served upon the sheriff, the commissioner of jurors, and at least three judges of one or more courts of record, residing in the city.‡

§ 133. If at least one judge of a court of record, residing in the city, and also the commissioner of jurors and the sheriff in person, or represented, as prescribed in the last section but one, do not attend, the clerk, or in his absence the deputy-clerk, must adjourn the drawing to the next day. Thereupon the clerk must forthwith cause to be served upon the absent commissioner or sheriff, and upon at least three judges of one or more courts of record

* *New Code*, § 1098; *Laws of 1847*, c. 495, substitute for § 9.

† *New Code*, § 1099. The matter contained in this and the next three sections is new, and corresponds with that in § 94 to § 98 (*ante*); the proceedings mentioned in these sections were governed by *Laws of 1847*, c. 495, § 4 (2 *R. S.* 413, §§ 24 to 28; 2 *Edm.* 430).

‡ *New Code*, § 1100; see note to last section.

residing in the city, written notice to attend the drawing upon the adjourned day.*

§ 134. If the officers specified in section ten hundred and ninety-nine of this act (§ 131, *ante*) attend upon the adjourned day, but not otherwise, the clerk, or, in his absence, the deputy-clerk, must proceed in their presence to draw the jurors.†

§ 135. The drawing must be conducted as follows:

I. The county clerk, or his deputy, must shake the box containing the ballots so as thoroughly to mix them.

II. He must then, without seeing the name contained in any ballot, publicly draw out of the box one ballot; and continue to draw, in like manner, one ballot at a time until the requisite number has been drawn.

III. A minute of the drawing must be kept by one of the attending officers, in which must be entered the name contained in each ballot drawn, before another ballot is drawn.

IV. After drawing the requisite number, the minute of the drawing containing the names of the persons drawn, with the proper additions of each, and specifying for what court and for what term they were drawn, must be signed by the clerk or his deputy and the attending officers, and filed in the clerk's office.‡

§ 136. If the term consists of two or more separate parts, the trial jurors for each part must be drawn, and a minute of the drawing must be made, signed and filed, and the subsequent proceedings must be the same as if it was a distinct term.§

§ 137. The commissioner may issue to a trial juror so drawn a printed notice, informing him that he has been drawn, and will be duly notified by the sheriff, and containing copies of such portions of this article as the commissioner deems advisable.||

* *New Code*, § 1101; see note to § 131, *ante*.

† *New Code*, § 1102; see note to § 131, *ante*.

‡ *New Code*, § 1103; 2 *R. S.*, 414, § 29 (2 *Edm.* 431), remodeled and amended, omitting subdivisions 4 and 5.

§ *New Code*, § 1104; this section is new.

|| *New Code*, § 1105; *Laws of 1870*, c. 539, § 14.

§ 138. The clerk must deliver to the sheriff a certified copy of the minute, or of each minute, if there are two or more. The sheriff must notify each juror named therein to attend the term or part for which he was drawn, by serving upon him, at least six days before the commencement thereof, a notice addressed to him, stating that he has been drawn as a trial juror for, and is requested to attend, the term or part specified in the notice. The notice may be served personally or by leaving it at the juror's residence or usual place of business, with a person of proper age and discretion. Before the commencement of the term or part, the sheriff must file with the clerk the certified copy of the minute, with a return, under his hand, indorsed thereupon or annexed thereto, naming each person notified, and specifying the manner in which he was notified.*

§ 139. The clerk of each court for a term of which trial jurors are notified to attend by the sheriff, must certify to the clerk of the board of aldermen each case where less than a majority of the persons named in a minute of a drawing are returned as personally served. The board of aldermen are prohibited from allowing or paying any fees or charges to the sheriff for notifying any of the persons named in that minute, or for making a return thereupon. A clerk of a court who omits to notify the clerk of the board of aldermen, as prescribed in this section, is liable to a penalty of one hundred dollars for each omission, to be recovered by any person suing therefor.†

§ 140. At any time during the sitting of a term of a court of record in the city, the court may direct an additional number of trial jurors to be drawn for the term, or for the part at which the order is made. The order must specify the number to be drawn, and the time of drawing. The drawing may be made either in open court, under the direction of the judge, or in the ordinary manner, except that notice is not required. The sheriff must forthwith

* *New Code*, § 1106; *Laws of 1870*, c. 539, § 16, remodeled.

† *New Code*, § 1107; *Laws of 1853*, c. 498, § 9.

notify the jurors drawn by such a notice as the court directs, to attend the term or part, at the time specified in the order.*

§ 141. Where a person duly drawn and notified to attend a term of a court of record as a trial juror, fails to attend at the time specified in the notice, or from day to day, the court at that term must impose upon him a fine of not less than fifty, nor more than two hundred and fifty dollars. A fine thus imposed may be wholly or partly remitted by direction of the judge, in open court, before the end of the same term, and upon good cause shown; otherwise it shall not be remitted, except as prescribed in sections eleven hundred and thirteen and eleven hundred and fourteen (§§ 145 and 146, *post*) of this act. Each remission so made by the judge, with the reason therefor, must be entered in the minutes of the court. This section applies to a special juror, as well as to an ordinary trial juror.†

§ 142. Where a person, duly drawn and notified, fails to attend and serve at a term of a court of record, as required by law, without having been excused, the court besides imposing a fine, as prescribed in the last section, may direct the sheriff to arrest him and bring him before the court, and when he has been so brought, it may, in its discretion, compel him to serve.‡

§ 143. A list of trial jurors, for each of the district courts, must be selected by the commissioner of jurors, and must consist of not less than fifty, nor more than one hundred jurors. A person shall not be placed upon such a list who does not reside in the district in which the court is held. The judge of each district court must impose a fine of twenty-five dollars upon each person, duly drawn and notified to attend the court as a trial juror, who fails to attend as required by the notice. The clerk of the court

* *New Code*, § 1108; this section is new and corresponds to § 175, *post*.

† *New Code*, § 1109; *Laws of 1870*, c. 539, §§ 18 and 20, with amendment and addition.

‡ *New Code*, § 1110; *Laws of 1870*, c. 539, § 3, remodeled, but substantially the same.

must, within ten days thereafter, transmit to the commissioner of jurors a certificate, showing that the fine has been so imposed, and stating how the notice to attend was served upon the delinquent, in order that the same proceedings may be had as in the case of a delinquent juror in a court of record. A judge or a clerk who violates this section forfeits one hundred and fifty dollars for each offense.*

§ 144. The board for the selection of grand jurors must, at the time when it selects the grand jurors for each jury year, also select from the lists of trial jurors for that year, the names of not less than one hundred and twenty, nor more than one hundred and fifty persons, to constitute the sheriff's jurors for that jury year. The commissioner of jurors must forthwith transmit to the sheriff of the city and county of New York a list certified by him, containing the names of the persons so selected, with the proper additions of each, and showing that they have been selected as prescribed in this section. The sheriff must cause ballots to be prepared as prescribed in article second of title third of this chapter, and to be deposited in a proper box. Where the sheriff is authorized or required by law to impanel a jury for any purpose, the requisite number of ballots must be drawn from the box as prescribed in that article, by the sheriff, or by his under-sheriff, or deputy-sheriff. But the sheriff may in his discretion divide the names contained in the list into three panels each containing an equal number of names as nearly as may be. In that case he must designate the months in which each panel will be used, so that the jury duty shall be distributed equally, as nearly as may be, among the jurors; and ballots shall be deposited in the box at the beginning of each month, containing the names of the jurors designated for that month.†

§ 145. The commissioner of jurors must cause a notice to be served upon each delinquent trial juror, returned as

* *New Code*, § 1111; *Laws of 1870*, c. 539, §§ 29 and 30, amended.

† *New Code*, § 1112; this section is new.

having been fined, stating the amount of the fine, and the term at which he was fined, and requiring him to attend before the commissioner, on a specified day and hour, and show cause why the fine should be wholly or partly remitted, or payment of the fine should not be enforced. The notice must be served at least six days before the day therein specified. If the sheriff's return shows that notice to attend, as a trial juror, was personally served upon the person fined, the notice to show cause, as prescribed in this section, may be served upon him either personally, or by leaving it at his residence or usual place of business, with a person of suitable age and discretion; otherwise it must be served upon him personally. If a person so notified fails to attend, the fine must be enforced. If he attends, he may demand a hearing before the board for the enforcement of jury fines, otherwise the commissioner must decide with respect to the remission of the whole or any part of the fine; and the sufficiency of the cause shown, if any, and his decision is conclusive with respect to that fine, unless the person fined within ten days thereafter serves upon him a written demand of a hearing before such board. In that case the commissioner must appoint a time for the hearing; and the person fined must then attend, without further notice.*

§ 146. The presiding justice of the supreme court in the first department, the chief judges of the common pleas, of the superior and of the marine courts, the mayor, the recorder, the city judge, the judge of the court of general sessions, and the commissioner of jurors, constitute the board for the enforcement of jury fines. The board must meet at the office of the commissioner of jurors, on the last Monday of October in each year, and on the last Monday of each month thereafter, until and including the following month of June, and as much oftener as the business before it requires. Three members of the board constitute a quorum. The board, either upon a hearing,

* *New Code*, § 1113, as amended in 1879. This section and the next are substituted for part of § 19 of Act of 1870, c. 539; see also *Laws of 1847*, c. 495, §§ 5 and 6.

or when acting upon the commissioner's decision, as the case requires, has exclusive power, except as in this article otherwise prescribed, to remit the whole or any part of a fine. The board or the commissioner may, in its or his discretion, hear testimony or determine a case upon affidavits, and may from time to time adjourn the hearing or final disposition of a particular case.*

§ 147. The board may compel the attendance of any person required to appear before it, as prescribed in the last section but one; it may issue a warrant directed to the sheriff of the city and county of New York, commanding him to arrest and bring before the board a person who fails to attend at the time appointed for hearing his case, or to pay a fine imposed upon him and not remitted by the board. If a delinquent trial juror, duly drawn and returned by the sheriff as personally notified to attend a term, or personally notified to attend before the commissioner, as prescribed in the last section but one, is, in the opinion of the board, able to pay his fine, the board may make an order directing the sheriff to arrest him, and imprison him in the county jail until the fine is paid, not exceeding thirty days. The sheriff must obey such an order. The board may make an order directing that a person paying a fine imposed upon him be excused from jury duty for a period not exceeding one year.†

§ 148. After ten days have expired since the final decision of the board of enforcement with respect to a fine, as prescribed in the last section but one, if the fine has not been remitted or paid, the commissioner must issue a warrant, under his hand, directed to the sheriff of the city and county of New York, reciting the facts, and commanding the sheriff to collect from each person named in the schedule annexed thereto the sum set opposite that person's name in the schedule, and to pay over the same to the commissioner. The schedule must contain the names of

* *New Code*, § 1114; see note to last section.

† *New Code*, § 1115; the remaining portion of § 19, *Laws of 1870*, c. 539.

persons fined and notified to show cause, whose fines have not been wholly paid or remitted; it must show the amount of each fine remaining unremitted or unpaid; and the residence or usual place of business of each person fined, as far as it can be conveniently ascertained. The sheriff must collect each fine by a levy upon and sale of the personal property of the person fined, as prescribed by law where an execution against property is issued upon a judgment rendered in a court of record. The sheriff is entitled in each case to the same fees as upon such an execution, to be collected in the same manner. He must return the warrant and schedule, with his proceedings thereupon, to the commissioner, within thirty days after the delivery thereof to him; and must then pay over the money collected, less his fees. His return may be compelled by the supreme court, in the same manner as the return of an execution against property issued upon a judgment rendered in that court. For his failure to collect a fine an action may be maintained against him in a case where such a case may be maintained by a judgment creditor against a sheriff failing to collect an execution against property, and with like effect. The provisions of section one thousand one hundred and nineteen of this act (§ 151, *post*) apply to such an action.*

§ 149. The commissioner must, within thirty days after return of the warrant to him, file with the clerk of the court by which such uncollected fine was imposed, a certificate to the effect that the warrant has been returned, and showing that fines remain uncollected. Thereupon the clerk must make in the docket-book of judgments kept by him, the same entries as nearly as may be with respect to each uncollected fine, as if it was a final judgment rendered in an action; if the fine was imposed by a court other than the supreme court, the clerk thereof must immediately transmit a transcript of the entries to the clerk of the city and county of New York, who must file it and make the appropriate entries in his docket-book of

* *New Code*, § 1116; *Laws of 1847*, c. 495, § 6, with addition.

judgments. The commissioner must pay the clerk's fees, at the rate allowed for similar services, with respect to judgments. When the entries have been made, the fine, with interest, becomes a lien upon the real property of the person fined, as if it was recovered by a judgment in the same court; and an execution to collect it may be issued, directed to the sheriff of the city and county of New York, as upon such a judgment. The commissioner has, in relation to the execution and the satisfaction of the fine, all the powers of the attorney for a party recovering such a judgment, in relation to the judgment and the execution issued thereupon.*

§ 150. The commissioner of jurors must receive all moneys paid or collected for fines or penalties, as prescribed in this article; and he may make all payments therefrom, which he is authorized by this article to make. He must give a receipt for any money paid to him for a fine or penalty; he must keep a just and faithful account of all receipts and payments by items, showing the name of the person from whom each sum of money was received, and to whom each sum of money was paid, and must at all reasonable times keep his account open to public inspection. At the end of each calendar year his account must be verified by his affidavit, to the effect that it is, in all respects, just and true, and that he has not received any sum of money during the year for which he has not charged himself in the account. The account thus verified, must be audited and certified by at least three other members of the board for the enforcement of jury fines; and the commissioner must thereupon pay over, to the chamberlain of the city, the balance, if any, in his hands. The account thus audited and certified, must immediately be transmitted by the commissioner to the clerk of the board of aldermen, and must be published in the newspaper designated, as prescribed by law, for the publication of the official proceedings of city officers.†

* *New Code*, § 1117; *Laws of 1870*, c. 539; substitute for § 22.

† *New Code*, § 1118; *Laws of 1870*, c. 539, § 21; amended.

§ 151. The corporation attorney of the city of New York must, when required by the commissioner of jurors, prosecute in the proper court an action for the collection of each penalty incurred, as prescribed in this article, unless he is satisfied upon an examination of the case, that there is a defence to the action. The action must be maintained in the name of the mayor, aldermen and commonalty of the city of New York, as plaintiffs. The commissioner, with the assent of the corporation attorney, may compromise, settle or discontinue an action so brought. From the proceeds of an action, prosecuted to judgment and execution, or compromised, as prescribed in this section, the corporation attorney may retain the taxable or taxed costs. He must pay over the remainder to the commissioner.*

§ 152. A physician who knowingly gives a false certificate, or makes a false representation, for the purpose of enabling or assisting a person to be discharged, excused, or exempted from service as a trial juror, in the city and county of New York, is guilty of a misdemeanor.

§ 153. A person to whom application is made within the city of New York, by the commissioner of jurors or by his authority, for information as to a fact upon which the liability of himself or any other person to serve as a trial juror depends, and who refuses to give information relating thereto, which he can give, or knowingly gives false information relating thereto; or a person who knowingly makes to the commissioner of jurors, or to a person acting by his authority, a false representation as to the identity, residence or any other matter relating to the liability of himself or any other person to serve as a trial juror, forfeits fifty dollars for each offence.†

§ 154. A person who gives, pays, promises, or offers money or any other thing to the commissioner of jurors, the sheriff, the county clerk, or other clerk of a court; or to a

* *New Code*, § 1119; *Laws of 1870*, c. 539, §§ 9, 10, 21 and 31.

† *New Code*, § 1120; *Laws of 1870*, c. 539, § 12, amended.

‡ *New Code*, § 1121; *Laws of 1870*, c. 539, § 10, amended.

deputy of, or a person employed by the county clerk or other clerk of a court, or to an officer, messenger, or other person employed by the sheriff or the commissioner of jurors, for the purpose of enabling or assisting himself or any other person named or drawn as a trial juror to evade or to be discharged, exempted or excused from service, or who knowingly makes a false statement or representation to a judge, the commissioner of jurors, or a member of the board of enforcement of jury fines, for such purpose, or who knowingly retains, conceals, suppresses, or wilfully destroys a notice to attend before the commissioner of jurors, or at a term of a court, or any other paper relating to the liability to serve or service as a trial juror, left at the residence or place of business of another who has been named or drawn as a trial juror, is guilty of a misdemeanor. The district attorney must prosecute for each offence specified in this or the next two sections which comes to his knowledge.*

§ 155. An officer or a person employed by the sheriff, by the commissioner of jurors, or by the county clerk, or other clerk of a court, who takes money or any other thing as a gift, bribe, or payment for the purpose of enabling or assisting a person named or drawn as a trial juror, to evade or to be discharged, exempted, or excused from jury duty, or who wilfully and knowingly prevents or hinders the execution of any provision of this article, is guilty of a misdemeanor.†

§ 156. A person named or drawn as a trial juror, to whom an offer or suggestion to procure his discharge, exemption, or excuse from jury duty, for or in consideration of a corrupt inducement or reward, is made by any person, and who fails within twenty-four hours thereafter to inform the commissioner of jurors thereof, is guilty of a misdemeanor.‡

* *New Code*, § 1122; *Laws of 1870*, c. 539, part of § 11, amended.

† *New Code*, § 1123; *Laws of 1870*, c. 539, part of § 11, amended and added to.

‡ *New Code*, § 1124; *Laws of 1870*, c. 539, the remaining portion of § 11.

§ 157. A person who swears falsely in an affidavit, or testifies falsely upon an inquiry made as prescribed in this article, is guilty of perjury in a case where falsely swearing, in an affidavit used upon a motion, in a civil action, or falsely testifying upon the trial of an issue of fact, in such an action, would constitute that crime.*

§ 158. Trial jurors (in Kings county) must be selected by the commissioner of jurors, who may decide upon their qualifications and exemptions as prescribed in this article. The commissioner may from time to time appoint, and at pleasure remove, one assistant, and as many more assistants, clerks and messengers, as the board of supervisors directs. The commissioner, and each assistant whom he designates for the purpose, by a certificate filed in the office of the county clerk, may administer an oath or affirmation in relation to any matter embraced within the provisions of this article. The commissioner must keep a record of all proceedings before him, or in his office.†

§ 159. The commissioner is entitled to, and must collect for a copy of a paper furnished by him, the same fees as the clerk of a court of record; he must furnish a copy of each paper filed, or proceedings taken in his office, to any person applying therefor and paying the fees. All the money received by him for fees or fines, collected from trial jurors, or otherwise, in the discharge of his duties as commissioner, must be accounted for by him, and paid into the treasury of the county.‡

§ 160. The board of supervisors of the county must provide suitable rooms, and other accommodations for the use of the commissioner of jurors, and also for the compensation of his assistants, clerks and messengers, and for necessary printing and advertising, books, stationery, and other articles required for the convenient discharge of his duties.§

* *New Code*, § 1125; this section is new.

† *New Code*, § 1132; *Laws of 1858*, c. 322; parts of §§ 1 and 5 remodeled; see §§ 122 and 123, *ante*.

‡ *New Code*, § 1133; *Laws of 1858*, c. 322, § 39.

§ *New Code*, § 1134; *Laws of 1858*, c. 322, § 6; amended.

§ 161. The assessors in the city of Brooklyn, and of each town in the county of Kings, or a majority of them, must, after the first day of May, and on or before the first day of July in each year, return to the commissioner of jurors a written list, under his or their hands, containing the names of all persons in the city or town, as the case may be, who are liable to serve as trial jurors, and stating the occupation, place of business, and residence of each person, as far as those particulars can be conveniently ascertained. The omission to include the names of one or more persons so liable, or any other error or defect in a list, does not affect the validity of any proceeding prescribed in this article. The commissioner must within the same period select from the persons residing in the county, suitable persons to serve as trial jurors. In making the returns or selection, the assessors and the commissioner respectively, must take the names of those persons only whom they believe to be qualified to serve, and not exempt from service, as trial jurors. A list of the names so selected, must be made by the commissioner in a book specifying, as nearly as he has ascertained the facts, the occupation, the place of business, and the residence of each person, including the town, or, in the city of Brooklyn, the ward. In the list the towns must be arranged alphabetically, and the wards numerically, and the names of the jurors must be arranged alphabetically, according to their surnames, each under the name of the town or ward where he resides.*

§ 162. As soon after the first day of June in each year as the commissioner has made the list, he must publish a notice, for at least ten days, in at least six daily newspapers, published in the county, to the effect that the list of trial jurors for the year is ready, at his office, for examination and correction. He must then receive evidence of disqualifications or exemptions, and must mark "not qualified" or "exempt" in the list opposite the name of each person

* *New Code*, § 1135; *Laws of 1858*, c. 322, § 7; amended and re-modeled.

found to be disqualified to serve, or exempt from serving as a trial juror, as the case requires. He must also record therein the ground of each disqualification or exemption. *

§ 163. On the first Monday of August in each year, or earlier if the corrections can be earlier made, the commissioner must prepare the list of trial jurors for the year by copying, from his book, the names of all persons who appear therein to be liable to serve as trial jurors, with the proper additions of each. The commissioner must file a transcript of the list, verified by his affidavit, in the office of the county clerk.†

§ 164. Supplemental lists, containing the names and proper additions of persons subsequently ascertained to be liable to serve as trial jurors, may, from time to time thereafter, be made, and transcripts thereof, verified as prescribed in the last section, must be filed in like manner by the commissioner. Ballots containing those names must be prepared, as prescribed in the next section, and used in like manner as the other ballots therein specified for the residue of the jury year.‡

§ 165. The commissioner must prepare ballots, by writing the names contained in the list, a transcript of which was filed in the office of the county clerk, with the proper additions of each person on separate pieces of paper, which must be uniform, as nearly as may be, in appearance. On the second Monday of August in each year he must deposit the ballots in the box kept by him for that purpose, and must place his seal upon the box, whereupon all jury ballots, previously in use, must be destroyed. The box must be constructed with an aperture large enough only to conveniently admit the hand of the person by whom the ballots are to be drawn; and the aperture must be provided with a cover so arranged as to be conveniently sealed when closed.§

* *New Code*, § 1136; *Laws of 1858*, c. 322, § 8, amended and remodeled.

† *New Code*, § 1137; *Laws of 1858*, c. 322, § 12.

‡ *New Code*, § 1138; *Laws of 1858*, c. 322, § 13, amended.

§ *New Code*, § 1139; *Laws of 1858*, c. 322, § 14.

§ 166. The commissioner must seasonably notify the justices of the supreme court residing in the county, the judges of the city court of Brooklyn, the county judge, and the justices of sessions of the county, to attend at his office on a day designated by him, not less than fourteen nor more than twenty days before the day appointed for holding a term of a court of record in the county at which issues of fact are triable by jury, in order to witness and assist in the drawing of trial jurors for that term. The number of trial jurors to be drawn for each term may be fixed by the judge who is to preside at or hold the term, by an order under his hand, delivered to the commissioner. If the number has not been so fixed at the time of the drawing, one hundred and thirty-two trial jurors must be drawn for the term.*

§ 167. If two or more of the judges specified in the last section attend with or without one or more justices of sessions, the commissioner must break the seal of the box containing the ballots, open it, and exhibit the ballots for their inspection, together with his original and each supplemental list of trial jurors, and also the verified transcripts thereof, filed in the county clerk's office. The ballots containing the names of trial jurors excused from service for the whole or a portion of a previous term of a court of record in the county, which have not already been replaced in the box to be re-drawn, must then be replaced therein, and the judges attending the drawing must take care, when the seal is broken, that they are so replaced. If a supplemental list has been made, and a transcript filed since the last drawing, ballots containing the names appearing therein must at the same time be placed in the box. The judges and the commissioner, or a majority of them, must appoint one of the attending officers to draw the ballots from the box, and another to checkmark the drawing as it proceeds upon a copy of the lists, transcripts of which have been filed with the county clerk.†

* *New Code*, § 1140; *Laws of 1858*, c. 322, § 15, as amended by *Laws of 1866*, c. 821, § 7, and remodeled.

† *New Code*, § 1141, as amended in 1879; *Laws of 1858*, c. 322, § 16, amended; see § 17, as amended by *Laws of 1863*, c. 506.

§ 168. The commissioner must then shake the box containing the ballots so as thoroughly to mix them. The person appointed for that purpose must then, without seeing the name contained in any ballot, publicly draw one ballot from the box and read aloud the contents thereof. If the drawing is for trial jurors to serve in the city court of Brooklyn, and the person drawn does not reside in that city, the ballot must be returned to the box; but if he resides in that city, or if the drawing is for trial jurors to serve in another court, the person appointed to checkmark the drawing must place opposite the name of the person drawn, upon the copy of the lists, the figure one. The ballot must then be deposited in a second box provided for that purpose, and constructed like the first box. Another ballot must then be drawn in like manner from the first box, and the same process must be repeated until the requisite number has been drawn, except that each name must be checkmarked in its numerical order.*

§ 169. When the drawing is completed, the commissioner and the judges by whom it was conducted must sign a minute at the end of the copy of the lists upon which the checkmarks have been made, setting forth that the trial jurors whose names are contained therein were duly drawn by them for the court and the term therein specified, in the order denoted by the figures. The judges must then close each box and place upon the cover thereof their seals, which must not be broken except when necessary for a subsequent drawing.†

§ 170. The proceedings upon each subsequent drawing are the same, but the list must be checkmarked with numbers, commencing with the number next in order after the last number used at the preceding drawing.‡

§ 171. After all the ballots have been drawn from the first box and deposited in the second box, the commissioner must make a new list, by copying the list used upon the

* *New Code*, § 1142; *Laws of 1858*, c. 322, § 17, remodeled and condensed.

† *New Code*, § 1143; *Laws of 1858*, c. 322, § 18.

‡ *New Code*, § 1144; *Laws of 1858*, c. 322, § 19.

preceding drawings, omitting the checkmarks. He must then correct it by properly indicating each person who has been found to be disqualified, exempt, dead, or not resident within the county; and each person who has been excused, and for what time. Thereafter, when trial jurors are drawn, the ballots must be drawn from the second box, the names must be checkmarked on the corrected list, and the ballots not used must be deposited in the first box, except that where a ballot is drawn containing the name of a person indicated on the corrected list as disqualified, exempt, dead, or non-resident, it must be destroyed, and a ballot containing the name of a person who has been excused for a period then unexpired, must be returned to the box from which it was drawn, without checkmarking.*

§ 172. Immediately after each drawing of trial jurors, the commissioner must prepare a panel, verified by his affidavit, containing the names of the jurors drawn, with the proper additions of each, and stating for what court and for what term they were drawn. He must transmit the panel to the sheriff of the county, who must keep it on file in his office for public inspection. The sheriff must forthwith notify each juror named therein to attend the term for which he was drawn, by serving upon him a notice to that effect, addressed to him. The notice may be served personally or by leaving it at the juror's residence or usual place of business, with a person of proper age and discretion. It must specify the days during which the juror is required to be present, and it may contain copies of such portions of this article as the sheriff deems proper.†

§ 173. The thirty-six trial jurors first drawn for a term, or such other number as the judge appointed to hold or preside at the term directs, must be notified to be present during the first six days of the term, and the thirty-six trial jurors next drawn, or such other number as the judge directs, must be notified to be present during the next six days of the term, and a like number during each succeed-

* *New Code*, § 1145; *Laws of 1858*, c. 322, § 20.

† *New Code*, § 1146; *Laws of 1858*, c. 322, § 21, as amended by *Laws of 1873*, c. 166.

ing six days. The judge holding or presiding at the term, may, in his discretion, on the application of a trial juror, excuse him from the whole or a part of the time of service required of him. The judge may also change the time of service of a juror to a later day, during the same or a subsequent term of the court. Each juror whose time of service is changed to a day certain must attend at the opening of court on that day, and thereafter until discharged, without further notice. If he fails so to do he is liable to the same punishment as if he had been personally notified by the sheriff to attend the term and to be present on that day. The clerk of the court must enter in a book kept for that purpose the name of each juror who is so excused, or whose time of service is changed.*

§ 174. Before the commencement of each term of a court, for which trial jurors have been drawn, as prescribed in this article, the sheriff must file with the clerk the panel or a copy of the panel, with a return under his hand, endorsed thereupon or annexed thereto, showing the name and additions of each juror notified, the days during which he was notified to attend, and the manner in which he was notified.†

§ 175. At any time during the sitting of a term of a court of record in the county, the court may direct an additional number of trial jurors to be drawn for that term. The order must specify the number to be drawn and the time of drawing. The drawing must be conducted as prescribed in sections eleven hundred and forty-one, eleven hundred and forty-two, and eleven hundred and forty three of this act (§§ 167, 168, and 169, *ante*), except that notice is not required. The sheriff must forthwith notify each juror drawn, by such a notice as the court directs, to attend the term at the time specified in the order.‡

* *New Code*, § 1147; *Laws of 1858*, c. 322, § 23, as amended by *Laws of 1866*, c. 821, § 2.

† *New Code*, § 1148; *Laws of 1858*, c. 322, § 24, amended (see *Laws of 1873*, c. 166).

‡ *New Code*, § 1149; *Laws of 1853*, c. 336, § 5.

§ 176. In a special proceeding pending before the county judge of Kings county, in which a trial jury is necessary, the judge may impanel a jury from the trial jurors who are serving at the time in the court of sessions of the county. In a special proceeding pending before a judge of the city court of Brooklyn, in which a trial jury is necessary, the judge may impanel a jury from the trial jurors who are serving at the time in that court. If there are no jurors serving in the court of sessions or in the city court, as the case may be, the judge may make an order requiring the commissioner of jurors to draw the number of trial jurors designated therein, whereupon the commissioner must draw the requisite number, and the sheriff must notify them, as prescribed in this article for drawing and notifying other trial jurors.*

§ 177. The board of supervisors of the county must allow to each judge, including each justice of the supreme court, for the services performed by him, as prescribed in this article, such compensation as the board deems reasonable and proper.†

§ 178. Where a person duly drawn and notified to attend a term of a court of record as a trial juror fails to attend at the time specified in the notice, or from day to day, the court at that term must impose upon him a fine of twenty-five dollars for each day that he fails so to attend. This section applies to a special juror as well as to an ordinary trial juror.‡

§ 179. Where a person duly drawn and notified fails to attend and serve at a term of a court of record, as required by law, without having been excused, the court, besides imposing a fine, as prescribed in the last section, may direct the sheriff to arrest him and bring him before the court; and, when he has been so brought, it may in its discretion compel him to serve.§

* *New Code*, § 1150; *Laws of 1866*, c. 821, § 10.

† *New Code*, § 1151; *Laws of 1866*, c. 821, § 9.

‡ *New Code*, § 1152; *Laws of 1858*, c. 322, § 25, amended (see § 180, *post*).

§ *New Code*, § 1153; this section is new (see § 142, *ante*).

§ 180. The commissioner of jurors must cause a notice to be served upon each delinquent trial juror returned as having been fined, stating the sum in which, and the term at which he was fined, and requiring him to show cause, if he has any, before the board specified in this section, at the commissioner's office, on a day not less than three days thereafter, and at an hour specified in the notice, why the fine should be remitted. The commissioner must notify the justices of the supreme court residing in the county, the county judge, and the chief judge of the city court of Brooklyn, to attend at the same time and place and act with him as a board for the remission and enforcement of jury fines. It is their duty to attend and act accordingly. The commissioner and two of those justices or judges constitute a quorum. The board may, in its discretion, hear testimony, and it may from time to time adjourn the meeting, or the hearing, or final disposition of a particular case. It may remit the whole or any part of a fine; but a fine shall not be remitted or reduced, unless the person upon whom it has been imposed, or, if a reason satisfactory to the board is given why his affidavit cannot be furnished, another person in his behalf, makes and files with the commissioner an affidavit stating the grounds upon which a remission or reduction is claimed. Each affidavit so filed must be kept open to public inspection.*

§ 181. The commissioner of jurors must receive each fine paid or collected, as prescribed in this article. When ten days have expired since the final disposition of a case by the board, the commissioner must file in the office of the clerk of the court a return containing the name of each juror fined, whose fine remains unpaid, and a statement of the sum remaining unpaid. The clerk must thereupon issue to the commissioner a precept, under the seal of the court, specifying the name of each person fined and the amount of his fine remaining unpaid, and commanding the commissioner to levy and enforce collection of each fine, and

* *New Code*, § 1154; *Laws of 1858*, c. 322, § 27, as amended by *Laws of 1866*, c. 821, § 3; *Laws of 1871*, c. 744, § 1.

to return the precept with his doings thereupon, within ninety days after the receipt thereof. For the purpose of collecting a fine, the commissioner must levy upon and sell the personal property of a person fined, with like effect and subject to the same provisions of law as where a sheriff levies upon and sells personal property by virtue of an execution issued upon a judgment of a court of record.*

§ 182. The commissioner must return the precept, according to its command, to the clerk of the court issuing it. If he fails so to do, the court may enforce the return by attachment for contempt. When the precept is returned the clerk must make in the docket of judgments kept by him the same entries, as nearly as may be, with respect to each uncollected fine, as if it was a final judgment rendered in an action. If the fine was imposed at a term of the city court of Brooklyn, the clerk thereof must immediately transmit a transcript of the entries to the clerk of the county of Kings; who must file it, and make the appropriate entries in his docket of judgments. When the entries have been made, the fine, with interest, becomes a lien upon the real property of the person fined, as if it was recovered by a judgment in the same court, and an execution to collect it may be issued, directed to the sheriff of the county of Kings, as upon a judgment. The commissioner has, in relation to the execution and the satisfaction of the fine, all the powers of the attorney for a party recovering such a judgment in relation to the judgment and the execution issued thereupon.†

§ 183. The lien created by such a docket must be discharged by the county clerk on filing with him the commissioner's certificate of payment.‡

§ 184. If the commissioner of jurors or either of his assistants, or a clerk or other person employed by him, corruptly and without sufficient cause, omits the name of a

* *New Code*, § 1155; *Laws of 1858*, c. 322, § 29, as amended by same acts as last section, §§ 4 and 2, respectively.

† *New Code*, § 1156; *Laws of 1858*, c. 322, § 29, adding § 6 of *Laws of 1866*.

‡ *New Code*, § 1157; *Laws of 1866*, c. 321, § 5.

person duly drawn from a panel of trial jurors, or the ballot, containing the name of such a person, from either of the boxes prescribed in this article, or, directly or indirectly, receives a fee, reward, compensation, or advantage in consideration of, or as an inducement to such an omission, he is guilty of a felony, and shall, on conviction, be punished by imprisonment in a State prison for a term not less than two nor more than five years.*

§ 185. A willful omission by the commissioner, of a duty required of him by this article, other than that specified in the last section, is a misdemeanor.†

§ 186. A person to whom application is made within the county of Kings by an assessor, or by the commissioner of jurors, or either of his assistants, for information as to a fact upon which the liability of himself or any other person to serve as a trial juror depends, and who refuses to give information relating thereto, which he can give, or knowingly gives false information relating thereto, or a person who knowingly makes to an assessor or to the commissioner of jurors or a person acting by his authority, a false representation as to the identity, residence, or any other matter relating to a juror duly drawn and placed on a panel to be notified, or who knowingly retains, conceals, suppresses, or willfully destroys a notice to attend left at the residence or place of business of another who has been drawn as trial juror, is guilty of a misdemeanor.‡

§ 187. A physician who knowingly gives a false certificate or makes a false representation for the purpose of enabling or assisting a person to be discharged, excused, or exempted from service as a trial juror in the county of Kings, is guilty of a misdemeanor.§

§ 188. The commissioner of jurors must make a yearly report to the board of supervisors of all proceedings had before him or by him in the discharge of his duties, and he

* *New Code*, § 1158; *Laws of 1862*, c. 878, § 4, amended.

† *New Code*, § 1159; *Laws of 1866*, c. 821, § 8.

‡ *New Code*, § 1160; *Laws of 1858*, c. 322, § 9.

§ *New Code*, § 1161; this section is new, corresponding to § 12, *Laws of 1870*, c. 539 (see § 152, *ante*).

must pay over to the county treasurer, at least once in each three months, all money in his hands which he has received as commissioner.*

§ 189. The assessors of the city of Buffalo must, in the month of May in each year, make out, return, and file with the clerk of the court, a list of not less than six hundred residents of that city not exempt from jury duty, qualified to serve as trial jurors in the court. For that purpose, the assessors may, in their discretion, associate the clerk of the court with them. The court at any term thereof may, from time to time, make an order directing the assessors to make out and file, within a time specified in the order, a new list of jurors, or a list of any number of additional jurors; and it may punish an omission to obey such an order as a contempt.†

§ 190. At least fourteen days before the time appointed for holding a term of the court, where issues of fact in civil or criminal causes are triable, the clerk of the court, in the presence of a judge thereof, must draw from the list so returned by the assessors the names of thirty-six persons, or such other number as the court, at any term thereof, directs, to serve as trial jurors. The drawing must be conducted as described by law for the drawing of trial jurors by a county clerk, except that notice thereof is not necessary. A list of the names of the persons drawn must be certified by the clerk and attending judge, and delivered to the sheriff of Erie county.‡

§ 191. The sheriff must thereupon notify each of the persons so drawn, as prescribed by law for notifying a juror drawn to attend a term of the circuit court. Before the first day of the term, the sheriff must file the list with the clerk, accompanied with his return, specifying who were

* *New Code*, § 1162; *Laws of 1858*, c. 322, § 40.

† *New Code*, § 303; *Laws of 1854*, c. 96, § 28; *Laws of 1857*, c. 361, § 7; *Laws of 1870*, c. 313; 3 *R. S.* 6 ed. 270, § 36. The application of this and the next three sections extended to certain criminal cases.

‡ *New Code*, § 304; *Laws of 1854*, c. 96, § 29; *Laws of 1857*, c. 361, § 8; 3 *R. S.* 6 ed. 270, § 37. See note to last section; see next two sections.

notified, and the manner in which each person was notified. The clerk must make the same disposition of the ballots, containing the names of the jurors who have served, of those who did not appear, and of those who were discharged, as prescribed by law with respect to the circuit court. Each juror attending a term of the court must be paid, by the county of Erie, the same compensation as a juror attending the circuit court.*

§ 192. At a term where issues of fact in civil or criminal causes are triable, the court may, in its discretion, direct additional jurors to be drawn from any list returned by the assessors, and require the sheriff or a policeman in attendance upon the term, forthwith to notify them to attend; and if a person so drawn cannot be found, the court may cause his name to be returned to the box.†

§ 193. Jurors for the terms of the county court, at which issues of fact are triable by jury, and of the court of sessions, must be drawn and notified in the same manner as for a term of the circuit court.‡

Formation of the Jury.

§ 194. At the opening of a term of a court of record, at which issues of fact are to be tried by jury, the clerk must cause ballots, uniform as nearly as may be in appearance, to be prepared, by writing the name of each person returned to the term as a trial juror, with his proper additions on a separate piece of paper. He must roll up or fold each ballot, in the same manner, as nearly as may be, so as to resemble the others, and so that the name is not visible. The ballots must be deposited in a sufficient box, from which they must be drawn, as prescribed in this article.§

* *New Code*, § 305; see note to last two sections.

† *New Code*, § 306.

‡ *New Code*, § 357; *Old Code*, § 32; *Laws of 1877*, c. 271. This section applies to every county in the State.

§ *New Code*, § 1163; 2 *R. S.* 420, § 59 (2 *Edm.* 438).

This statute is merely directory (*Cole v. Berry*, 6 *Cow.* 584).

§ 195. When an issue of fact, to be tried by a jury, is brought to trial, the clerk, under the direction of the court, must openly draw, out of the box, as many of the ballots, one after another, as are sufficient to form a jury.*

§ 196. Before the first ballot is drawn, the box must be closed and well shaken, so as thoroughly to mix the ballots; and the clerk must draw each ballot, without seeing the name written on any of them, through an aperture made in the lid of the box large enough only to admit his hand conveniently.†

§ 197. The first twelve persons who appear as their names are drawn and called, and are approved as indifferent between the parties, and not discharged or excused, must be sworn and constitute the jury to try the issue.‡

* *New Code*, § 1164; 2 *R. S.* 420, § 60.

† *New Code*, § 1165; 2 *R. S.* 420, § 66.

‡ *New Code*, § 1166; 2 *R. S.* 420, § 61; *People v. Larned*, 7 *N. Y.* 451; and as to administering general oath, see *People v. Albany C. P.*, 6 *Wend.* 548.

An irregularity in the impaneling of a jury is no ground of error, if it does not prejudice or injure the defendant (*People v. Cummings*, 3 *Park.* 343).

If a juror do not answer to his name when called, though he afterwards appears before the jury is full, he may be refused a place in the jury-box (*People v. Vermilyea*, 7 *Cow.* 369).

After the names of the jurors in the ballot-box have been called and exhausted, absent jurors may be called; and if one of them supposed to be absent happens to be present, he may be sworn on the panel (*People v. Rogers*, 13 *Abb. Pr. N. S.* 370).

If the name of a juror be called, and he do not appear in court, his name must then be returned to the ballot-box with the undrawn ballots; and if he then come into court he cannot be required to take his seat in the jury-box (*People v. Larned*, 7 *N. Y.* 445).

In an action for waste, it is not necessary, either upon the execution of a writ of inquiry, or upon the trial of an issue of fact, that the jury, the judge, or the referee, should view the property; where the trial is by a referee, or by the court without a jury, the referee or the judge may, in his discretion, view the property, and direct the attorneys for the parties to attend accordingly. In any other case, the court may, in its discretion, by order, direct a view by the jury (*New Code*, § 1659; the section contained in this note has not yet been adopted).

§ 198. The ballots containing the names of the jurors, so sworn, must be then deposited in another box, and there kept apart from the other ballots until that jury is discharged.*

§ 199. After that jury is discharged, the ballots containing their names must be again rolled up or folded, as prescribed in section eleven hundred and sixty-three of this act (§ 194, *ante*), and returned to the box from which they were first taken, and the same course must be pursued as often as an issue is brought to trial by a jury.†

§ 200. The ballot containing the name of a juror, who is absent when his name is drawn or called, or is set aside or excused from serving on that trial, must be again rolled up or folded in the same manner as before, and returned to the box containing the undrawn ballots, as soon as the jury is sworn.‡

§ 201. If an issue is brought to trial by a jury while a jury is impaneled in another cause at the same term, and not then discharged, the court may order a jury for the trial of that issue to be drawn out of the box containing the ballots then undrawn; but in any other case, the ballots containing the names of all the trial jurors returned at, and attending the term, must be placed together in the same box, before a jury is drawn therefrom.§

§ 202. If a sufficient number of jurors, duly drawn and notified, do not attend, or cannot be obtained to form a trial jury, the court may, in any county except Westchester, direct the sheriff to require the attendance of such a number of talesmen from the bystanders, or from the county at large, qualified to serve as trial jurors, as it deems sufficient for the purpose. In Westchester county the court must direct the sheriff to draw a sufficient number of ballots from the first box, specified in section 1038 (§ 90, *ante*) of this act, if there is not a sufficient number of ballots remaining therein, to draw the residue from the second box, specified in section 1051 (§ 103, *ante*) of this

* *New Code*, § 1167.

† *New Code*, § 1169.

‡ *New Code*, § 1168.

§ *New Code*, § 1170.

act. In any other county, except New York and Kings, it may, in its discretion, instead of directing him to require talesmen to attend, direct him to draw a sufficient number of ballots from the third box, specified in section 1052 (§ 104, *ante*) of this act. In either case, the sheriff must notify the persons thus drawn to attend forthwith, or upon a day fixed by the court. If, for any reason, a sufficient number of jurors to try the issue is not obtained from the persons notified under an order made as prescribed in this section, the court may make another order or successive orders until a sufficient number is obtained, and in making each order, the court may exercise the same discretion as in making the first order.*

§ 203. In any county except New York, Kings or Westchester, the court may also direct the sheriff to require the attendance of such a number of qualified talesmen for the trial of an issue of fact as it deems sufficient, where, by reason of one or more juries being impaneled, or for any other reason, no ballot remains undrawn, or where, in consequence of jurors being set aside, a juror cannot be obtained for the trial of that issue from the list of those returned.†

§ 204. If in a case specified in the last two sections the sheriff is a party to the issue, the court must appoint a disinterested person to act in place of the sheriff. For that purpose, the person so appointed possesses all the powers and is subject to all the duties and liabilities of the sheriff, with respect to the matters specified in those sections.‡

§ 205. The sheriff, or person appointed by the court, must notify the requisite number of persons to attend and make return thereof, as prescribed in section ten hundred and forty-eight of this act (§ 100, *ante*); except that each person must be required to attend forthwith. Each person so notified must attend forthwith, and unless excused by

* *New Code*, § 1171, as am'd in 1879. The summoning of talesmen is only for a single trial (*Shields v. N. S. Bank*, 3 *Hun*, 477).

† *New Code*, § 1172; 2 *R. S.* 420, part of § 65. As to what the record must show, see *Cooper v. Bissell*, 16 *Johns*. 146.

‡ *New Code*, § 1173; 2 *R. S.* 420, § 65.

the court or set aside must serve as a juror upon the trial. For a neglect or refusal so to do, he may be fined in the same manner as a trial juror regularly drawn and notified as prescribed in this chapter ; and he is subject to the same exceptions and challenges as any other trial juror.*

§ 206. A general, special, or trial term of a court of record may be adjourned from day to day, or to a specified future day, by an entry in the minutes. Jurors may be drawn for and notified to attend a term so adjourned, and causes may be noticed for trial thereat, as if it was held by original appointment. Any judge of the court may so adjourn a term thereof, in the absence of a sufficient number of judges to hold the term.†

§ 207. Where the trial or hearing of an issue of fact, joined in an action or special proceeding, civil or criminal, has been commenced at a term of a court of record, it may, notwithstanding the expiration of the time appointed for the term to continue, be continued to the completion thereof ; including, if the cause is tried by a jury, all proceedings taken therein until the actual discharge of the jury ; or if it is tried by the court without a jury, until it is finally submitted for a decision upon the merits.‡

Miscellaneous Provisions, including those relating to Embracery, and other act of Misconduct.

§ 208. A trial by a jury, of an issue of fact, joined in a civil action in a court of record, must be had as prescribed in this chapter ; except in a case where it is otherwise specially prescribed by law. An alien is not entitled to a jury composed in parts of aliens, or strangers, in an action or special proceeding, civil or criminal.§

* *New Code*, § 1174; 2 *R. S.* 420, § 55. As to challenges, see *post*, § 239, etc.

† *New Code*, § 34; *Old Code*, § 24 (see *Fisher v. Hepburn*, 48 *N. Y.* 41).

‡ *New Code*, § 45.

§ *New Code*, § 1190; 2 *R. S.* 419, § 53 (2 *Edm.* 437), remodeled; see also § 227, *post*.

This is known in some of the States as a jury "*de medietate*

§ 209. A venire to procure jurors cannot be issued in a civil action brought in a court of record, except as specially prescribed by law.*

§ 210. In the marine court of the city of New York, by a rule adopted at the February general term, 1874, it is provided that in marine cases, wherein an order of arrest was granted, no jury trial will be allowed, unless demanded at the time of joining issue, and that a copy of this order be printed on the back of each warrant issued, and such notice be served personally on the party arrested, at the time of the arrest.†

lingua," and is composed of one-half aliens, meaning thereby persons of the same nationality of the party claiming the privilege, where he is a foreigner, and the other half denizens. The aliens acting in such a jury must understand our language. When an alien claims a trial by such a jury, the court may order one to be summoned instantly.

* *New Code*, § 1191; 2 *R. S.* 410, § 9 (2 *Edm.* 427), omitting part as to foreign jury; see §§ 885 and 886, *post*.

A venire (*venire facias juratores*) in practice is the name of a writ directed to the sheriff, commanding him to cause to come from the body of the county, before the court from which it issued, on some day certain, and therein specified, a certain number of qualified citizens, who are to act as jurors in the said court (*Bowyer's Law Dic.*).

† In marine causes, unless both parties sooner appear, the court must wait one hour after the return; or, if the defendant has given bail, one hour after the opening of the court. As soon after the parties appear, or after the expiration of the hour, as the business upon which the court is then engaged will permit, the court must take up the cause. If the plaintiff does not then appear, a judgment dismissing the complaint, with costs, must be rendered. If the defendant does not then attend in person, the plaintiff must then make his complaint, and the defendant's default must be entered. If the plaintiff appears, and the defendant attends in person, the pleadings must then be made, and issue must be joined. The pleadings may be oral or written; if they are oral, the clerk must enter the substance thereof in the minutes. If either party desires a trial by jury, he must demand the same, at the time of the joinder of issue; otherwise the issue must be tried by the court, without a jury (*New Code*, § 3185).

Where a trial by a jury is duly demanded, the court at chambers must direct the issue to be tried, at a trial term, upon such notice

§ 211. A juror shall not be questioned, and is not subject to an action or other liability, civil or criminal, for a verdict rendered by him in an action in a court of record, or not of record, or in a special proceeding before an officer, except by indictment for corrupt conduct, in a case prescribed by law.*

§ 212. A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court, may be defeated, impaired, impeded or prejudiced, in the following case :

A person duly notified to attend as a juror, at a term of the court, for improperly conversing with a party to an action or special proceeding, to be tried at that term, or with any other person, in relation to the merits of that action or special proceeding ; or for receiving a communication from any person, in relation to the merits of such an action or special proceeding, without immediately disclosing the same to the court.†

as it deems proper, or without notice; it may also direct that the action have a preference upon the day calendar, either generally, or for a particular day, and it may give such direction as it deems proper with respect to filing a note of issue. Where a trial by jury is not duly demanded, or where the defendant is in default, the evidence must then, or at such subsequent time, either at chambers or at a trial term, or special term, as the court at chambers appoints, be given, and thereupon final judgment must be rendered. But the issue must be appointed to be tried within six days after the joinder thereof, unless both parties assent to a longer time, or a trial by jury is demanded, and there is no term of the court at which it can be had within that time. The trial cannot be adjourned without the consent of both parties, beyond three calendar months from the joinder of issue (*New Code*, § 3186).

[The sections contained in this note have not yet been adopted.]

* *New Code*, § 1192; 2 *R. S.* 421, § 69 (2 *Edm.* 439).

† *New Code*, § 14, subd. 6; 2 *R. S.* 534, § 1; 3 *R. S.* (6 ed.) 838.

Every person who gives or offers to give a bribe to any judicial officer, juror, referee, arbitrator, umpire or assessor, or to any person who may be authorized by law to hear or determine any

§ 213. A person, drawn or notified to attend, as a trial juror, in an action in a court of record or not of record, or in a special proceeding before an officer, who takes anything

question or controversy, with intent to influence his vote, opinion, or decision, upon any matter or question which is or may be brought before him for decision, is punishable by an imprisonment in a State prison not exceeding ten years, or by a fine not exceeding five thousand dollars, or both (*Penal Code, N. Y.* [not yet adopted], § 125.)

Every juror, referee, arbitrator, umpire, or assessor, and every person authorized by law to hear or determine any question or controversy, who asks, receives, or agrees to receive any bribe upon any agreement or understanding that his vote, opinion, or decision upon any matter or question which is or may be brought before him for decision shall be thereby influenced, is guilty of felony (*Penal Code, N. Y.* [not yet adopted], § 127).

Every juror, or person drawn or summoned as a juror, or chosen arbitrator, or umpire, or appointed referee, who either:

I. Makes any promise or agreement to give a verdict for or against any party; or,

II. Willfully permits any communication to be made to him, or receives any book, paper, instrument, or information relating to any cause pending before him, except according to the regular course of proceeding upon the trial of such cause, is guilty of a misdemeanor (*Penal Code, N. Y.* [not yet adopted], § 128).

Every judicial officer, juror, referee, arbitrator, or umpire, who accepts any gift from any person, knowing him to be a party in interest, or the attorney or counsel of any party in interest to any action or proceeding then pending or about to be brought before him, is guilty of a misdemeanor (*Penal Code, N. Y.* [not yet adopted], § 129).

The word gift in the foregoing section shall not be taken to include property received by inheritance, by will, or by gift in view of death (*Penal Code, N. Y.* [not yet adopted], § 130).

Every person who attempts to influence a juror, or any person summoned or drawn as a juror, or chosen an arbitrator, or appointed a referee, in respect to his verdict or decision of any cause or matter pending, or about to be brought before him, either:

I. By means of any communication, oral or written, had with him, except in the regular course of proceedings upon the trial of the cause;

II. By means of any book, paper, or instrument, exhibited otherwise than in the regular course of proceedings upon the trial of the cause;

to render his verdict, or receives from a party to the action or special proceeding a gift or gratuity, forfeits ten times the sum or ten times the value of that which he took or received, to the party to the action or special proceeding, aggrieved thereby, and is also liable to that party for his damages sustained thereby, besides being subject to the punishment prescribed by law.*

§ 214. An embraceor, who procures a person drawn

III. By means of any threat or intimidation;

IV. By means of any assurance or promise of any pecuniary or other advantage; or,

V. By publishing any statement, argument, or observation relating to the cause, is guilty of a misdemeanor (*Penal Code, N. Y.* [not yet adopted], § 131).

Every person authorized by law to assist at the drawing of any jurors to attend any court, who willfully puts, or consents to the putting upon any list of jurors as having been drawn, any name which shall not have been drawn for that purpose in the manner prescribed by law, or who omits to place on such list any name that shall have been drawn in the manner prescribed by law, or who signs or certifies any list of jurors as having been drawn which was not drawn according to law, or who is guilty of any other unfair, partial, or improper conduct in the drawing of any such list of jurors, is guilty of a misdemeanor (*Penal Code, N. Y.* [not yet adopted], § 132).

Every officer to whose charge any juror is committed by any court or magistrate, who negligently or willfully permits them, or any one of them, either :

I. To receive any communication from any person;

II. To make any communication to any person;

III. To obtain or receive any book or paper, or refreshment; or,

IV. To leave the jury room without the leave of such court, or magistrate first obtained,

Is guilty of a misdemeanor (*Penal Code, N. Y.* [not yet adopted] § 133).

Every person who, directly or indirectly, utters or addresses any threat or intimidation to any judicial or ministerial officer, or to any juror, referee, arbitrator, umpire or assessor, or other person authorized by law to hear or determine any controversy, with intent to induce him, contrary to his duty, either to do, or omit or delay any act, is guilty of a misdemeanor (*Penal Code, N. Y.* [not yet adopted] § 185).

* *New Code*, § 1193; 2 *R. S.* 421, § 70.

or notified to attend as a trial juror, to take gain or profit, contrary to the last section, forfeits ten times the sum, or ten times the value of that which was so taken, to the party aggrieved thereby, and is also liable to that party for his damages sustained thereby; besides being subject to the punishment prescribed by law.*

§ 215. A person who has been lawfully and personally notified to attend as a trial juror to inquire into a matter or thing, or to hear and try a controversy in a special proceeding pending before a judge, justice of the peace, commissioner, or other officer, and who willfully neglects to attend as required by the notice, may be fined by the officer in a sum not exceeding twenty-five dollars. But this section does not extend to a case where special provision is made by law for punishing the default of a trial juror.†

§ 216. A sheriff, constable, or other officer, who notified jurors to attend in a case specified in the last section, must, when directed by the officer before whom the special proceeding is pending, attend and take charge of the jury. For a willful neglect to obey such a direction, or for any misconduct while attending the jury, by which a right or remedy of a party to the special proceeding may be impaired or prejudiced, he must be fined by that officer in a sum not exceeding twenty-five dollars.‡

§ 217. Where a fine is imposed, in a case specified in the last two sections, written notice thereof must be served upon the person fined, to the end that he may apply to the officer imposing it, for the remission of the whole or a part thereof, upon proof that he had a reasonable excuse for his neglect or misconduct, or that other good cause exists for the remission.§

§ 218. If within thirty days after the service of the notice, the fine has not been remitted by the officer imposing it, he must make a special return of the delinquency

* *New Code*, § 1194; 2 *R. S.* 421, § 71, amended.

† *New Code*, § 1195; 2 *R. S.* 551, § 4 (2 *Edm.* 572), extended to apply to proceedings *de lunatico inquirendo* (see § 909, *post*).

‡ *New Code*, § 1196; 2 *R. S.* 551, § 5.

§ *New Code*, § 1197; 2 *R. S.* 551, § 6, amended.

or misconduct for which the fine was imposed, and of the amount of the fine, accompanied with proof by affidavit of service of the notice specified in the last section, to the next term of the county court of the county in which the delinquent resides.*

§ 219. The county clerk must deliver to the district attorney a copy of the return, and of the affidavit, at the time when he delivers to him copies of the minutes of fines imposed by the county court. The fine must be collected, or it may be remitted or reduced in the same manner as a fine imposed by the county court upon a defaulting trial juror.†

Of the Trial of Indictments.

§ 220. In all criminal prosecutions, the accused has a right to a speedy and public trial by an impartial jury, and is entitled to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor.‡

§ 221. All issues of fact joined upon any indictment shall be tried by a jury in the county where such indictment was found, unless for special causes the supreme court shall order an indictment removed into that court to be tried in some other county.§

§ 222. Such trials shall be had by jurors drawn, summoned and returned in the manner prescribed by law, and where any court of oyer and terminer shall be held at the same time with any circuit court, the jurors returned for such circuit court shall be the jurors for such oyer and terminer, and the jurors returned for any county court

* *New Code*, § 1198; 2 *R. S.* 551, § 7.

† *New Code* § 1199; 2 *R. S.* 551, § 8.

‡ 1 *R. S.* (6 ed.) § 14, p. 376.

§ 3 *R. S.* (6 ed.) § 1, p. 1028; *People v. Harris*, 4 *Den.* 152; *People v. Webb*, 1 *Hill*, 182; *People v. Baker*, 3 *Abb. Pr.* 47; *S. C.*, 3 *Park. Cr.* 181.

shall be the jurors for the court of sessions appointed to be held at the same time.*

§ 223. When twenty-four jurors duly drawn and summoned do not appear, or when, by reason of there being one or more jurors impaneled, or in consequence of jurors being set aside, or for any other reason, there shall not remain twenty-four ballots containing the names of jurors then attending, the court shall order the sheriff to summon from the bystanders, or from the county at large, so many persons qualified, to serve as jurors as shall be necessary to make at least twenty-four jurors, from whom a jury for the trial of the indictment may be selected.†

§ 224. The names of the persons so summoned by the sheriff shall be written on distinct pieces of paper, shall be rolled or folded each in the same manner as near as may be, and shall be deposited with the ballots remaining undrawn, if any there be, or in a sufficient box by themselves, if there be no undrawn ballots from which a jury shall be drawn.‡

§ 225. In all other cases, the jury for the trial of any indictment shall be drawn in the same manner as prescribed by law for the trial of issues of fact in civil cases.§

§ 226. Every person summoned by order of the court as a juror, shall be liable to the same penalties for disobedience or neglect as in civil cases, which shall be collected and applied in the same manner.||

§ 227. No alien shall be entitled to a jury of part aliens or strangers, for the trial of any indictment whatever.¶

§ 228. No person who was a member of the grand

* 3 R. S. 6 ed. § 2, p. 1028; *People v. Mallon*, 3 *Lans.* 229; *Gardiner v. People*, 6 *Park. Cr.* 192; *Shields v. Niagara County Savings Bank*, 5 *N. Y. S. C. R. (T. & C.)* 588.

† 3 R. S. 6 ed. § 3, p. 1028; *Matter of Reynolds*, 6 *Park. Cr.* 309; *People v. Colt*, 3 *Hill*, 435.

‡ 3 R. S. 6 ed. § 4, p. 1028.

§ 3 R. S. 6 ed. § 5, p. 1028; *Gardiner v. People*, 6 *Park. Cr.* 192; *People v. Cancemi*, 7 *Abb. Pr.* 299; *Ruloff's Case*, 11 *Abb. Pr. N. S.* 287.

¶ 3 R. S. 6 ed. § 6, p. 1028.

¶ 3 R. S. 6 ed. § 7, p. 1028; see § 208, *ante*.

jury or inquest by which any indictment shall have been found, shall serve as a petit juror for the trial of such indictment, if he be challenged for that cause by the accused.*

§ 229. No person indicted for any felony can be tried, unless he be personally present during such trial; nor can any person indicted for any other offense be tried unless he be present, either personally or by his attorney, duly authorized for that purpose. And every person indicted shall be admitted to make any lawful proof by competent witnesses on oath or by other lawful testimony.†

§ 230. The proceedings prescribed by law in civil cases, in respect to the impaneling of juries, the keeping them together, and the manner of rendering their verdict, shall be had upon trials of indictments; and the provisions of law in civil cases relative to compelling the attendance and testimony of witnesses, their examination, the administration of oaths and affirmations, and proceedings as for contempt to enforce the remedies and protect the rights of parties, shall extend to trials and other proceedings on indictments, so far as they may be in their nature applicable thereto, subject to the provisions contained in any statute.‡

§ 231. In all prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party is to be acquitted; and the jury have the right to determine the law and the fact.§

* 3 *R. S.* 6 ed. § 8, p. 1028.

† 3 *R. S.* 6 ed. § 18, p. 1029; *People v. Clark*, 1 *Park. Cr.* 360; *Maurer v. People*, 43 *N. Y.* 1; *Stephens v. People*, 19 *N. Y.* 549; *People v. Petry & Mulligan*, 2 *Hilton*, 525; *People v. Wilkes*, 5 *How. Pr.* 105.

‡ 3 *R. S.* 6 ed. § 19, p. 1029; *Fitzgerald v. People*, 49 *Barb.* 122; *Stephens v. People*, 4 *Park. Cr.* 506; *S. C.*, 19 *N. Y.* 551; *Kalle v. People*, 4 *Park. Cr.* 592; *People ex rel. Phelps v. Fancher*, 2 *Hun*, 231; *People v. Restell*, 3 *Hill*, 295; *Kolle v. People*, 9 *Abb. Pr.* 17; *S. C.*, 17 *How. Pr.* 565.

§ 1 *R. S.* 6 ed. § 21, p. 376.

In criminal cases, the jury are bound by the instruction of the

Corrupting Jurors.

§ 232. Every person who shall attempt improperly to influence any juror in a civil or criminal case, or any one

court, as to the law, to the same extent as in civil cases (*Duffy v. People*, 26 N. Y. 588).

The application and effect of certain portions of this act are declared and regulated as follows: except that, where a particular provision, included within a chapter or a portion of a chapter, specified in a subdivision of this section, expressly designates the courts, persons, or proceedings affected thereby, that provision is deemed excluded from the application and effect prescribed in the subdivision.

2. In chapter third, sections 303, 304, 305, and 306 (§§ 189, 190, 191, 192, *ante*) apply to trial jurors upon the trial of an indictment or other criminal cause, as prescribed in subdivision seventh of this section, with respect to the application of titles third and fourth of chapter tenth, and as specified in the next two sections.

7. In chapter tenth, titles first, second, fifth, and sixth (§§ 194 to 217, *ante*) apply only to proceedings taken on or after the first day of May, 1877, in one of the courts specified in subdivision fourth of this section. Titles third and fourth (§§ 60 to 188, *ante*) of that chapter apply only to jurors drawn for a term of a court, commencing not less than twenty days after the first day of May, 1877. (*New Code*, § 3311, subs. 2 and 7).

A jury, for the trial of an indictment or other criminal cause, at a term of a court of record, commencing on or after the twenty-first day of May, 1877, must be procured from the trial jurors selected, drawn, and notified, as prescribed in this act, for the term of the court at which it is triable, including the talesmen or additional jurors, procured as prescribed therein; and the same must be tried by the jury so formed. But the statutes remaining unrepealed after the first day of May, 1877, relating to challenges or disqualifications of petit jurors in a criminal cause, or prescribing the cases where talesmen or additional petit jurors must be summoned in a criminal cause, remain unaffected by this act, and are applicable to the proceedings taken as prescribed in this act, and to the trial jurors therein specified (*New Code*, § 3312).

[The sections contained in this note have not yet been adopted.]

summoned or drawn as such juror, or any one chosen an arbitrator, or appointed a referee, in relation to any cause or matter pending in the court, for which such juror shall have been drawn or summoned, or pending before such arbitrator or such referee, shall, upon conviction, be adjudged guilty of a misdemeanor, and shall be punished as hereinafter directed.*

§ 233. If any person drawn, summoned or sworn as a juror in any case, shall make any promise or agreement to give a verdict for or against any person accused of any offence, or for or against any party to a civil suit; or shall receive any paper, evidence or information from any one, in relation to any matter or cause for the trial of which he shall be sworn, without the authority of the court or officer before whom such juror shall have been summoned, and without immediately disclosing the same to such court or officer; he shall, upon conviction, be adjudged guilty of a misdemeanor.†

If any person drawn or summoned as a juror, or if any person chosen an arbitrator or appointed a referee shall take anything to give his verdict, award or report, or shall receive any gratuity or gift whatever, from any party to any suit, proceeding or prosecution, for the trial of which such person shall have been drawn or summoned, or for the hearing of which he shall have been chosen an arbitrator or appointed a referee, he shall, on conviction, be punished by imprisonment in a State prison not exceeding five years, or in a county jail not exceeding one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment.‡

Every person who shall corrupt, or attempt to corrupt, any other drawn or summoned as a juror, appointed a referee, or chosen an arbitrator, by giving, or offering to give,

* 3 R. S. 6 ed. § 16, p. 972.

† 3 R. S. 6 ed. § 17, p. 972; see § 212, *ante*.

‡ 3 R. S. 6 ed. § 11, p. 957.

any gift or gratuity whatever, with intent to bias the mind of such juror, referee or arbitrator, in relation to any cause or matter which may be pending in the court to which such juror shall have been summoned, or in which such referee or arbitrator shall have been chosen or appointed, shall, on conviction, be punished by imprisonment in a State prison not exceeding five years, or in a county jail not more than one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment.*

§ 234. If any person whose duty it shall be to assist at the drawing of any jurors to attend any court, shall designedly put, or consent to the putting upon any list of jurors as having been drawn, any name which shall not have been drawn for that purpose, in the manner prescribed by law; or shall omit to place on such list any name that shall have been drawn, in the manner prescribed by law; or shall sign or certify any list of jurors as having been drawn, which was not drawn according to law; or shall be guilty of any other unfair, partial or improper conduct, in the drawing of any such list of jurors, he shall, upon conviction, be adjudged guilty of a misdemeanor.†

Jurors' fees for serving in any court or before any officer.

§ 235. To each juror impaneled to try a cause in any circuit court or any county court, twenty-five cents for each case in which he shall be impaneled, to be paid by the party noticing the cause for trial, or if noticed by both parties, to be paid by such party as the court shall direct.‡

* 3 R. S. 6 ed. § 12, p. 958.

† 3 R. S. 6 ed. § 18, p. 972; Friery v. People, 2 Abb. Ct. App. Dec. 231.

‡ See note to § 240, *post*.

§ 236. The several boards of supervisors in this State may, at their first or any subsequent meeting, after the passage of this act, direct a sum, not exceeding two dollars a day, to be allowed to every grand and petit juror for attending the courts of record held within their several counties, in addition to other fees which such jurors may receive; and they may also direct an allowance to be made to such jurors for traveling in coming to and returning from such courts, not exceeding five cents a mile; such money shall be raised in the same manner as other county charges are by law raised and collected.*

§ 237. In all cases, when the trial of any issue in any civil or criminal action, in any court of record in any county with a jury, shall be protracted beyond the period of thirty days, it shall be the duty of the supervisors of the said county, upon the certificate of the judge or justice who presided at such trial that the same was necessarily protracted beyond the period of thirty days, to fix, audit and allow to the jurors sitting on such trial such extra compensation in addition to that now authorized by law as, in their opinion, shall be reasonable and proper for their services, and any expenses which may have been incurred for meals provided for them during such trial, and the said extra compensation and expenses shall be county charges, and paid as such.*

§ 238. Whenever any board of supervisors shall have directed any allowance to be made to jurors, as herein provided, they shall raise such sum as may be necessary for that purpose in the same manner as other county charges are by law to be raised and collected.

The sums so allowed by any board of supervisors to any jurors, shall be paid to them by the county treasurer of the county, on the production of a certificate of the clerk of the court at which such jurors shall have attended, specifying the time each juror has actually attended, and the distance traveled by him.*

§ 239. The foregoing provisions shall not apply to

* See note to § 240, *post*.

jurors in the city of New York, who shall be allowed twelve and a half cents each juror, for every action in which he is sworn as such; nor shall they apply to petit jurors in the city and county of Albany.*

§ 240. To each juror sworn in any action in a mayor's court, twenty-five cents.

To each juror sworn before any officer in any special proceeding allowed by law, or before any sheriff upon any writ of inquiry, or try any claim to personal property, twelve and a half cents.†

§ 241. From and after the first day of January next, the sum of seventy-five cents per day for every day's attendance, and for every twenty miles' travel, shall be allowed and paid to every person who shall be sworn and serve as a petit juror, for his attendance at any circuit court, court of oyer and terminer, court of common pleas, or court of general sessions of the peace, to be held in and for the county of Schenectady, to be paid by the county treasurer, on the certificate of the county clerk of his attendance, as aforesaid.‡

§ 242. The three dollars now allowed by law for trying every civil suit, after the first day of January next, shall be paid to the county clerk, and he shall pay the same to the county treasurer, and the supervisors shall, at their next annual meeting, and at every annual meeting thereafter, levy and collect a sum, which, together with the three dollars allowed on each suit, shall be sufficient to pay such petit jurors, as aforesaid.§

§ 243. Jurors shall receive for each day of actual attendance and service in the court of general sessions of the peace, or in the court of oyer and terminer, the sum of two dollars, to be paid to each of them by the county treasurer, upon a certificate of his attendance and service by the clerk, and an order of the court for his payment; and in other courts of record, each juror shall receive for each case in which he shall be impaneled one dollar if

* See note to next section. † 3 R. S. 6 ed. § 29, p. 911.

‡ 3 R. S. 6 ed. § 30, p. 912. § 3 R. S. 6 ed. § 31, p. 912.

the case be tried, and fifty cents if default be made, such fee to be paid by the clerk of the court, and to be collected by him; fifty cents before the case is placed on the calendar, and if there be a trial, fifty cents before the verdict shall be entered.*

§ 244. Grand jurors attending any session or meeting of any grand jury held in and for the county of Albany, and petit jurors attending any circuit court, court of oyer and terminer, county court, general sessions of the peace, or any court of record held in and for the city and county of Albany, instead of the compensation now allowed by law, shall be entitled to receive one dollar and a half for each day's attendance as such jurors, in addition to the fees for travel now allowed by law; and the amount so compensating the said jurors shall be raised in the same manner as other county charges are now raised and collected; and all acts or parts of acts, so far as they are inconsistent with this act, are hereby repealed.†

§ 245. The board of supervisors of the county of Erie may at their annual meeting direct a sum, not exceeding one dollar and fifty cents per day, to be allowed to every grand and petit juror for attending the courts of record held within such county, in addition to any other fees which such jurors may receive; and they may also direct an allowance to be made to such jurors for traveling in coming to and returning from such courts, not exceeding three cents per mile. The money for so compensating jurors shall be raised in the same manner as other county charges are by law to be raised and collected.‡

* 3 R. S. 6 ed. § 32, p. 912.

† 3 R. S. 6 ed. § 33, p. 912.

‡ 3 R. S. 6 ed. § 34, p. 913.

In an action, brought in the city court of Long Island City, the fees allowed to an officer, other than the city judge, or to a juror or witness, are the same, and costs may be awarded to the same parties, in the same cases, and at the same rates, where the plaintiff demands judgment for less than fifty dollars, as if the action was brought before a justice of the peace; and where the plaintiff demands judgment for fifty dollars or more, as if the action was brought in the supreme court (*New Code*, § 3206).

[The section contained in this note has not yet been adopted.]

CHAPTER IV.

CHALLENGES TO JURORS.

§ 246. A challenge is an objection, or an exception, to one or more of those who have been returned as jurors, or who have been arrayed to pass upon a case on trial. *

Classes of Challenges.

§ 247. A challenge *to the array* is that which applies to all the jurors as arrayed in order by the officer upon the panel.

The general principle on which this kind of challenge rests is that there be some error or evident partiality committed in obtaining the panel, and that such error or partiality from its nature applies to all the jurors so obtained. Challenges of this class are allowed in some but not in all of the States.†

§ 248. A challenge *for cause* is that for which some reason is given or assigned.

The general principle on which its allowance or rejection depends, is the nature or character of the reason assigned.

Challenges *for cause* may be to the *array* or to the *poll*; they are of various kinds, and are unlimited in number.

§ 249. A challenge *to the favor* is that made or which is applied to the poll for a cause or reason which is not

* *Coke Litt.* 155, b.

In civil cases it is not material which party challenges first (Cowen's note, 1 *Cow.* 439). But in criminal cases, it is said, the prisoner has the first right to challenge (*Rex v. Brandreth*, 32 *How. St. Tr.* 774; *Macfarland's Trial*, 8 *Abb. Pr.* [N. S.] 57; *Contra*, *Cooley v. State*, 38 *Texas*, 636).

† *Colby Cr. Law & Pract. of N. Y.* 235; 2 *Blatch. C. C.* 435.

sufficiently manifest to authorize what is called a principal challenge.

The general principle on which the challenge to *favor* depends, is a reasonable suspicion that the juror will act under some undue influence, bias or prejudice.

§ 250. A challenge to the *poll* is that which is made to each juror *individually*.

§ 251. A *principal challenge* is that which may be made to the *array* or to the *poll*, and made for a reason or cause which, if substantiated, is sufficient evidence of bias for or against the party challenging.*

§ 252. A *peremptory challenge* is that which is made without the assigning of any reason, and which the court must allow. The number of peremptory challenges is limited by statute.†

§ 253. The following are given as causes of challenge:

I. Cause *propter honoris respectum* (from regard to rank); this does not exist in the United States.

II. Cause *propter defectum*—"on account of defect"—as want of statutory requirements; or want of judgment, as in infancy or extreme old age.

III. Cause *propter affectum*—"on account of partiality"—as partiality or bias shown to actually exist, or presumed to exist.

IV. Cause *propter delictum*—"on account of crime"—as legal incompetency, on account of infamy.

* 3 *Black. Comm.* 363; 4 *Id.* 353.

The rule that, in interposing a challenge, the class to which it belongs must be stated, is not usually enforced in practice. The court may require this to be done, but when not so required the challenge is good without assigning a ground (*Carnal v. People*, 1 *Park. Cr.* 272, and authorities there cited. *Contra*, *Freeman v. People*, 4 *Den.* 9 [BEARDSLEY, J.]; *People v. Cotta*, 49 *Cal.* 167; *People v. Buckley*, 4 *Id.* 241).

An objection made to a juror on the trial, although not *expressed* as a challenge, may be treated as such by the appellate court, if it appears that such objection was intended and understood as a challenge (*Diveny v. Elmira*, 51 *N. Y.* 506).

† *State v. McClear*, 11 *Nev.* 89; see *post*, § 451, &c.

I. *Cause of incapacity* arising from a want of statutory qualifications.

II. Arising from partiality on account of mere relationship.

III. Arising from an interest in the result of the trial.

IV. Arising from conscientious scruples about finding a verdict of conviction in a capital case.

V. Arising from declarations of opinions or wishes as to the result of the trial.

VI. Arising from the declaration of opinion formed and expressed as to the guilt or innocence of one accused of crime.

Practice as to Challenges.

§ 254. In American practice, generally, the two principal kinds of challenge are : first, *to the array* ; by which is meant the whole jury as it stands *arrayed in panel* ;* and to the *polls*—by which is meant the several *persons* or *heads* in the *array*.

The Practice in Federal Courts.

§ 255. The act of Congress passed on the 20th of July, 1840, confers upon the courts of the United States the power to make all necessary rules and regulations for conforming the impaneling of juries to the laws and usages in force in the States.†

§ 256. This power includes that of regulating the challenges of jurors, whether peremptory or for cause, and in cases both civil and criminal ; with the exception in criminal cases of treason or other crimes of which the punishment is declared to be death. But this act does not

* Panel meant a little square pane of parchment on which the jurors' names were written.

† 5 *Stat. at Large*, 394 ; *United States v. Shackleford*, 18 *How.* 588 ; see Chap. VIII., *post*.

confer in misdemeanors the right of a peremptory challenge in the circuit courts.*

Challenge to the Array.

§ 257. Challenge to the array is based upon the partiality or default of the sheriff, coroner or other officer that made the return; it should be made before challenges to the poll, and it must be made in writing.†

§ 258. Principal challenges to the array are such as these:

I. If the sheriff is the actual prosecutor or the party aggrieved.

II. If he is of actual affinity to either of the parties, and if the relationship exists at the time of the return.

III. If he returns any individual at the request of the prosecutor or the defendant.

IV. If he returns any person who is in his judgment more favorable to one side than to the other.

V. If he belongs or belonged to an association for the prosecution of offenders, of whom the defendant was claimed to be one.

VI. If an action of battery is pending between the sheriff and the defendant, or if the latter has an action of debt against the former.

VII. If the statutory requisitions are not complied with.

§ 259. In each of these cases, on the presumption of partiality in making up the return, the array will be quashed.‡

§ 260. Principal challenge to the array, if made good, is cause for exemption without resort to triers.

§ 261. An irregularity in the drawing of the jury

* *United States v. Devlin*, 6 *Blatchf.* 71; *United States v. Johns*, 1 *U. C. C.* 363; see § 800, *post*.

† *People v. Doe*, 1 *Mann. Mich.* 451.

‡ *Bac. Abr. Juries E.* 1; *Dick. Sess.* 183, 184; *R. v. Dolby*, 2 *B. & C.* 104; *State v. Darocha*, 20 *La. Ann.* 356; *State v. Gut*, 13 *Minn.* 341; see §§ 268 and 269, *post*.

which does not affect either the rights of the prisoner or the composition of the jury, is not a ground of challenge to the *array*.*

§ 262. Challenges to the array *for favor* not being a principal challenge, are left to the discretion of the triers. Challenges of this class are based on the supposed partiality of the sheriff, when such partiality is not sufficiently distinct to make it the subject of a principal challenge. Thus, when the defendant is the sheriff's tenant, or where there is affinity, but no relationship, between the sheriff and one of the parties, or where they are united in the same office; in these cases there may be a challenge to the array *for favor*.†

§ 263. If the array is challenged, it is in the discretion of the court to say how it shall be tried; sometimes it is tried by two coroners, and sometimes by two of the jury, with this difference, that if the challenge is for kindred in the sheriff, it is to be tried by two of the jurors returned; but if the challenge is found in favor of partiality, then by any other two assigned thereunto by the court.‡

§ 264. On challenging the array, the opposite party may either plead to it or demur to its sufficiency in law.§

If he pleads, then the triers are sworn and charged to inquire "whether it be an impartial array or a favorable one." If they affirm it, the clerk enters under it the word "*affirmatur*," but if they find it to be partial, the clerk enters the words "*calumnia vera*" on the record.||

§ 265. The court may either decide the demurrer *at once*, or adjourn its consideration to a future period.¶

* *Ferris v. People*, 35 *N. Y.* 125; *Friery v. People*, 2 *Keyes*, 424.

† *BURNS, J., Jurors*, 8; *Dyer*, 367, a; *Bac. Abr. J. E.* 1; *Co. Litt.* 156, a; *Pringle v. Huse*, 1 *Cow.* 436, note 1.

‡ 2 *Hale P. C.* 275; *R. v. Savage*, 1 *Mood. C. C.* 51.

§ See *Forms*, 10 *Wentw.* 474.

|| 4 *Black. Com.* 353, n. 8; *Bacon's Abr. Juries E.* 12; 1 *Oh. C. L.* 549.

¶ *Ibid.*

Where the judges, upon hearing the arguments, overruled the challenge, the decision is entered on the original record, and at *nisi prius* appears on the *postea*; but if it is overruled without demurrer on being debated, the objections may afterwards be made the subject of a bill of exceptions.*

§ 266. Should the challenge be admitted and the array be quashed, a new *venire* is awarded the coroners or elisors, in the same manner as if it had been prayed by one of the parties to be so directed, to prevent the delay at an earlier stage of the proceedings.†

§ 267. But where parties proceed to trial before a jury, without objection to the manner in which the jury was summoned or impaneled, it is too late after the rendition of the verdict to raise such objection.‡

§ 268. It is not a good cause of challenge to the panel or array of trial jurors, in an action in a court of record, that the officer who drew them is a party to, or interested in the action, or counsel or attorney for, or related to a party.§

§ 269. It is not a good cause of challenge to the panel or array of trial jurors in an action in a court of record, that they were notified to attend by an officer, who is a party to or interested in the action, or related to a party, unless it is alleged in the challenge, and is established, that one or more of the jurors drawn were not notified; and that the omission was intentional.||

§ 270. In a penal action in a court of record, or not of record, to recover a sum of money, it is not a good cause of challenge to a trial juror or to an officer who notified the trial jurors, that the juror or the officer is liable to pay

* 1 *Ch. C. L.* 549; *Bacon's Abr. Juries E.* 12; and see § 271, *post*.

† *Co. Litt.* 158, a.

‡ *Dayharsh v. Enos*, 5 *N. Y.* 531; *Mayor, &c. of New York v. Mason*, 1 *Abb.* 344-352; *S. C.*, 4 *E. D. Smith*, 142; *Hardenburg v. Cray*, 15 *How.* 307; *Co. Litt.* 158, a.

§ *New Code*, § 1177; 2 *R. S.* 420, § 56 (2 *Edm.* 437).

|| *New Code*, § 1178; 2 *R. S.* 420, § 57.

taxes in a city, town, or county, which may be benefited by the recovery.*

§ 271. An objection to the qualifications of a juror is available only upon a challenge. A challenge of a juror, or a challenge to the panel or array of jurors, must be tried and determined by the court only. Either party may except to the determination, and it may be reviewed upon a question of fact, or a question of law, or both, as where an issue of fact presented by the pleadings is tried by the court; except that where one or more exceptions are taken to the rulings of the court made after the jury is impaneled, an exception to the determination of a challenge must be heard at the same time, and the case must contain the matters necessary to present it upon the facts, or the law, or both.†

Grounds of Challenge.

§ 272. It is a good ground of challenge to the array if

* *New Code*, § 1179; 2 *R. S.* 420, § 58; also 2 *R. S.* 551, § 2 (2 *Edm.* 571).

† *New Code*, § 1180; *Laws of 1873*, c. 427, § 1 (9 *Edm.* 609, amended); *Thomas v. People*, 67 *N. Y.* 218.

On a writ of error, an objection, that jurors were accepted, whose examination disclosed the fact that they were disqualified by reason of opinion, will not be considered where no exception to the acceptance of such jurors was taken at the trial, and the question is first raised on appeal from a conviction (*Bronson v. People*, 32 *Mich.* 34).

On the trial of a person indicted for murder, the prosecution challenged a juror for implied bias. The challenge was sustained, and the defendant excepted, on the ground that the juror was improperly excluded. The defendant was convicted of murder in the second degree. It was held that the decision sustaining the challenge was not the subject of exception under section 1170, subd. 1 of the *Penal Code of California* (*People v. Colson*, 49 *Cal.* 679; *People v. Murphy*, 45 *Id.* 137).

The decision on a question of fact raised on a challenge for actual bias is final, and cannot be reviewed on appeal (*People v. Vasquez*, 42 *Cal.* 560; *People v. Cotta*, *Id.* 187).

the sheriff (in the U. S. courts the marshal) who served the writ or summons is a party to the cause.*

§ 273. It is a good ground of challenge, if some of the jurors had not been duly summoned, but that their names had been placed upon the list by the clerk of the court, by their own request.†

§ 274. A challenge to the array is waived if not made before the jurors are sworn.‡

§ 275. The district attorney need not verify his answer to a challenge to the array.§

§ 276. If the circuit clerk is an attorney for plaintiff or defendant, even if he was attorney at the time of the drawing, making, or arraying the panel, that is not ground of principal challenge to the array.||

§ 277. It is not a valid objection to a jury procured as prescribed in the last four sections (§§ 202, 203, 204, and 205, *ante*), that it contains none of the jurors originally returned to the term, or is only partially composed of such jurors.¶

§ 278. That the panel was certified by the deputy clerk instead of his principal, is not ground of challenge to the array.**

§ 279. That two sets of jurors were drawn at the same time from the jury box for two distinct courts, is not ground of challenge, if these two sets of jurors be kept entirely separate, and if a distinct panel of each be given to the sheriff.††

§ 280. It is not ground of challenge, that the jurors

* *Woods v. Rowan*, 5 *Johns*. 133. *Contra*, §§ 268 and 269, *ante*.

† *McCloskey v. People*, 6 *Park*. 155.

‡ *New York v. Mason*, 4 *E. D. Smith*, 142; S. C., 1 *Abb. Pr.* 344.

§ *Gardner v. People*, 6 *Park*. 155.

|| *Wakeman v. Sprague*, 7 *Cow*. 720; and see § 268, *ante*.

¶ *New Code*, § 1175; 2 *R. S.* 420; remaining portion of § 65 extended.

** *People v. Fuller*, 2 *Park*. 16.

†† *Crane v. Deygert*, 4 *Wend*. 675.

were drawn more than fourteen days before the sitting of the court.*

§ 281. Where a special term of the court of oyer and terminer is appointed by the governor in pursuance of chapter 408, section 14, *Laws of 1870*, the names of the jurors must be drawn fourteen days before the holding of the court, and a challenge to the array for a failure so to do is proper, and should be sustained.†

§ 282. A challenge to the array of petit jurors at a court of general sessions for the city and county of New York, alleged that the jurors were not selected by the commissioner of jurors of said county, and that neither he nor any one on his behalf attended the drawing, but that the jurors were selected by one appointed by the mayor as commissioner, and that the statute under which the mayor acted was unconstitutional. Held, that the challenge showed upon its face that the jury were selected by an officer *de facto*, whose acts in the exercise of the functions of the office were valid as to the public, and whose appointment could not be questioned collaterally, and that therefore a demurrer to the challenge was properly sustained.‡

§ 283. Talesmen are not to be summoned for the whole term of the court, but only for a single cause, ready and moved for trial—simply to fill up a panel; and a challenge to the jurors (talesmen) so summoned is valid.§

§ 284. The power of the mayor of the city of New York to appoint, in pursuance of an act of the legislature, a commissioner of jurors, to prepare the lists from which the names of the persons to serve as petit jurors are to be

* *Ibid.*

† *Powell v. People*, 5 *Hun*, 169; *aff'd* 63 *N. Y.* 88.

‡ *Carpenter v. People*, 64 *N. Y.* 483; *Dolan v. People*, *Id.* 485.

§ *Shields v. Niagara Savings Bank*, 3 *Hun*, 477; and see *How v. Brundage*, 1 *Supm. Ct. (T. & C.)* 429, and §§ 202, 203 and 205, *ante*.

Where a sufficient number of jurors cannot be obtained from a special struck jury, the court has the power to order the summoning of talesmen for the purpose of filling up the jury (*People v. Tweed*, 11 *Hun*, 197; *S. C.*, 50 *How. Pr.* 286).

taken, cannot be tried on a challenge to the array of the jurors so drawn.*

§ 285. In New York, since the statute authorizing the clerk to array the jury, a challenge to the array lies for partiality or default in the clerk in the same manner as it formerly lay against the sheriff.†

§ 286. A challenge to the array will not be allowed on the ground that all persons of a particular fraternity have been excluded from the jury, if those who are returned possess the requisite qualifications.‡

§ 287. In Pennsylvania, under the acts of assembly relating to the summoning of jurors, it was held no cause of challenge to the array that the sheriff was not present the whole time during which the selection of jurors was made; or that the sheriff and commissioner took up between two and three weeks in making the selection, and putting the names of the jurors into the wheels; or that it did not appear that the sheriff and commissioner wrote the names of the jurors selected by them, and put the same into the wheels, this duty having been performed by a clerk in their presence and by their order; or that the pieces of paper on which the names were written were not safely kept between the time of writing and putting them into the wheel, the same having been put into a box where they were kept until the selection was completed, when they were put into the wheels; or that the names which were remaining in the wheels at the end of the year were taken out before the names selected for the new year were put in.§

§ 288. The person challenging the array must be strictly prepared to prove the cause.||

§ 289. If he omits to challenge, he cannot take advantage of the alleged defect afterwards.¶

* *Dolan v. People*, 6 *Hun*, 493.

† *Pringle v. Huse*, 1 *Cow.* 435, 436; *Gardner v. Turner*, 9 *Johns.* 262.

‡ *People v. Jewett*, 3 *Wend.* 314.

§ *Com. v. Lippan*, 6 *Serg. & R.* 395.

|| *R. v. Savage*, 1 *Mood. C. C.* 51.

¶ *R. v. Sutton*, 8 *B. & C.* 417; 2 *M. & R.* 406.

A person on trial for a felony, not capital (burglary), who re-

§ 290. When the action of the court, as in cases of challenges to the array and peremptory challenges, is placed on record, and there is a regular issue and joinder, and judgment on this issue, then error lies to this at common law.*

Challenges to Favor.

§ 291. A challenge for favor or bias must specify the specific reasons of objection. It is not enough to challenge for "bias." The *kind* of bias must be stated.†

§ 292. But the specific cause need not be assigned before the trial of such a challenge.‡

How Challenges are to be Tried.

§ 293. In many States challenges are tried exclusively by the court. Chapter 427 of Laws of New York of 1873, providing that all challenges of juror, both in civil and criminal cases, shall be tried and determined by the court alone, is constitutional.§

§ 294. In United States courts all challenges, whether to the array or panel, or to individual jurors for cause or favor, shall be tried by the court without the aid of triors.||

fuses to pass on jurors who have been accepted by the State and put upon him in a body, and demands that the jury be impaneled as in capital cases, cannot complain on error that this was refused him, when it appears that the opportunity to examine each juror separately, as to qualifications and cause of challenge, was granted him, but of which he failed to avail himself (*Sellers v. State*, 52 *Ala.* 368).

* *Gray v. R.*, 1 *Cl. & Fin.* 427; *Mansell v. R.*, 8 *E. & B.* 54; *Dears & B.* 375; *O'Connell v. R.*, 11 *Cl. & Fin.* 155; see also § 271, *ante*.

† *People v. Renfrou*, 41 *Cal.* 37; *People v. McGungill*, *Id.* 429.

But a party cannot sustain a challenge to the favor by proof that the "bias" is in his own favor (*People v. Mather*, 4 *Wend.* 229).

‡ *Lowenberg v. People*, 5 *Park.* 414.

§ *Weston v. People*, 6 *Hun.* 140; *People ex rel. Tweed v. Liscomb*, 3 *Id.* 760; reversed in 60 *N. Y.* 559, but not on this point; see § 271, *ante*.

|| Act of March 3, 1865, § 2; 13 *Stat.* 500; see § 800, *post*.

§ 295. The trial of challenges in Pennsylvania is by statute assigned to the court.*

§ 296. In Ohio, by the Code of Criminal Procedure, all challenges for cause shall be tried by the court on the oath of the person challenged, or on other evidence, and such challenge shall be made before the jury is sworn, and not afterward.

§ 297. In other States statutory provisions exist allowing triers.

§ 298. *Triers* are persons appointed according to law to try whether a person challenged *to the favor* is qualified or not to serve on the jury. The number of triers is two, unless the plaintiff and defendant or the attorneys consent to a different number, or unless some special cause or reason is mentioned or alleged by one of them, or unless one, and only one, juror has been sworn, and two triers are appointed with him.†

Method of Selecting Triers.

§ 299. When a challenge is made to the first juror the court appoints two indifferent and impartial jurors to be triers. If the juror challenged is found by these two triers to be indifferent and impartial, he shall then be sworn and shall join these two triers in determining the next challenge. When two jurors have been found impartial and have been sworn, then the office and duty of triers shall cease, and the jurymen shall decide or determine every subsequent challenge. When more than two jurors have been sworn, then the court may assign or appoint any two of those jurors thus sworn to determine the challenges.‡

§ 300. The oath of the triers, as given in the 17th edition of Archibold's Criminal Pleadings, published in 1871, is "You shall well and truly try whether A. B., one of

* Rev. Act Bill, II. § 89.

† 1 Co. Litt. 158, a; Bacon Abr. *Juries* H. 12.

‡ Thorn's Case, 4 C. H. Rec. 81; Bouvier's Law Dic. vol. 2.

the jurors, stands indifferently to try the prisoner at the bar, and a true verdict give according to the evidence. So help you God." Where the judge is substituted for the triers, he is not to be sworn, but he should decide upon the same principle as the triers.

§ 301. It has been ruled in New York to be error to swear the triers simply to find whether the juror is indifferent upon the issue joined.*

§ 302. From the necessities of the case no challenge of triers is admissible.†

§ 303. The form of oath to be administered to a witness sworn to give evidence before the triers is as follows: "The evidence which you shall give to the court and triers upon this inquest shall be the truth, the whole truth and nothing but the truth, So help you God."

§ 304. When the facts on which a challenge rests are disputed the proper course is to submit the question to triers, but if neither of the parties ask for triers to settle the issue of the fact and submit their evidence, whether consisting of the jurors *voir dire* or of extraneous evidence, to the judge, and take his determination thereon, they cannot afterwards object to his competence to decide that issue.‡

§ 305. The triers examine the juryman challenged, and decide upon his fitness.§

§ 306. If a juror has mistaken a question put to him, the challenge may be retried after he has been received and sworn on the jury.||

§ 307. The decision of the triers is final; but the triers are liable to punishment for misconduct in office.¶

* *Freeman v. People*, 4 *Den.* 9.

† *Archibold's C. P.* 17 ed. 154, 5.

‡ *People v. Rathbun*, 21 *Wend.* 509; *People v. Mather*, 4 *Id.* 229; *People v. Doe*, 1 *Mann. Mich.* 451; *Stewart v. State*, 8 *Eng.* (13 *Ark.*) 720.

§ *Thompson v. People*, 3 *Park. Cr.* 467; *People v. Doe*, 1 *Mich.* 451.

|| *People v. Wilson*, 3 *Park. Cr.* 199.

¶ *People v. Rathbun*, 21 *Wend.* 509; *Irick v. Black*, 2 *Green. N. J.* 195.

§ 308. Where, on a trial for murder, a juror was challenged for favor, and the first two jurors sworn having been appointed triers, sworn as such, and on hearing the evidence, arguments, and charge, could not agree, it was held that the next two (the third and fourth) should be selected to rehear the matter as triers, and they were sworn.*

§ 309. The production of evidence to the judge, without asking for triers, will be considered as the substitution of him in the place of triers, and his decision will be treated in like manner as would be the decision of triers; and therefore, although the determination of the judge should be against the weight of evidence, a new trial will not be granted for that cause when the defendant is acquitted; in analogy to the principle that if on a main question in a criminal case the defendant was found not guilty, there cannot be a new trial.†

§ 310. It is a ground of challenge to the favor in an action for libel on the manager of an opera and involving an examination of the conduct of the manager, that a juror declares himself opposed to theatrical representations or performances.‡

§ 311. A juror challenged for favor should be rejected unless the triers find that he stands impartial and indifferent.§

§ 312. If there is a doubt concerning his indifference he should be rejected.||

* *People v. Dewick*, 2 *Park. Cr.* 230.

† *People v. Mather*, 4 *Wend.* 229.

If, on the trial of the validity of a challenge, other than for principal cause, it appears that the juror has formed an opinion in relation to a portion of the facts embraced in the issue, but not upon the whole issue, and otherwise stands indifferent between the parties, the allowance or refusal of the challenge is within the discretion of the court (*Dew v. McDevitt*, 17 *Am. L. Reg. [N. S.]* 621).

‡ *Maretzek v. Cauldwell*, 5 *Rob.* 660; S. C., 2 *Abb. Pr. (N. S.)* 407.

§ *Smith v. Floyd*, 18 *Barb.* 522; *Maretzek v. Cauldwell*, 2 *Abb. Pr. (N. S.)* 407.

|| *Smith v. Floyd*, 18 *Barb.* 522; *Thorn's Case*, 4 *City H. Rec.* 81; *Freeman v. People*, 4 *Den.* 35.

§ 313. Where it appears that a juror and the plaintiff are married to first cousins, it is good cause of challenge to favor. And if the fact of this relationship is not discovered until after the case has been tried, it is good cause for granting a new trial.*

§ 314. It is a ground of challenge to the favor, if the juror is bail for the defendant.†

§ 315. It is a ground of challenge to the favor, if the juror is a tenant of one party or the other, of either plaintiff or defendant.‡

§ 316. Upon the trial of a challenge for favor it is erroneous to reject all evidence except such as goes to establish a fixed and absolute opinion touching the guilt or innocence of the prisoner. A fixed opinion of the guilt or innocence of the prisoner, though it may be necessary to sustain a challenge for principal cause, need not be proved where the challenge is for favor. A less decided opinion may be shown and exhibited to the triers, who must determine upon its effect. Thus, when the question is submitted to the triers, a juror challenged for favor, if examined, may be questioned whether he ever thought the prisoner guilty, or what impressions statements which he had heard or read respecting the evidence had made upon his mind; and on the same reasoning, an opinion imperfectly formed, or one based on the supposition that facts are as they have been represented, may be proved before the triers upon such a challenge.§

§ 317. A person called as a juror upon the trial of an indictment for murder, being challenged, testified that he had heard the killing talked about, had expressed an opinion, and then had an impression or opinion, depending upon the truth of what he had heard; that he thought it would take evidence to remove that impression; but that

* *Miley v. Lebanon Nat. Bank*, 1 *Penn. (Pearson)* 541; *People v. Thompson*, 41 *N. Y.* 1; 3 *Black. Com.* 363.

† *People v. McCollister*, 1 *Wh. Cr. Cas.* 391.

‡ *Hathaway v. Helmer*, 25 *Barb.* 29.

§ *People v. Fuller*, 2 *Park. Cr.* 16.

he would decide the case on the evidence, and believed that he could render an impartial verdict upon the evidence, unbiased by such opinion; held, that the trial court was justified in holding the juror indifferent.*

§ 318. On a trial for murder two jurymen were challenged, one for principal cause and for favor, and the other for favor. Each stated that he had formed an impression as to the prisoner's guilt, from reading the published testimony for the prosecution on a former trial. One stated that it would take evidence to remove the impression, but each stated that he would give his verdict upon the evidence. Held, that the challenge for favor should have been sustained.†

§ 319. The question is to be submitted as a question of fact upon all the evidence to the conscience and discretion of the triers, whether the juror is indifferent or not, and any fact or circumstance from which bias or prejudice may justly be inferred, although weak in degree, is admissible evidence.‡

§ 320. And as to the mode of proving a challenge, the law of evidence is the same as in other cases. Proof may be made by records, papers, or witnesses, either to support the challenge or to disprove it. The juror himself may be

* *Thomas v. People*, 67 *N. Y.* 218.

† *Greenfield v. People*, decided in *N. Y. Court of Appeals*, September 17, 1878, *N. Y. Weekly Digest*, vol. 7, p. 345; 6 *Abb. New Cas.* 1; distinguishing *Thomas v. People*, 67 *N. Y.* 218, § 317, *ante*; *Staup v. Com.*, 74 *Pa. St.* 458; and see *Frazier v. State*, 23 *Ohio St.* 551.

"How can it be determined or assumed," said the court, "that the mind which has already yielded to the force of facts presented to it, through the medium of sworn witnesses, and has formed an opinion thereon, will, on a second hearing of the same facts through a like medium, come to a different conclusion, or even so far command itself as to calmly and judicially weigh them again in the balance of a fresh and unbiased judgment? Can that mind be unbiased in the second pondering of testimony which has already caused it to preponderate and settle to or towards a conclusion? We think not" (*Greenfield v. People*, 6 *Abb. New Cas.* 13).

‡ *People v. Bodine*, 1 *Den.* 281.

examined as to his statutory qualifications, or to any other matter not going to his dishonor or discredit. He may be questioned as to the character and extent of his supposed bias, and whether he thinks it would influence him after hearing the evidence, and whether he has formed an opinion of the merits of the case.*

§ 321. Though it is not a good ground of challenge to a juror for principal cause, that he has an impression as to defendant's guilt or innocence, yet upon a challenge for favor, evidence as to such impression is admissible, and is to be judged of by the triers; but the juror should not be set aside unless the triers find that he has formed a settled opinion. It is not sufficient to justify triers in setting aside a juror in a criminal case as not being indifferent, that he has formed an unfavorable opinion of the accused.†

§ 322. Since the passage of the act of 1873, by which challenges both for principal cause and for favor are to be tried by the court in place of the triers at common law, it is not necessary to reiterate, upon the challenge for favor, the evidence taken upon a challenge for principal cause on the same ground; but the court is to decide upon the testimony given on both challenges. And in reviewing the decision of a trial court upon a challenge to the favor, the appellate court has the power by statute, and it is its duty, to pass upon the facts *de novo*, from the evidence adduced before the court below.‡

§ 323. Where, upon a challenge for favor, it appeared that the person challenged had a preconceived opinion or impression as to the guilt of the accused, based upon an incomplete report of testimony which he had read in an

* *People v. Knickerbocker*, 1 *Park*. 302; *People v. Hettrick*, 1 *Wh. Cr. Cas.* 399; *People v. Melvin*, 2 *Id.* 262; *Mechanics' & Farmers' Bank v. Smith*, 19 *Johns.* 115.

† *People v. Honeyman*, 3 *Den.* 121; *People v. Lohman*, 2 *Barb.* 216.

‡ *Greenfield v. People*, 13 *Hun*, 242. Affirmed on this point, in Court of Appeals, September 17, 1878; *N. Y. Weekly Digest*, vol. 7, p. 345; *S. C.*, 6 *Abb. New Cas.* 1; *Thomas v. People*, 67 *N. Y.* 218; see § 271, *ante*.

account of a former trial, which report might or might not be supported by the evidence, but he believed he could, if sitting as a juror, render a fair and impartial verdict on the evidence, notwithstanding such impression, he was held not to be a competent juror.*

§ 324. The provision of the act of 1872 (chap. 475, L. 1872), providing that a present opinion or impression in reference to the guilt or innocence of a prisoner, or the expression of such an opinion, shall not, in the cases specified, be a sufficient ground of challenge for principal cause, does not interfere with or affect the challenge for favor.†

§ 325. Where a challenge for principal cause is overruled by the court, and the juror is then challenged for favor, it is erroneous to instruct the triers that the latter challenge is in the nature of an appeal from the judgment of the court upon the facts.‡

§ 326. The decision of the judge acting as trier upon a challenge to the favor is final.§

§ 327. The mere fact of a juror freeing himself from disqualification on his *voir dire* does not preclude the party questioning him from challenging him for favor, and producing evidence before the court or the triers, as the practice may be, to disprove the testimony. Otherwise, an incompetent juror could qualify himself by adding perjury to his other disqualifications.||

Challenge for Principal Cause.

§ 328. The distinction between challenges for favor and those for principal cause is so fine, that it is practically

* *Greenfield v. People*, 6 *Abb. New Cas.* 1; reversing, on this point, S. C., 13 *Hun.* 242; but see *O'Mara v. Com.*, 75 *Pa. St.* 424; *State v. Huzel*, 27 *La. Ann.* 375; *Hall v. State*, 51 *Ala.* 9.

† *Thomas v. People*, 67 *N. Y.* 218.

‡ *Freeman v. People*, 4 *Den.* 9.

§ *Sanches v. People*, 22 *N. Y.* 147; *R. v. Edmunds*, 4 *B. & Ald.* 471; *Costly v. State*, 19 *Ga.* 614; *Buchanan v. State*, 24 *Id.* 282; *Heath v. Com.*, 1 *Rob.* 735; *Contra, New Code*, § 1180, § 271, *ante*.

|| *Carnal v. People*, 1 *Park. Cr.* 273; *Freeman v. People*, 4 *Den.* 9; *People v. Bodine*, 1 *Id.* 281; *Com. v. Heath*, 1 *Rob.* 735.

disregarded; consequently, what will be said under the head of challenges for principal cause is to be examined as connected with challenges for favor. The fact that in some jurisdictions, *all* challenges are decided by the court without the intervention of triers, does not, however, do away with the distinction between the two classes.*

§ 329. The question in such case is whether the jurymen is altogether indifferent as he stands unsworn.†

§ 330. To be a sufficient ground for disqualifying a juror from sitting in the trial of a criminal prosecution, the opinion formed by him must be fixed and unconditional.‡

§ 331. Or of such a nature as to require affirmative evidence to remove it.§

§ 332. It is not sufficient ground of challenge for principal cause, that a juror had formed an opinion that the prisoner had killed the person for whose murder he was indicted; killing being only one element of the crime, *that fact may exist consistently with the prisoner's innocence of the murder.*||

§ 333. The same was held in Iowa.¶

§ 334. In New Hampshire, where jurors have heard the prisoner tried upon another indictment, before another jury, and found guilty, and answered upon inquiry that they had formed an opinion of his guilt upon the second indictment, which was pending at the same time, from the evidence which they had heard on the other trial, they were held to be incompetent.**

But hearing, without opinion, does not incapacitate.††

§ 335. A juror, on being examined, testified that he

* *State v. Howard*, 17 *N. H.* 171; *Greenfield v. People*, 6 *Abb. New Cas.* 4, and note thereto.

† *People v. Horton*, 13 *Wend.* 8; *People v. Allen*, 43 *N. Y.* 28, 34.

‡ *State v. Kingsbury*, 58 *Me.* 239.

§ *Cancemi v. People*, 16 *N. Y.* 501; APPLETON, Ch. J., 1871.

|| *Lowenberg v. People*, 27 *N. Y.* 336.

¶ *State v. Thompson*, 9 *Iowa*, 188; *State v. Ostrander*, 18 *Id.* 434; *Contra*, *State v. Brown*, 15 *Kans.* 400.

** *State v. Webster*, 13 *N. H.* 491.

†† *State v. Howard*, 17 *N. H.* 171; *Com. v. Thrasher*, 11 *Gray*, 57.

had asked one of the defendants if he had an action in court, brought for the possession of real property. That the defendant answered in the affirmative, but did not converse much about it. The juror further stated, that he had formed and expressed an opinion upon the merits of the case; but that he believed that such opinion would readily yield to the evidence presented on the trial, and that he could hear and decide the case as impartially as if he had not previously formed and expressed an opinion. He was held to be competent.*

§ 336. A declaration of opinion, to disqualify a juror, must be such as implies malice or ill-will against the prisoner, thereby showing that the person challenged does not stand indifferent between the State and him. This is the uniform language of the books and cases which are of authority under our constitution, as well as of the English courts, up to the present time. Mere opinions thrown out as a jest, or to avoid being impaneled, will not *per se* operate as a disqualification. And so of a general bias and prejudice against crime.†

§ 337. In 1854, TANEY, Ch. J., laid down the following test in a criminal trial in Baltimore: "If the juror has formed an opinion that the prisoners are guilty, and entertains that opinion now, without waiting to hear the testimony, then he is incompetent. But if, from reading the newspaper or hearing reports, he has an impression on his mind unfavorable to the prisoner, but has no opinion or prejudice which will prevent him from doing impartial justice when he hears the testimony, then he is competent."

The same view has been expressed in the United States circuit court in New York.‡

§ 338. In Maine, in a criminal trial, thirty-six jurors were called; to each one the oath was administered to make true answers to such questions as should be asked by the court, or by their order. The questions which the pris-

* *Scranton v. Stewart*, 52 *Ind.* 68.

† *John v. State*, 16 *Geo.* 200; *Williams v. State*, 3 *Kelley*, 453.

‡ *United States v. McHenry*, 6 *Blatch.* 503.

oners' counsel put to the most of them were, in substance, whether they had formed or expressed any opinion as to the innocence or guilt of the prisoners, and whether they were conscious of any bias or prejudice against them? The inquiries then made by the counsel for the State, were substantially whether the juror had any conscientious scruples which would prevent him from returning a verdict against the prisoners if the proof should show them to be guilty; and whether he was related to either of the prisoners? It was permitted to both parties to ask, in various forms of language, whether the juror was conscious of any such bias or preference as to prevent his acting with impartiality, and whether he had heard, read, or conversed upon the subject? together with such connected questions as should elicit the views and feelings of the juror upon the subject matter.*

§ 339. In Vermont, the prior expression of an opinion disqualified, notwithstanding the juror declares when challenged that he has no opinion, and could try the case impartially.†

§ 340. In Massachusetts, a juror having said upon the *voir dire* that he had formed an opinion from what he had heard, but that he did not know how much he might be influenced by it, was allowed to be challenged for cause.‡

§ 341. A juror, however, it is said, cannot be asked whether he considers that the facts set forth in the indictment constitute a proper subject for punishment. The shaping and propounding of the interrogatories are certainly within the discretion of the court.§

§ 342. A person indicted is not entitled to have the jury asked, before they are impaneled, whether they have formed or expressed an opinion as to the credibility of a witness whose testimony is to be relied on in support of this indictment, and who testified, and whose credibility

* *State v. Jewell*, 33 *Me.* (3 *Reding*) 583.

† *State v. Clark*, 42 *Vt.* 629.

‡ *Com. v. Knapp*, 9 *Pick.* 496.

§ *Com. v. Buzzell*, 16 *Pick.* 153; *Com. v. Gee*, 6 *Oush.* 177.

was in question, in another case before them. Nor can the defendant be allowed to prove on the trial of this indictment that the jury have declared that they would believe this witness.*

§ 343. The judge presiding at a criminal trial may exclude from the panel jurors who state, in answer to his questions, that they have formed and hold such an opinion of the constitutionality of the statute on which the prosecution is founded, that if persisted in they cannot convict the defendant, whatever the evidence may be.†

§ 344. A juror having convicted the defendant of a similar offense at the same term, is thereby incapacitated.‡

§ 345. A juror challenged by the accused, stated that he had formed an opinion, in part from rumor, and part from reading the newspaper account of the evidence taken before the coroner, but that his opinion was not fixed, and that he could hear and determine the case upon the evidence to be adduced on the trial, uninfluenced by the previous opinion or impression; held competent.§

§ 346. In Connecticut, while the jury were being impaneled for the trial of an indictment for murder, A. was called as a talesman, and being inquired of whether he had formed any opinion as to the prisoner's guilt, said that soon after the prisoner's arrest he read certain newspaper accounts of what purported to be his confessions, and upon reading them he was of opinion that if those accounts were true, a horrid murder had been committed, but he had formed no opinion as to the truth or falsity of them; and remarked to his family while reading the accounts, that the case on the trial would probably turn out to be a very different affair. He added that he had not any settled opinion on the subject, and felt that he could render an impartial verdict; it was held that he was not disqualified by bias to sit as a juror in the cause.||

* *Com. v. Porter*, 1 *Gray (Mass.)* 423.

† *Com. v. Austin*, 7 *Gray*, 51.

‡ *Com. v. Hill*, 4 *Allen*, 591.

§ *Artwein v. Com.*, 76 *Pa. St.* 414.

|| *State v. Potter*, 18 *Conn.* 166.

§ 347. In New York, it has been laid down that the law attaches the disqualification to the fact of forming and expressing an opinion, and does not look beyond to examine the occasion or weigh the evidence on which that opinion was founded.*

§ 348. There is no distinction, it was said, as to the grounds of the opinion formed by the juror of the guilt of the accused, whether it be founded on being an eye-witness, or on hearing the testimony of those who were present at the transaction, or whether it is based on rumors, reports, and newspaper publications. In either case, it is a good cause of challenge.†

§ 349. A juror's examination disclosed the fact that he had read the newspaper account of the alleged burglary for which the defendant was on trial; he also stated that he had a prejudice against the accused, and did not think he could give him an impartial trial. But on further examination, he stated that such prejudice arose principally from newspapers, and not from any personal unfriendliness or animosity to the accused. He was held to be a competent juror.‡

§ 350. And in an action for libel for publishing an address which was adopted at a political meeting, one who was present and acted at such meeting was held not to be a competent juror.§

§ 351. So, a challenge to a juror for principal cause was sustained where the juror had said that he believed the defendant was guilty, although he testified that he had no fixed opinion upon the subject of the defendant's guilt; that he only entertained impressions derived from

* *People v. Mather*, 4 *Wend.* 229; *People v. Bodine*, 1 *Den.* 281; *Blake v. Millspaugh*, 1 *Johns.* 316; *Pringle v. Huse*, 1 *Cow.* 432.

† *People v. Mather*, 4 *Wend.* 229; and see *Greenfield v. People*, 6 *Abb. New Cas.* 1.

‡ *Jones v. People*, 2 *Col. T.* 351; but see *Exp. Vermilyea*, 6 *Cow.* 555, in which it was declared that an expression of opinion against the party by a juror, though from his knowledge of the cause and not from any favor or ill-will, was a principal cause for challenge.

§ *Lewis v. Few*, *Anth. N. P.* 102.

history and common reports, meaning thereby printed statements in papers and reports in conversations; that he had never heard witnesses to the transactions testify or say anything on the subject in question. If the evidence supported the circumstances he had heard, he had a fixed belief respecting the guilt of the defendant; if these circumstances should be done away by evidence, he should not consider him guilty.*

§ 352. So it was held no ground of principal challenge that the juror had formed an opinion that a crime had been committed by *somebody*, but had not formed an opinion as to the guilt or innocence of the prisoner.†

§ 353. The forming of an opinion without its expression was considered a sufficient ground of exclusion.‡

§ 354. An impression, however, does not disqualify, nor does a hypothetical opinion disqualify.§

§ 355. In North Carolina, the rule is, that an opinion fully made up and expressed against either party on the subject matter of the issue to be tried is good cause of principal challenge; but an opinion imperfectly formed, or one merely hypothetical, that is, founded on the supposition that facts are as they have been represented or assumed to be, does not constitute a cause of principal challenge, but may be urged by way of challenge to the favor, which is to be allowed or disallowed, as the triers may find the fact of favor or indifference.||

§ 356. In the same State, on a challenge for cause, the

* *People v. Mather*, 4 *Wend.* 229; *People v. Bodine*, 1 *Den.* 281; *Freeman v. People*, 4 *Id.* 31; *O'Brien v. People*, 36 *N. Y.* 276.

† *Friery v. People*, 2 *Keys*, 424; S. C., 2 *Abb. Court of App. Dec.* 215, and 54 *Barb.* 319.

‡ *People v. Rathbun*, 21 *Wend.* 509; *Armstead v. Com.*, 11 *Leigh.* 657; *Heath v. Com.*, 1 *Rob.* 735.

§ *People v. Honeyman*, 3 *Den.* 121; *People v. Hayes*, 1 *Edm. Sel. Cas.* 582; *O'Brien v. People*, 36 *N. Y.* 276; S. C., 48 *Barb.* 274; *People v. Fuller*, 2 *Park. Cr.* 16; *Stout v. People*, 4 *Id.* 71; *McGregg v. State*, 4 *Blackf.* 106; *Rice v. State*, 7 *Ind.* 336; *Cherry v. State*, 5 *Neb.* 412.

|| *State v. Benton*, 2 *Devereaux & Bat.* 196; *State v. Bone*, 7 *Jones*, 121; *State v. Cockman*, 1 *Wins. N. C. No.* 2-95.

juror stated that he had formed and expressed an opinion adverse to the prisoner upon rumors which he had heard, but that he had not heard a full statement of the case, and that his mind was not so made up as to prevent the doing of impartial justice to the prisoner. The court found the juror indifferent, and the supreme court refused to reverse the decision.*

§ 357. In Mississippi, the rule is that while it is not necessary to exclude a juror that he should have formed and expressed his opinion against the accused with malice or ill-will, a mere hypothetical opinion, from rumor only, and subject to be changed by testimony, does not disqualify.†

§ 358. A juror, on his examination in chief, testified that when the homicide was committed he was a telegraph operator, and had learned some of the facts of the case from dispatches sent through the office, and others from a witness of the prosecution. That upon these facts he had formed a "fixed opinion," which it would take evidence to remove. On cross-examination (by the prosecution), he testified that the opinion he had formed depended on the truth or falsity of the facts which had come to his knowledge; that "if it turns out that what I have heard is not true, then I will have no opinion in the matter." Held, that the juror had not a mere "hypothetical opinion" or a "mere impression," and the challenge of the juror for implied bias on behalf of the accused should have been sustained.‡

§ 359. In Missouri, opinion formed only on rumors, and producing no bias, does not disqualify.§

§ 360. In Tennessee, it has been declared that loose impressions and conversations of a juror as to the prisoner's

* *State v. Ellington*, 7 *Ired.* 61.

† *Ogle v. State*, 33 *Miss.* 383; *Noe v. State*, 4 *How. (Miss.)* 330; *Lee v. State*, 45 *Miss.* 114.

‡ *People v. Johnston*, 46 *Cal.* 78; *State v. Johnson*, 1 *Walk.* 392; *State v. Plower*, *Id.* 318.

§ *State v. Rose*, 32 *Mo.* 560; *State v. Burnside*, 37 *Id.* 343; *State v. Davis*, 29 *Id.* 391.

guilt or innocence, founded upon rumor, would not, if disclosed by others to the court on selection of the jury, have effect to set him aside as incompetent, nor if disclosed after verdict, be a cause of new trial.*

§ 361. But an emphatic opinion of guilt excludes. Thus, when a juror said on the morning of the trial, "I have formed my opinion as to that case; I believe he ought to be hung." Again, "Damn him, he ought to be hung;" it was held on error, that he should have been rejected as incompetent.†

§ 362. The formation of an opinion by one who had heard all the testimony is a disqualification, while one who has formed a hypothetical opinion from rumor, and who at the same time declares he could render an impartial verdict, will be a competent juror; between these extremes, the qualification or disqualification must depend on the circumstances of each case; absolute freedom from preconceived opinion should be required where it can be had, yet where, from the notoriety of the transaction or other cause, that cannot be obtained, as near an approximation to it as possible should be had.‡

§ 363. In Louisiana, opinion based on common rumor, such opinion being without any prejudice or bias against the accused, does not disqualify.§

§ 364. In Kansas and Florida, a mere hypothetical opinion does not exclude.||

§ 365. An opinion founded on mere rumor ought *prima facie* to be regarded as a mere hypothetical opinion, forming no ground for challenge, unless it appear that the

* *Howerton v. State*, *Meigs*, 262; *Alfred v. State*, 2 *Swan*, 581; *Mayor v. State*, 4 *Sneed*, 597; *Moses v. State*, 11 *Humph.* 232; *McGowan v. State*, 9 *Yerg.* 184.

† *Brakefield v. State*, 1 *Sneed (Tenn.)*, 215; *Ogle v. State*, 33 *Miss.* 383; *Wiggin v. Plumer*, 11 *Foster (N. H.)* 251.

‡ *Sam v. State*, 13 *Smeeds & Marshall*, 189; *Staup v. Com.*, 74 *Pa. St.* 458.

§ *State v. Caulfield*, 23 *La. An.* 148; *State v. Ward*, 14 *Id.* 673.

|| *Roy v. State*, 2 *Kans.* 405; *O'Connor v. State*, 9 *Flor.* 215.

opinion formed is a decided one, likely to influence the juror in his decision.*

§ 366. That a juror has expressed a hypothetical opinion in the defendant's case is ground of challenge to the favor, though not an objection to his competency.†

§ 367. To constitute good cause of challenge to a juror, on the ground of preconceived opinion of the case formed by him, it was said it must appear that such preconceived opinion was a decided one, and not hypothetical.‡

§ 368. In an action by a woman against a brewer for selling lager bier to her husband, a juror testified that he considered the business of manufacturing and selling lager bier a nuisance and a low business, and that no man should be allowed to make or sell it; and in answer to a question by the court whether he had a leaning in favor of either party to the action, said: "Well, my feeling on that is, to have the thing stopped—that is what I feel." He was held to be incompetent.§

But a juror who testified that it was the traffic and not the persons engaged in it, against whom he had the feeling, was held competent.||

§ 369. Where the proposed juror in a capital case stated upon principal challenge, that he had read accounts and formed an opinion as to the prisoner's guilt or innocence, which was unaltered, and which it would require evidence to remove, and that he could not sit exactly indifferent from the facts which he had heard; and afterwards, when cross-examined, stated that if sworn he would try to be governed by the evidence, but would have a

* *Armstead's Case*, 11 *Leigh*, 657; *Epp's Case*, 5 *Grat.* 681; *Wormley v. Com.*, 10 *Id.* 658.

† *Durrell v. Mosher*, 8 *Johns.* 445; *Riley's Case*, 1 *C. H. Rec.* 23; *Milligan's Case*, 6 *Id.* 69; *People v. Johnson*, 2 *Wh. Cr. Cas.* 361; *People v. Fuller*, 2 *Park. Cr.* 16; *Stout v. People*, 4 *Id.* 71; *Freeman v. People*, 4 *Den.* 9; *People v. Mallon*, 3 *Lans.* 224.

‡ *Osiander v. Com.*, 3 *Leigh*, 780; *Sprouce v. Com.*, 2 *Virg. Cas.* 375; *Heath v. Com.*, 1 *Rob.* 735; *Pollard v. Com.*, 5 *Rand.* 659.

§ *Albrecht v. Walker*, 73 *Ill.* 69.

|| *Kroer v. People*, 78 *Ill.* 294.

little prejudice; and again, that he meant by his answer that he had read the evidence given in newspapers, and assuming the statements to be true he had formed an opinion, but that it would not affect his mind in determining on evidence. It was ruled that it was inferable that the juror had formed an opinion of which he had not been able to divest himself, that the prisoner was entitled to the benefit of a doubt; and that the acceptance of the juror was error, for which upon writ of error a new trial would be granted.*

§ 370. A juror on his examination by the court stated that shortly after the killing, and while he was looking at the body of the deceased, he inquired of the bystanders how the killing occurred; being told that it was done without provocation, he said that the prisoner ought to be hung. But he also stated that he had no opinion now. The court held him competent. The prisoner excepted. It was held that, without some explanation of his change of mind, the juror was incompetent, and a new trial was ordered.†

§ 371. By an act passed by the legislature of New York in 1872 (c. 475, vol. 2, p. 1135), the previous formation or expression of an opinion or impression in reference to circumstances upon which any criminal action of law is based, or in reference to the guilt or innocence of the prisoner, or a present opinion or impression in reference thereto, shall not be sufficient ground of challenge for the principal cause to any person who is otherwise legally qualified to serve as a juror upon a trial of such action, provided the person proposed as a juror, who may have formed or expressed, or has such opinion or impression as aforesaid, shall declare on oath that he verily believes that he can render an impartial verdict according to the evidence submitted to the jury on such trial, and that such previously-formed opinion or impression will not bias or influence his verdict, and provided the court shall be satis-

* *People v. Mallon*, 3 *Lans.* 225; *Black v. State*, 42 *Tex.* 377.

† *Norfleet v. State*, 4 *Sneed (Tenn.)*, 340.

fied that the person so proposed as a juror does not entertain such a present opinion as would influence his verdict as a juror.*

§ 372. In Pennsylvania, if a juror forms an opinion without waiting to hear the testimony, he is incompetent. But an impression from reading a newspaper, or hearing reports, without any opinion or prejudice which will prevent him from doing impartial justice when he hears the testimony, will not disqualify.†

§ 373. In Delaware, the test adopted by MARSHALL, Ch. J., in Burr's case, appears to have been received.‡

§ 374. In Virginia, it is said that upon a question whether one called as a juror in a case of felony, and challenged for cause, stands indifferent or not, the general rule is that one who has formed a decided opinion that the prisoner is guilty or innocent, whether that opinion be formed on evidence of witnesses whose testimony he has heard on a former trial, in conversation with witnesses, or common report, is not an indifferent juror, and that it is immaterial whether such opinion has been expressed or not. If the person called as a juror, it was urged, has been so inconsiderate and unjust as upon insufficient or no evi-

* 3 R. S. 6 ed. § 41, p. 1032; *People v. Stokes*, 53 N. Y. 179; *Phelps v. People*, 6 Hun, 401; affirmed in Court of Appeals, 72 N. Y. 335; *People ex rel. Tweed v. Liscomb*, 3 Hun, 760.

† *Irvine v. Kearn*, 14 Serg. & R. 292; *Com. v. Lenox*, 3 Brewster, 249; *Com. v. Flanagan*, 7 W. & S. 415; *Com. v. Gross*, 1 Ashm. 281; *Com. v. Work*, 4 Crumrine, 493; *Staup v. Com.*, 74 Pa. St. 458.

‡ This test was as follows :

"Light impressions, which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him" (*Burr's Trial*, vol. 1, p. 416; *State v. Bonwell*, 2 Harrington, 529; *State v. Anderson*, 5 Id. 493).

dence to have prejudged the prisoner's cause, much more is he unfit to be trusted with it as a juror.*

§ 375. Where one of the grand jury which found the indictment is one of the jury which is to try the prisoner for felony, the prisoner, if he is guilty of no *laches* in making the discovery, may object to the juror at any time before the evidence is introduced.†

§ 376. In Ohio, the following shall be good cause for challenge to any person called as a juror on any indictment: 1. That he was a member of the grand jury which found the indictment. 2. That he has formed or expressed an opinion as to the guilt or innocence of the accused.‡

§ 377. This statute was held constitutional, and applied in practice.§

§ 378. Under the statute of Alabama of 1831, which provides that if a juror in a capital case has formed and expressed an opinion founded upon rumor, he shall be sworn in chief, it must appear that such opinion *was* founded upon mere rumor. Where it appears that the opinion was founded upon facts well authenticated by persons in whom the juror had confidence, it is good ground for challenge for cause.||

§ 379. In Illinois, the courts have united in the opinion that a juror is disqualified if he has formed or expressed a decided opinion upon the merits of the case.¶

§ 380. If without any qualification whatever a juror says the defendant is guilty, or the like, or that the plaintiff ought to recover in the action, or that the verdict ought to be against the plaintiff, he would be disqualified as not standing impartial between the parties.**

* *Armstead v. Com.*, 11 *Leigh*, 357; *Heath v. Com.*, 1 *Rob.* 735.

† *Bristow v. Com.*, 15 *Grat.* 634.

‡ *Code of Crim. Pro.* § 134; *Warren's Cr. Law*, 1870.

§ *Cooper v. State*, 16 *Ohio*, 328.

|| *Quesenbury v. State*, 3 *Stew. & Port.* 308; *Ned v. State*, 7 *Port.* 187.

¶ *Gates v. People*, 14 *Ill.* 433; *Gray v. People*, 26 *Id.* 344; *Neeley v. People*, 13 *Id.* 685.

** *Smith v. Eames*, 3 *Scam.* 78; *Gardiner v. People*, *Id.* 88; *Sellers v. People*, *Id.* 414.

§ 381. If, on the contrary, he says he has no prejudice or bias of any kind for or against either party; that he has heard rumors in relation to the case, but has no personal knowledge of the facts, and from the rumors has formed and expressed an opinion in a particular way if they are true, without expressing any belief in their truth, he would not be disqualified.*

§ 382. And the same ruling was had with another who declared that he would not convict even if convinced of the prisoner's guilt.†

§ 383. In Arkansas, if a juror in a criminal case states upon his *voir dire* that he has formed an opinion as to the guilt or innocence of the prisoner from rumor, he should be required to state also that the opinion was not such as to bias or prejudice his mind, in order to render him competent; and if he states that he has conversed with persons about the case, and formed his opinions from such conversation, he should be required to state further that such persons did not profess to have a personal knowledge of the matters stated by them; but it is not necessary that he should know, or be able to state whether such persons were witnesses in the case.‡

§ 384. In Georgia, it is said that a juror who states that he has formed and expressed an opinion in a particular case upon the guilt or innocence of the prisoner, is not competent to sit in such case.§

§ 385. And that while the opinion of the juror which disqualifies depends upon the nature and strength of the opinion, and not upon its source or origin, yet the mere formation of an opinion by a juror from rumor, without having expressed that opinion, or expressed it otherwise than jocularly, is not good cause of challenge.||

* *Smith v. Eames*, 3 *Scam.* 78; *Thompson v. People*, 24 *Ill.* 60; *Baxter v. People*, 3 *Gilman*, 386; *Leach v. People*, 53 *Ill.* 311.

† *Gates v. People*, 14 *Ill.* 433.

‡ *Meyer v. State*, 19 *Ark.* 156.

§ *Reynolds v. State*, 1 *Kelley*, 222; *Anderson v. State*, 14 *Ga.* 709.

|| *Boon v. State*, 1 *Kelley*, 631; *John v. State*, 16 *Ga.* 200; *Baker*

§ 386. *The opinion must be settled and abiding.**

§ 387. In Iowa, an unqualified opinion as to the guilt or innocence of the prisoner, formed from rumor, is sufficient to exclude a juror.†

§ 388. But the opinion must be absolute, and not such as in the judgment of the juror would leave him without bias in the case.‡

§ 389. In Michigan, an opinion, partial but not positive, does not disqualify.§

§ 390. Hence it is no cause for challenge that the juror believed that the crime with which the defendant was charged was committed by *some one*.||

§ 391. In California, having formed and expressed an opinion from report, does not disqualify a person to sit as a juror if he declares he can sit on the jury without bias; that evidence can change his opinion, and that he will be governed by the evidence.¶

§ 392. It is otherwise when the opinion is unqualified.**

§ 393. Under the criminal code of that State a challenge for implied bias can be taken only where the juror has formed and expressed an unqualified opinion or belief that the prisoner is guilty of the offense charged.††

§ 394. It is not material that the juror did not state whether his opinion was for or against the prisoner; the courts would not allow the juror to be questioned on that point.‡‡

§ 395. The opinion, to disqualify, must go to the *whole*

v. State, 15 *Id.* 498; *Herdgins v. State*, 2 *Kelley*, 173; *Griffin v. State*, 15 *Ga.* 476; *Anderson v. State*, 14 *Id.* 709.

* *Wright v. State*, 18 *Ga.* 383.

† *Waw-kon-chaw-nee-kaw v. United States*, 1 *Morris*, 332; *State v. Shelledy*, 8 *Iowa*, 477.

‡ *State v. Sater*, 8 *Iowa*, 420.

§ *Holt v. People*, 13 *Mich.* 224.

|| *Holt v. People*, 13 *Mich.* 224; *Stewart v. People*, 23 *Id.* 63.

¶ *People v. Mahoney*, 18 *Cal.* 180.

** *People v. Edwards*, 41 *Cal.* 640.

†† *People v. Macauley*, 1 *Cal.* 379; but see § 358, *ante*.

‡‡ *People v. Williams*, 6 *Cal.* 206.

case. If it touches merely portions, it is inoperative as a ground for challenge. Thus, if a juror believes that if certain facts be true, the defendant is guilty.*

§ 396. Or because he has drawn an inference from a single inculpatory fact.†

§ 397. Or because he even holds that the *fact* of homicide, though not its *malice*, is to be traced to defendant, the issue being on malice.‡

§ 398. Neither does the formation of opinion as to the general character of the prisoner disqualify a juror.§

§ 399. A juror is bound to answer under oath any question asked him with regard to his competency as a juror, providing such questions do not tend to degrade him or make him infamous.||

§ 400. It seems he will not be excused from stating whether he has any prejudice against a religious sect, on the ground that the answer would tend to disgrace him.¶

* *Lee v. State*, 45 *Miss.* 114.

An opinion on a part of the facts of a case upon which a verdict depends may disqualify a juror. Thus, in an action for damages incurred by reason of the communication of disease to plaintiff's cattle, from cattle brought by the defendant to this State (Illinois) from Texas, in contravention of the Statute of 1867, a juror testifying as to his competency, said that he believed Texas cattle would communicate disease, whether themselves diseased or not. The challenge was overruled. *Held*, error, as it appeared that the Texas cattle had passed along the road and by the place where plaintiff's cattle were (*Davis v. Walker*, 60 *Ill.* 452).

† *Loyd v. State*, 45 *Ga.* 57.

‡ *Lowenberg v. People*, 27 *N. Y.* 336; *S. C.*, 5 *Park. Cr.* 414; *Wright v. State*, 18 *Ga.* 383; *State v. Thompson*, 9 *Iowa*, 188; *State v. Ostrander*, 18 *Id.* 434.

§ *People v. Allen*, 43 *N. Y.* 28; reversing *S. C.*, 57 *Barb.* 338.

|| *Dane's Abridgement*, 334; *Edwards' Jurymen's Guide*, 85; *State v. Benton*, 1 *Dev. & Bat.* 196; *Mayor v. Blache*, 3 *La.* 619; *Pringle v. Huse*, 1 *Cow.* 432; *Hudson v. State*, 1 *Blackf. (Ind.)* 319; *State v. Bonwell*, 2 *Harrington*, 529; *State v. Crank*, 2 *Bailey*, 66; *Fletcher v. State*, 6 *Humph.* 249; *Mechanics' & Farmers' Bank v. Smith*, 19 *Johns.* 115.

¶ *People v. Christie*, 2 *Park. Cr.* 579.

§ 401. The juror may be examined under oath as to his qualifications; though it is said that he is not to be so examined when the question touches his dishonor or discredit. He is, of course, subject to cross-examination by the party opposing the challenge.*

§ 402. The form of oath to the juror on the *voir dire* is as follows: You shall true answers make to all such questions as shall be put to you touching your competency to serve as juror in the case of the people (Commonwealth or State) against the prisoner, So help you God.

§ 403. The court, of its own motion, without suggestion of either party, may examine upon oath all who have been summoned to serve upon the jury touching any disability created by statute, such as infancy, want of freehold or property qualifications, or, in a capital case, conscientious scruples on the subject of capital punishment; and upon any such disability being thus made to appear, or if it be shown that any one summoned has been convicted of perjury, the court may and should set aside any such juror of its own action without objection made by either party.†

§ 404. And the court, of its own motion, without the suggestion or consent of either party, may excuse or set aside a juror who, though in all other respects competent, is disabled physically or mentally by disease, domestic affliction, ignorance of vernacular tongue, loss of hearing, or other like cause, from properly performing the duties of a juror.‡

§ 405. But the erroneous exercise of this power is a matter of exception by the prisoner, for which, in an extreme case of abuse, the judgment of the court may be

* *Heath v. Com.*, 1 *Rob.* 735; *People v. Bodine*, 1 *Den.* 281; *People v. Knickerbocker*, 1 *Park. Cr.* 302; *Howzer v. Com.*, 1 *P. F. Smith*, 333.

† *McCarty v. State*, 26 *Miss.* 299; *State v. Howard*, 17 *N. H.* 171; *People v. Christie*, 2 *Park. Cr.* 579; *United States v. Blodgett*, 35 *Ga.* 336.

‡ *Montague v. Com.*, 10 *Grat.* 767; *Jesse v. State*, 20 *Ga.* 156; *Breeding v. State*, 11 *Texas*, 257; *State v. Marshall*, 8 *Ala.* 302; *Com. v. Hayden*, 4 *Gray*, 18; *Stewart v. State*, 1 *Ohio*, 66.

reversed. But the case to reverse must be one of oppression to the defendant.*

§ 406. In Massachusetts, the right of propounding questions is for the court exclusively, and not for parties.†

§ 407. As it is the duty of the court to impanel for the trial of each case a competent and impartial jury, the court may propound to the jurors returned, other interrogatories than those which they are required to put by the statute.‡

§ 408. A challenge of a juror, because of his having formed and expressed an opinion on the question to be tried, can be made only by the party against whom it was so formed and expressed. It seems that the other cannot interfere.§

Questions which have been Allowed by the Courts.

§ 409. The following questions, in the several cases in which they occur, were adopted, as determining the competency of the juror :

I. "Have you formed and expressed an opinion about the guilt of Col. Burr?"||

II. "Have you formed and delivered an opinion on the subject matter of this indictment?"¶

III. "Have you heard anything of this case so as to make up your mind? Do you feel any bias or prejudice for or against the prisoner at the bar?"**

* *State v. Ostrander*, 18 *Iowa*, 435; *People v. Lee*, 17 *Cal.* 76.

† *Com. v. Gee*, 6 *Cush.* 177.

‡ *Pierce v. State*, 13 *N. H.* 536; *Com. v. Gee*, 6 *Cush.* 177; *Montague v. Com.*, 10 *Grat.* 767; see *People v. Jones*, 1 *Edm. Sel. Cas. (Circuit, 1845)*.

§ *State v. Benton*, 2 *Dev. & Bat.* 196.

|| MARSHALL, Ch. J., 1 *Burr's Trial*, 367.

¶ CHASE, J., in *United States v. Callender*, *Callender's Trial*, pamphlet, 19, 21.

** PARKER, J., *Sefridge's Trial*, pamphlet, 9.

IV. "Have you formed and expressed an opinion of the guilt or innocence of the prisoner?"*

V. "Have you formed and expressed an opinion as to the general guilt or innocence of all concerned in the commission of the offense?" (Viz., the burning of the convent in Charlestown, Mass.)†

VI. "Have you made up your mind as to which of the two parties was in the wrong in the Kensington riots?"‡

VII. "Have you at any time formed or expressed an opinion, or even entertained an impression which may influence your conduct as a juror?"

VIII. "Have you any bias or prejudice on your mind for or against the prisoner?"§

IX. "If upon hearing the evidence you should find it evenly balanced, which way would you be inclined to decide the case?"||

X. "Have you any bias or prejudice against Roman Catholics?"¶

XI. "Notwithstanding the opinion that you have formed, can you enter the jury-box and decide the guilt or innocence of the defendant upon the evidence which may be submitted to you, and upon that alone, uninfluenced by

* MARSHALL, Ch. J., in *United States v. Hare, &c.*, United States Circuit Court for Baltimore, May T., 1818, pamphlet.

† Supreme Court of Massachusetts on Trial of the Charlestown Rioters, *Com. v. Buzzell*, 16 *Pick.* 153.

‡ ROGERS, J., Supreme Court of Pennsylvania, April 29, 1845, in *Com. v. Sherry* (*MSS.*).

§ OGDEN, J., on a homicide trial; *People v. Johnson*, 2 *Wheel. C. C.* 367.

|| BREESE, J., in *Chicago, &c. R. R. Co. v. Buttolf*, 66 *Ill.* 347.

But in an action by a woman, for damages for the death of her husband, alleged to have been caused by the negligence of the defendant, by whom he had been employed, several jurors were asked, if the testimony was evenly balanced, they would not incline to the plaintiff's side? and they replied that they would; it was held that such questions were improper (*Keegnan v. Kavanagh*, 62 *Mo.* 230.)

¶ *People v. Christie*, 2 *Park. Cr.* 579; *S. C.*, 2 *Abb. Pr.* 526. Trial of an indictment for riot arising out of prejudices existing between Roman Catholics and others.

the impression or opinion which you say you have formed of the guilt or innocence of the defendant?"*

XII. On the trial of a person indicted for selling intoxicating liquor to a person who was in the habit of getting drunk, the following questions to a juror were held to be proper to enable the defendant to exercise his right of peremptory challenge :

"Are you a member of a temperance society?"

"Are you connected with any society or league organized for the purpose of prosecuting a certain class of people, under what is called the new temperance law of the State, or have you ever contributed any funds for such a purpose?"†

XIII. A juror, having stated before the triers that he has formed no opinion, and had no impressions as to the guilt of the prisoner, but that it had been, and still was his impression, that the general character of the prisoner was bad; the following question was then put to the juror :

"Would you disregard what you have heard and read, and render your verdict according to the evidence?" It was held that the question, though *inartificially* put, substantially called for the consciousness of the juror as to his ability to try the case impartially, and that it was therefore properly allowed.‡

§ 410. The bias, however, must go to the particular issue; and the question is not opinion as to guilt, but general bias for or against the prisoner.§

§ 411. And jurors, who have tried and decided a criminal case, are not competent to act as jurors on a second trial of the same case; the act of 1872, c. 475, of Laws of N. Y. (§ 371, *ante*), does not apply to such a case.||

* ALLISON, P. J., in trial of Probst for murder of Dearing, *Official Report*, 8.

† *Lavin v. People*, 69 *Ill.* 303; and see *Chicago, &c. R. R. Co. v. Buttolf*, 66 *Id.* 347.

‡ *Lohman v. People*, 1 *Comst.* 379.

§ *Josephine v. State*, 39 *Miss.* 613.

|| *Barclay v. People*, 5 *Leg. Gaz.* 278; S. C., 8 *Abb. L. J.* 104.

Pecuniary Interest in the Result.

§ 412. If this be merely as a member of the town or county to whose treasury a fine is to be paid, such interest does not incapacitate at common law.*

It is otherwise, however, when the juror has an individual claim to a fine or forfeiture which a conviction would produce.

§ 413. It is a good ground of challenge by a person suing a city for damages for an injury caused by a defective condition of a sidewalk alleged to have been improperly constructed, and negligently allowed to remain out of repair, that the juror challenged is a citizen and tax-payer of the city sued.†

§ 414. A resident and taxpayer of a city is not competent to serve as a juror in an action wherein the city is interested, except in a suit for a penalty or forfeiture, unless such disqualification or incompetency be removed by the charter of the city.‡

§ 415. It is a ground of challenge that a juror is an inhabitant of the town, where the moiety or portion of the penalty in the case goes to the poor of that town.§

§ 416. Where a juror said when on a jury that he "was a Tom Paine man, and would as lief swear on a

* *Middletown v. Ames*, 7 Vt. 166; see §§ 85, 86 and 270, *ante*.

† *Hearn v. City of Greensburgh*, 51 Ind. 119; *Cramer v. City of Burlington*, 42 Iowa, 315.

In an action against a turnpike company's toll-gatherer, a challenge for principal cause against a stockholder of the company will not be allowed, if the company would not be liable for the recovery in case it cannot be collected from the defendant (*Williams v. Smith*, 6 Cow. 166).

And the fact that a juror is a stockholder in a gravel road company, does not disqualify him, in an action brought by another gravel road company against a stockholder, for his subscription (*Miller v. Wild Cat, &c. Co.*, 52 Ind. 51).

‡ *Diveny v. Elmira*, 51 N. Y. 506; §§ 86 and 270, *ante*.

§ *Wood v. Stoddard*, 2 Johns. 194.

spelling-book as on the Bible," it was held a good ground for challenge.*

So also of conviction of an infamous crime.†

Conscientious Scruples.

§ 417. Where a juror, on being called in a capital case, declared that he had conscientious scruples on the subject of capital punishment, and that he would not, because he conscientiously could not, consent or agree to a verdict of murder in the first degree, death being the punishment, though the evidence required such a verdict, it was held by the supreme court of Pennsylvania a principal cause of challenge by the prosecution.‡

§ 418. The same opinion is adopted in New York, even though the juror does not belong to a religious denomination scrupulous on the subject, which seems to have been the qualification of the revised statute.§

§ 419. And the same opinion is held in Virginia,|| Maine,¶ New Hampshire,** Vermont,†† Indiana,‡‡ and Ohio.§§ By the Code of Criminal Procedure, section 134, this is made a statutory cause of challenge||| in Massachu-

* *Com. v. McFadden*, 11 *Harris*, 12.

† 1 *Inst.* 158; *Brown v. Crashaw*, 1 *Bulstr.* 154; 2 *Hale P. C.* 277.

‡ *GIBSON*, C. J., dissenting; *Com. v. Leshner*, 17 *Serg. & R.* 155.

§ 3 *R. S.* 6 ed. § 13, p. 1029; *People v. Damon*, 13 *Wend.* 351; *Lowenberg v. People*, 5 *Park. Cr.* 414; *S. C.*, 27 *N. Y.* 336; *O'Brien v. People*, 36 *Id.* 276; *Walter v. People*, 5 *Tiffany* (32 *N. Y.*) 147.

|| *Clare's Case*, 8 *Grat.* 606.

¶ *State v. Jewell*, 33 *Me.* (3 *Redding*) 583.

** *State v. Howard*, 17 *N. H.* 17, *i.*

†† *State v. Ward*, 39 *Vt.* 226.

‡‡ *Jones v. State*, 2 *Blackf.* 475; *Greenley v. State*, 60 *Ind.* 141; *Gross v. State*, 2 *Carter (Ind.)* 329; *Driskill v. State*, 7 *Ind.* 338.

§§ *State v. Town*, *Wright*, 75; *Martin v. State*, 16 *Ohio*, 364.

|| *Warren's Ohio Cr. Law*, 1870, 131.

setts,* Georgia,† Alabama,‡ Louisiana,§ Mississippi,|| and California.¶

§ 420. And in the United States circuit court for the eastern district of Pennsylvania, by BALDWIN, J.**

§ 421. But when, notwithstanding such scruples, the juror thought that he could do justice as between the State and the accused, he was held competent.††

§ 422. In Arkansas, jurors may not be rejected because they are opposed to capital punishment, unless they go further and bring themselves under the disqualifications prescribed by the statute.‡‡

§ 423. In Alabama, the exemption is extended to scruples as to penitentiary punishment.§§

The defendant has no ground of complaint if a juror having such conscientious scruples should not be set aside.¶¶

§ 424. On the trial of an indictment for polygamy, a juror who has conscientious scruples against indicting a person for that offence, is disqualified.¶¶

It is sufficient to exclude a juror from such a trial where he declines to answer the question whether he is living in polygamy, on the ground that the answer would tend to criminate him.***

§ 425. On the trial of an indictment for murder, a juror was challenged by the government on the ground that he was opposed to capital punishment. The juror being sworn, said he was opposed to capital punishment,

* R. S. c. 137, § 6; Gen. Stat. c. 172, § 5.

† Williams v. State, 3 Kelley, 453.

‡ States v. State, 28 Ala. 25.

§ State v. Nolan, 13 La. Ann. 376.

|| Lewis v. State, 9 S. & M. 115; Williams v. State, 32 Miss. 389.

¶ People v. Fanner, 2 Cal. 257.

** United States v. Wilson, 1 Baldwin, 78.

†† Williams v. State, 32 Miss. 389; People v. Stewart, 7 Cal. 140.

‡‡ Dig. § 158; C. S.; Atkins v. State, 16 Ark. 568.

§§ States v. State, 28 Ala. 25.

¶¶ Murphy v. State, 37 Ala. 147.

¶¶ United States v. Reynolds. 1 Utah T. 226.

*** Id. 319.

but if, acting as a juror, the evidence of guilt was clear, he should find the accused guilty. The court ordered him to take his seat as a competent juror. After other jurors had been called, but before any evidence had been submitted, the same juror stated that he had misunderstood the question, and given a wrong answer, and that he could not under any circumstances find a person guilty of murder. The challenge was repeated, and the juror set aside.*

§ 426. So, in Michigan, on the trial of a nuisance, for erecting a mill-dam, as to a juror who conscientiously believed all mill-dams to be nuisances, though he swears that as to such particular mill-dam he knows nothing, and has formed no opinion.†

§ 427. So in Massachusetts has it been the rule, that it is a good ground of challenge that the juror held that the offence for which the accused was to be tried was no crime.‡

§ 428. So in Pennsylvania, as to a juror who declared in a prior case, that he would acquit any one the judge wanted him to convict.§

§ 429. The prosecuting officer may inquire of a person presented as a juror in the trial of a case of counterfeiting, whether he has taken an oath to acquit all persons of counterfeiting; but the person may refuse to answer.||

§ 430. A belief that a statute is unconstitutional incapacitates.¶

But the converse is not true, for a statute is presumed to be constitutional until otherwise determined by the court.**

§ 431. In New York, it was held to be no cause of

* *People v. Wilson*, 3 *Park. Cr.* 199.

† *Crippin v. State*, 8 *Mich.* 117.

‡ *Com. v. Buzzell*, 15 *Pick.* 153.

§ *Com. v. McFadden*, 11 *Harris*, 12.

|| *Fletcher v. State*, 6 *Humph.* 249; *Com. v. Eagan*, 4 *Gray (Mass.)* 18.

¶ *Com. v. Austin*, 7 *Gray*, 51.

** *Com. v. Abbott*, 13 *Metc.* 120; *McNall v. McClure*, 1 *Lans.* 32.

challenging a juror that he is a Freemason, where one of the parties to a suit is a Freemason and the other is not.*

§ 432. The members of any association of men combining for the purpose of enforcing or withstanding the execution of a particular law, and binding themselves to contribute money for that purpose, are incompetent to sit as jurors on a trial of an indictment for violating that law.†

§ 433. But members of an association to prosecute offences against certain laws, who have each, by subscribing a certain sum to the funds of the association, rendered themselves liable to pay to the extent of their subscription, are not incompetent to sit as jurors on the trial of such a prosecution, commenced by the agent of the association, and carried on at its expense, if the presumption is that they have paid their subscriptions before the prosecution was commenced.‡

§ 434. And under the Iowa statute, on an indictment for horse stealing, a juror is not rendered incompetent by the fact that he belongs to an association for the prosecution of horse stealing.§

§ 435. And a bias or prejudice against crime generally is no disqualification.||

§ 436. In those jurisdictions where alienage is a disqualification (which is the case at common law), the objection is good if made by way of challenge. After verdict, it is too late, since the disqualification is one which due diligence would have discovered, and which is not moral, but technical.¶

* *People v. Horton*, 13 *Wend.* 9; *Burdine v. Grand*, 37 *Ala. N. S.* 478; but see *People v. Mather*, 4 *Wend.* 229.

† *Com. v. Eagan*, 4 *Gray (Mass.)* 18.

‡ *Com. v. O'Neil*, 6 *Gray (Mass.)* 343; *Com. v. Thrasher*, 11 *Id.* 55; *Williams v. State*, 3 *Kelley*, 453.

§ *State v. Wilson*, 8 *Clarke*, 407.

|| *Williams v. State*, 3 *Kelley*, 453.

¶ *Presbury v. Com.*, 9 *Dana*, 203; *Jones v. People*, 2 *Col. T.* 351; *Rex v. Sutton*, 8 *B. & C.* 417; *Rex v. Despard*, 2 *Man. & R.* 406; *State v. Nolan*, 13 *La. Ann.* 276; *Lane v. Scoville*, 16 *Kans.* 402; *Brown v. State*, 52 *Ala.* 345; and see § 271, *ante*.

§ 437. After a juror has been sworn in chief and taken his seat, if it be discovered that he is incompetent to serve, he may, in the exercise of sound discretion, be set aside by the court at any time before evidence is given, and this may be done even in a capital case, and as well for cause existing before, as after, the juror was sworn.*

§ 438. As a general rule, it is too late after the jury is empaneled to inquire into the impartiality of a juror.†

§ 439. But it is not too late after he is sworn and not yet impaneled.‡

§ 440. An objection to a juror must be made when he is called upon the panel, otherwise it is waived.§

§ 441. The correct practice is, immediately after the juror is challenged to swear him on his *voir dire*.||

§ 442. It is no waiver of the right to challenge for the defendant to pass the juror over to the court, or to the opposite side for examination.¶

Nor does a hasty expression of satisfaction with a juror necessarily render it error to allow a subsequent challenge to him.**

§ 443. A challenge which has been overruled is not waived by asking the parties if they have any objections to the jurors who have been drawn, if the parties reply in the negative.††

But a challenge which has been sustained cannot be withdrawn.‡‡

* *People v. Damon*, 13 *Wend.* 351; *Tooll v. Com.*, 11 *Leigh*, 714; *Com. v. McFadden*, 11 *Harris*, 12; *United States v. Morris*, 1 *Curtis C. C.* 23; *People v. Bodine*, 1 *Edm. Sel. Cas.* 36; *McGuire v. State*, 37 *Miss.* 369.

† *Com. v. Knapp*, 10 *Pick.* 477; *Ward v. State*, 1 *Humph.* 253.

‡ *Com. v. Twombly*, 10 *Pick.* 480.

§ *Seacore v. Burling*, 1 *How. Pr.* 175.

|| *King v. State*, 5 *How. (Miss.)* 730; *State v. Fowler*, 1 *Walker*, 318; *Com. v. Jones*, 1 *Leigh*, 598; *S. C.*, 12 *East.* 231.

¶ *McFadden v. Com.*, 23 *Penn. St.* (11 *Harris*) 12; *Hendrick v. Com.*, 5 *Leigh*, 708.

** *Adams v. Olive*, 48 *Ala.* 551.

†† *Hathaway v. Helmer*, 25 *Barb.* 29.

‡‡ *State v. Lautenschlager*, 22 *Minn.* 514.

§ 444. If the accused waives his right to challenge a juror, the public prosecutor cannot insist on having him excluded under an agreement that all should be considered as challenged by both parties.*

§ 445. The right to challenge a juror is a right to *reject*, not to *select*, and therefore neither of two defendants in an indictment on a joint trial has cause to complain of a challenge by the other.†

§ 446. If a juror be challenged on one side and be found indifferent, he may still be challenged on the other side.‡

§ 447. In a justice's court it is a ground of challenge to a juror that he is not a freeholder of that town.§

§ 448. In a justice's court it is a ground of challenge to a juror that he is an *alien*, though he be a freeholder, and an inhabitant of the town.||

§ 449. It is a ground of challenge to a juror that he has not the property qualification at the time of the trial; it is not sufficient that he had the property qualification when he was placed on the jury list.¶

§ 450. A juror who is not a freeholder, and who is not assessed for any personal estate, should be set aside, though it appears that he is worth over \$250 in personal property.**

Peremptory Challenges.††

§ 451. Every person arraigned and put on his trial for

* *People v. Mather*, 4 *Wend.* 229.

† *State v. Smith*, 2 *Ired.* 402; *United States v. Marchant*, 4 *Mason*, 160; S. C., 12 *Wheat.* 480.

‡ *Co. Litt.* 158, a; *Bac. Abr. Juries E.* 16; 1 *Chap. C. L.* 545.

§ *Streeter v. Hearsay*, 11 *Johns.* 168; *Fenwick v. Parker*, 3 *Code R.* 254.

|| *Borst v. Beecker*, 6 *Johns.* 332.

¶ *Kelly v. People*, 55 *N. Y.* 565.

** *Valton v. National Loan Fund Life Insurance Company*, 17 *Abb. Pr.* 268; see § 61, *ante*; see also *Armsby v. People*, 2 *S. C.* 157.

†† Peremptory challenges should not be used until the full number of jurors has been obtained and been passed upon, on challenges to the favor and for-cause. Then, a party to the issue (first,

any offence punishable with death or with imprisonment in a State prison ten years or any longer time, shall be entitled peremptorily to challenge twenty of the persons drawn as jurors for such trial, and no more.*

§ 452. Where a person charged with murder in the first degree is convicted of murder in the second degree, the legal effect is an acquittal of the original charge; therefore, if a new trial is granted him, he is entitled to but ten peremptory challenges instead of twenty, as on his first trial.†

§ 453. Where two or more defendants are tried together, no more than twenty peremptory challenges for all are allowed.‡

§ 454. On any trial for any offence punishable by death or by imprisonment in the State prison for the term of ten years or for a longer time, the people shall be entitled

usually, the party having the affirmative) may challenge peremptorily, one juror at a time. After each peremptory challenge and before the second is interposed, another juror should be called to fill the place made vacant by the first; and such juror may be challenged by each party for cause and to the favor, and not until the whole number is full again should another peremptory challenge be interposed. When the usages of courts differ upon this point leave to reserve the peremptory challenges should be asked.

Where a prisoner was compelled to exercise his right of peremptory challenge before the panel was full, his conviction was reversed on this ground (*Cooley v. State*, 38 *Tex.* 636); and see *Taylor v. Western P. R. R. Co.*, 45 *Cal.* 32, laying down the same rule in civil cases. A different opinion was held in the case of *Tatum v. Preston* (53 *Miss.* 654).

The right of peremptory challenge is absolute and continues till the juror is sworn (*Lindsley v. People*, 6 *Park. Cr.* 233; *Drake v. State*, 51 *Ala.* 30; *People v. McCarty*, 48 *Cal.* 557; *Murray v. State*, 48 *Ala.* 675; *Lamb v. State*, 36 *Wis.* 424; *Contra*, *Stewart v. State*, 50 *Miss.* 587; *Hoobach v. State*, 43 *Tex.* 242).

* 3 *R. S.* 6 ed. § 9, p. 1028; *Freeman v. People*, 4 *Den.* 21-32; *Dull v. People*, *Id.* 92; *People v. Bodine*, 1 *Id.* 309; *People v. Henries*, 1 *Park. Cr.* 579; *Lindsley v. People*, 6 *Id.* 233; *People v. Bodine*, 1 *Edm. Sel. Cas.* 78; *President of the W. W. Turnpike v. People*, 9 *Barb.* 161; *Dent v. People*, 1 *N. Y. S. C. (T. & C.)* 656.

† *Ray v. State*, 4 *Texas Court of App.* 444.

‡ *People v. Thayer*, 1 *Park. Cr.* 595.

peremptorily to challenge five of the persons drawn as jurors for such trial, and no more; and in the trial of an indictment for any offence punishable by imprisonment for a less term than ten years, the people shall be entitled peremptorily to challenge three of the persons drawn as jurors for such trial, and no more.*

§ 455. The people and the accused in all capital cases shall also be entitled to thirty peremptory challenges.†

§ 456. Every person arraigned and put on trial for any offence not punishable with death or with imprisonment in a State prison ten years or for a longer time, shall be entitled peremptorily to challenge five of the persons drawn as jurors for such trial, and no more, except that in cases tried in any court of special sessions, said right of peremptory challenge shall extend to only two of said persons so drawn.‡

§ 457. On the trial of all felonies and misdemeanors, the prosecution shall be entitled to the same number of peremptory challenges as are, or may be, by law given to the defence.§

§ 458. Every such person, and every person indicted for any offence, shall be entitled to the same challenges as are allowed in civil cases, either to the array of jurors, or to individual jurors.||

§ 459. The attorney general or district attorney prosecuting for the people of this State, shall be entitled to the same challenges in behalf of this State, either to the array or to individual jurors, as are allowed to parties in civil cases, and the same proceeding shall be had thereon as in civil actions.¶

* 3 *R. S.* 6 ed. § 39, p. 1032; *Walter v. People*, 32 *N. Y.* 159; *People v. Walters*, 18 *Abb. Pr.* 148.

† 3 *R. S.* 6 ed. § 12, p. 1029.

‡ 3 *R. S.* 6 ed. § 10, p. 1028; *President, &c. of the W. W. Turnpike v. People*, 9 *Barb.* 161; *People v. Henries*, 1 *Park. Cr.* 579; *People ex rel. Livermore v. Hamilton, Jr.*, 39 *N. Y.* 109; *Lindsley v. People*, 6 *Park Cr.* 240.

§ 3 *R. S.* 6 ed. § 14, p. 1029.

|| 3 *R. S.* 6 ed. § 15, p. 1029; *People v. Bodine*, 1 *Edm. Sel. Cas.* 78; *S. C.*, 1 *Den.* 309.

¶ 3 *R. S.* 6 ed. § 16, p. 1029; *People v. Henries*, 1 *Park. Cr.* 579;

§ 460. Persons of any religious denomination whose opinions are such as to preclude them from finding any defendant guilty of an offence punishable with death, shall not be compelled or allowed to serve as jurors on the trial of an indictment for any offence punishable with death.*

§ 461. Upon the trial of an issue of fact joined in a civil action in a court of record or not of record, each party may peremptorily challenge not more than two of the persons drawn as jurors for the trial.†

§ 462. The statute providing for peremptory challenges by the people is constitutional.‡

§ 463. On the preliminary trial of a prisoner's insanity, before the trial of the indictment against him, he has not the privilege of peremptory challenges, but he may challenge for cause.§

§ 464. Where a statute gives the right of peremptory challenge to a prisoner on trial "for an offence punishable with death or imprisonment in a State prison ten years or any longer time," a person indicted for burglary in the second degree, which is punishable by imprisonment in a State prison for a term not more than ten years nor less than five years, is entitled to peremptory challenges.||

§ 465. Under the Pennsylvania revised statutes, if the commonwealth waives the right to a challenge, and the defendant exhausts his challenges, the commonwealth cannot resume its rights.¶

People v. Masters, 3 *Id.* 517; *People v. Van Horne*, 8 *Barb.* 158; *People v. Aichinson*, 7 *How. Pr.* 242.

* 3 *R. S.* 6 ed. § 17, p. 1029; *People v. Damon*, 13 *Wend.* 351; *Walter v. People*, 32 *N. Y.* 147.

† *New Code*, § 1176; *Laws of 1847*, c. 134, § 1 (4 *Edm.* 648).

Summary proceedings to dispossess tenants are not "civil actions," and this section does not authorize peremptory challenges in such proceedings (*People v. Hamilton*, 39 *N. Y.* 107).

In England, there are no challenges in civil cases but for *cause* (*Marsh v. Coppuck*, 9 *C. & P.* 480).

‡ *Walter v. People*, 32 *N. Y.* 147.

§ *Freeman v. People*, 4 *Den.* 9.

|| *Dull v. People*, 4 *Den.* 91; *Granger v. State*, 5 *Yerg.* 459.

¶ *Com. v. Frazier*, 2 *Brewst.* 490.

§ 466. It has been said that the defendant's right to a peremptory challenge is waived when the juror is passed over to the court or the prosecution.*

§ 467. This opinion cannot be absolutely maintained, as, on due cause being shown, the court will at any moment before the case is opened permit the challenge.†

§ 468. After eleven jurors were impeached, *counsel for the prosecution privately* stated to the court that they had received information relating to one of the jurors who had been accepted and sworn, which justified them in applying to the court for leave to interpose a peremptory challenge. The question of the power of the court to grant such leave at this stage of the proceedings was opposed, and Judge DAVIS, after reserving his decision for further consideration, held that the challenge might be allowed in the sound discretion of the court. That the court could exercise such discretion without requiring counsel *publicly* to disclose their reasons for interposing it, the court being itself satisfied that substantial reasons existed rendering it improper that the juror proposed to be challenged should be allowed to sit in the case; and that the challenge might be so allowed at any time before the actual commencement of the trial, the people not having exhausted their challenges.‡

§ 469. It is clear that the right ceases when the panel is completed and accepted.§

§ 470. Peremptory challenges are not allowable on the trial of any collateral issue.||

§ 471. Peremptory challenges are not allowed at common law in trials for misdemeanors.¶

* *Com. v. Rogers*, 7 *Metc.* 500; *United States v. Hanway*, U. S. Circuit Court, Phila. 1862; *State v. Potter*, 18 *Conn.* 166.

† *Wyatt v. Noble*, 8 *Blackf.* 507; *Hendricks v. Com.*, 5 *Leigh*, 108; *McFadden v. Com.*, 23 *Penn.* (11 *Harris*) 12.

‡ *People v. Tweed*, 13 *Abb. Pr. N. S.* 371; *United States v. Morris*, 1 *Curt. C. Ct.* 23; *People v. Damon*, 13 *Wend.* 351.

§ *State v. Cameron*, 2 *Chandler (Wis.)* 172.

|| *Burns' Justice*, Jurors, 8; *Freeman v. People*, 4 *Den.* 9.

¶ *Reading's Case*, 7 *Howell's State Trials*, 265; *Oates' Case*, 10 *Id.*

§ 472. In summary proceedings to remove tenant, the law does not authorize either party peremptorily to challenge a juror.*

§ 473. A prisoner, who, in case of felony, has challenged twenty jurors peremptorily, cannot ordinarily withdraw one of those challenges to challenge another juror instead of one whom he had previously challenged.†

§ 474. Nor for the purpose of challenging for cause. But in case of innocent mistake made in challenging, permission should be given to rectify. The right of peremptory challenge is a right not to *select*, but to *reject*.‡

§ 475. At common law the government has no peremptory challenges.§

§ 476. But the government, unlike the defendant, is not required to show cause until after the panel is exhausted, having the power of setting aside individual jurors till that period, when, if the jury box be not then filled, the jurors who have been set aside will be severally called, and unless adequate cause is shown against them, will be chosen.||

§ 477. Such is still the practice in the federal courts, and in such of the States as have not in this respect superseded the common law by statutes.¶

1079; 4 *Black. Com.* 353, note by Mr. Christian; *United States v. Devlin*, 6 *Blatchf.* 71; *Freeman v. People*, 4 *Den.* 9.

* *People v. Hamilton*, 39 *N. Y.* 107; see *Summary Proceedings*, §§ 914-921, *post*; see note to § 461, *ante*.

† *R. v. Parry*, 7 *C. & P.* 836.

‡ *United States v. Marchant*, 4 *Mason*, 160; *S. C.*, 12 *Wheat.* 480; *State v. Smith*, 2 *Ired.* 402; *People v. Bodine*, 1 *Den.* 281; *State v. Wise*, 7 *Richard*, 412.

§ *R. v. Frost*, 9 *C. & P.* 136; *Henries v. People*, 1 *Park. Cr.* 579; *People v. Aichinson*, 7 *How. Pr.* 241.

|| *Mansell v. R.* (in error), 8 *El. & Bl.* 54; *R. v. Parry*, 7 *C. & P.* 836; *Lord Grey's Case*, 3 *Harg. St. Tr.* 519; *S. C.*, 9 *Howell's St. Tr.* 127; *Peter Cook's Case*, 4 *Harg. St. Tr.* 740; *S. C.*, 13 *Howell's St. Tr.* 311; 2 *Hale P. C.* 271; *Bac. Abr. Juries E.* 10; 2 *Hawk*, c. 43, § 3.

¶ *United States v. Wilson*, 1 *Bald.* 81; *State v. Arthur*, 2 *Dev.* 217; *State v. Craton*, 6 *Ired.* 164; *State v. Stallmaker*, 2 *Brevard*,

§ 478. The right may be exercised by the prosecutor at any period before the jury is elected, and it was held no error where the commonwealth, from excessive caution, set aside a juror who had been before ineffectually challenged by the prisoner.*

§ 479. The practice of permitting the prosecutor to defer showing cause of challenge until the panel be gone through, it was said, in a case in North Carolina, must be exercised under the supervision of the court, who will restrain it if applied to an unreasonable number; and in Georgia since the adoption of the penal code it is rejected altogether.†

§ 480. In Pennsylvania, by the revised acts of 1860, the commonwealth shall have the right in all cases to challenge peremptorily four persons, and every peremptory challenge beyond the number allowed by law in any of the said cases shall be entirely void, and the trial of such person shall proceed as if no such challenge had been made.

§ 481. In general, the prisoner has the right of peremptory challenge to a juror after he has made such answers on the *voir dire* as do not authorize a challenge for cause.‡

§ 482. But the right to a peremptory challenge, it is said, in Massachusetts, must be exercised, if at all, before the jurors are interrogated by the court concerning their bias and opinions.§

§ 483. It has been said that the defendant must personally, and not through counsel, make such challenges as are peremptory.||

1; *Rob. Dig.* 328; *Jewell v. Com.*, 10 *Harris*, 94; *Com. v. Jolliffe*, 7 *Watts*, 585; *Wormley v. Com.*, 10 *Grat.* 658.

* *Wormley v. Com.*, 10 *Grat.* 658.

† *Sealey v. State*, 1 *Kelley*, 213; *Reynolds v. State*, *Id.* 222; *State v. Benton*, 2 *Dev. & Bat.* 196.

‡ 4 *Black. Com.* 363; 2 *Hawk*, c. 43, § 10; *Bac. Abr. Juries* B. 11; *Hooker v. State*, 4 *Ohio*, 350; *People v. Bodine*, 1 *Den.* 281.

§ *Com. v. Rogers*, 7 *Metc.* 500; *Com. v. Knapp*, 9 *Pick.* 496.

|| *State v. Price*, 10 *Rich. Law*, 351.

§ 484. This, however, is a mere arbitrary and forced extension of the fiction of the jurymen and prisoner looking on each other to see if there is any personal reminiscence which would touch the question of indifference. The usual practice is for this kind of challenge, as is the case for all others, to be made by counsel.

Recalling Peremptory Challenges.

§ 485. It is said that the court in its discretion will not permit a peremptory challenge to be recalled after the jurymen is set aside, in order merely to admit a challenge for cause. But in case of surprise, such discretion may be properly invoked.*

§ 486. In Virginia, where a person called to serve as a juror in a criminal case was elected by the prisoner, but before he was sworn, the prisoner retracted his election, and asked that he might be permitted to challenge him peremptorily, but the court refused to permit such peremptory challenge, and the juror was sworn and served on the jury; it was held this was error, the prisoner having an absolute right to challenge any juror peremptorily at any time before he is sworn.†

§ 487. In Connecticut, however, B., having been called as a talesman, and examined as to his bias, and no reason to except to him appearing, the counsel for the prisoner were informed by the court that they could then challenge B. peremptorily if they desired to do so. They declined to exercise the right at that time as the panel was not then full, and B. was directed to take his seat as one of the jurors. After the panel was full, and but six peremptory challenges had been made, the prisoner's counsel claimed the right to challenge B. peremptorily. It was held that in the absence of any reason for a peremptory challenge *then* which did not exist *before*, when the exercise

* State v. Price, 10 Rich. Law, 351; R. v. Parry, 7 C. & P. 836.

† Hendrick v. Com., 5 Leigh, 708.

of the right was declined, it was too late to challenge B. peremptorily.*

§ 488. In Alabama, in a capital case, it is not ground of peremptory challenge of a juror, that upon common report he has formed and expressed an opinion of the guilt of the prisoner, if the juror believes that such an opinion would have no influence in the formation of his verdict should the evidence on the trial be different from the report of the facts.†

§ 489. A peremptory challenge to a juror after a principal challenge to him has been overruled, is a waiver of the challenge for cause.‡

§ 490. Under the act of Congress, July 20, 1825 (5 *Stat. at Large*, 394), the courts of the United States have the power to adopt the statutes of the several States respecting the impaneling, &c., of jurors; and the right of challenge, &c., except in respect to treason and other crimes specified in section 30, act of 1790 (1 *Stat. at Large*, 119); and where these statutes have been adopted, the right of peremptory challenge either by the prisoner or government must depend on them.§

§ 491. By the act of March 3, 1865, when the offence charged be treason or a capital offence, the defendant shall be entitled to twenty, and the United States to five peremptory challenges. On a trial for any other offence in which the right of peremptory challenge now exists, the defendant shall be entitled to ten, and the United States to two peremptory challenges.||

§ 492. Can a defendant, if he has not exhausted his peremptory challenges, object in error to the action of the court below in deciding against him a challenge for the favor? There is good authority for holding that in

* *State v. Potter*, 18 *Conn.* 166.

† *State v. Williams*, 3 *Stew.* 454; *State v. Morea*, 2 *Ala.* 275.

‡ *Friery v. People*, 2 *Keyes*, 424; S. C., 2 *Abb. Dec.* 215; S. C., 54 *Barb.* 319; *Conway v. Clinton*, 1 *Utah T.* 215.

§ *United States v. Shackleford*, 18 *How. U. S.* 588; see chap. VIII, *post*.

|| See note to last section.

ordinary cases he cannot. He is bound, it is argued, if he objects to the juror, and his objection is overruled by the court, to challenge such juror peremptorily, supposing the case ultimately shows that he has challenges to spare.*

§ 493. But if it appears that the defendant was misled by the action of the court, or that he was in any way excluded from making a peremptory challenge of the juror in question, then he should be allowed to review the decision in error.†

Challenges to Grand Jurors.

§ 494. By the revised statutes of the State of New York, a person held to answer to any criminal charge may object to the competency of any one summoned to serve as grand juror, *before he is sworn*, on the ground that he is the prosecutor or complainant upon any charge against such person, or that he is a witness on the part of the prosecution, and has been subpoenaed or been bound in a recognizance as such; and if such objection be established, the person so summoned shall be set aside.‡

§ 495. But no challenge to the array, nor to any person summoned to serve as grand juror shall be allowed, except as above stated.§

§ 496. It is no ground of challenge that a certain class were excluded in the selection of grand jurors, if those who are returned be unexceptionable.||

* *State v. Benton*, 2 *Den. & B.* 196; *People v. Knickerbocker*, 1 *Park. Cr.* 302; *McGowan v. State*, 9 *Yerg.* 184; *Norfleet v. State*, 4 *Sneed*, 340; *People v. Stonecifer*, 6 *Cal.* 405; *People v. McGungill*, 41 *Id.* 429; *State v. McQuaige*, 5 *S. C. (Richardson)*, 429.

† *Lithgow v. Com.*, 2 *Va. Cas.* 297; *Baxter v. People*, 3 *Gilm.* 368; *People v. Bodine*, 1 *Den.* 282; *People v. Freeman*, *Id.* 9; *Birdsong v. State*, 47 *Ala.* 68; and see § 271, *ante*.

‡ See § 754, *post*; *Dawson v. People*, 25 *N. Y.* 405; *People v. Jewett*, 3 *Wend.* 314; *S. C.*, 6 *Id.* 386; *McNevin v. People*, 61 *Barb.* 308; *contra*, *People v. Wintermute*, 1 *Dakota (Bennett)*, 63.

§ *Carpenter v. People*, 64 *N. Y.* 483.

|| *People v. Jewett*, 3 *Wend.* 314.

§ 497. It is no ground of challenge to a grand juror that he belongs to an association for the prosecution of crime.*

§ 498. It is a good cause of exception to a grand juror that he has formed and expressed an opinion as to the guilt of the party; it is also good ground of exception that he has shown or expressed hostile feelings to the party; but *these* objections must be made before the indictment be found, and will not afterwards be heard.†

§ 499. Challenges to the grand jury may also be made in the form of a plea in abatement. Under the provisions of 3 Revised Statutes (5 ed.), section 37, page 701, requiring the names of the persons appearing on the lists prepared, and filed, as required by sections 35 and 36, to be placed in a box, and the names of the persons to act as grand jurors to be drawn therefrom, there is no authority for the officer drawing the grand jurors, or the court before which they may be summoned, to go behind the proceeding of the board by which the list was prepared, for the purpose of nullifying the action of the grand jury after its formal organization. A plea in abatement on this ground will fail.‡

§ 500. A plea in abatement to an indictment found in a court of general sessions in the city of New York, alleging that the annual grand jury list was not wholly selected as required by statute (*Laws of* 1853, c. 498), from the petit jury lists made out by the commissioner of jurors, without any averments of fraud or design, is not good. The fact that a few names not appearing on the petit jury lists are accidentally put upon the grand jury list does not vitiate the whole list, and that it was by accident or oversight is to be presumed, in the absence of fraud or design.§

* *Musick v. People*, 40 *Ill.* 268.

† *People v. Jewett*, 3 *Wend.* 314; *United States v. White*, 5 *Cranch C. Ct.* 457; *State v. Gillick*, 7 *Iowa*, 287; *State v. Quimby*, 51 *Me.* 395; *People v. Monahan*, 32 *Cal.* 68.

‡ *Dolan v. People*, 64 *N. Y.* 485; see §§ 733 and 738, *post*.

§ *Dolan v. People*, 64 *N. Y.* 485.

§ 501. Nor is it a good plea that some one of the fifty selected as the special panel of grand jurors (*Laws of 1870*, c. 589, § 28) was not upon the petit jury lists, in the absence of an allegation that the persons actually sworn and impaneled were not upon that list. It is necessary also, in such a plea, to give the names of the persons alleged to have been selected and drawn who were not upon the petit jury lists.*

§ 502. It is not a good plea that the commissioner of jurors was prevented by duress from attending upon or supervising the grand jury. In the absence of allegations as to how the grand jury was drawn, and by whom, it is to be presumed that the drawing was made by some other person claiming the office, acting as *de facto* commissioner, and recognized as such by all the officers having relations with him or his work; and a jury drawn by a *de facto* commissioner is regular.†

§ 503. In New Jersey, it is said that it is not a good plea in abatement, that a member or members of the grand jury were interested in the conviction of the defendant, and had prejudged his case.‡

§ 504. In Alabama, it was held that a plea in abatement to an indictment preferred by a grand jury, one of whom was an alien, was a proper mode of objection.§

§ 505. In the United States circuit court in Minnesota, it was held that the mere fact that a prosecutor was a member of the grand jury, was no ground for a plea in abatement.||

§ 506. In Mississippi, the present practice is, that for exceptions to organization, a plea in abatement is too late.¶

§ 507. In Virginia, it was ruled that where a bill of indictment is found by a grand jury, one of whom is an

* *Dolan v. People*, 64 *N. Y.* 485.

† *Ibid.*

‡ *State v. Rickey*, 5 *Halstead (N. J.)*, 83.

§ *State v. Middleton*, 5 *Porter*, 484.

|| *United States v. Williams*, 1 *Dill.* 485.

¶ *James v. State*, 45 *Miss.* 572.

alien, or otherwise disqualified by law, the bill or presentment may be avoided by plea.*

§ 508. In Ohio, an indictment found by a grand jury composed of less than fifteen persons, having the qualifications required by statute, is not sufficient to put the accused on trial, and a plea to the indictment that one of the grand jurors had not the requisite statutory qualifications, is a good plea in bar.†

§ 509. In Maine, Tennessee, Alabama and Texas, it has been determined that the disqualifications of any one or more of the grand jurors finding an indictment must be taken advantage of by motion to quash, or plea in abatement, before the general issue is pleaded.‡

§ 510. It may be stated as a general rule, that where the statute has abolished challenges to the array of grand jurors, a plea in abatement can be interposed to an indictment setting forth that the finding of the indictment was by an illegal body. Such a plea must set forth the ground of objection specifically, and show that the jurors were legally incompetent.§

* *Com. v. Clurey*, 2 *Virg. C.* 20.

† *Doyle v. State*, 17 *Ohio*, 222.

‡ *State v. Duncan and Trott*, 7 *Yerg.* 271; *State v. Bryant*, 10 *Id.* 527; *State v. Brooks*, 9 *Ala.* 10; *Barney v. State*, 12 *S. & M.* 68; *McQuillan v. State*, 8 *Id.* 587; *Rawle v. State*, *Id.* 599; *State v. Symonds*, 36 *Me.* 128; *Vancock v. State*, 12 *Tex.* 469; *Jackson v. State*, 11 *Id.* 261; *State v. Carver*, 49 *Me.* 588; *State v. Wright*, 53 *Id.* 328.

§ *People v. Jewett*, 6 *Wend.* 385; *Arch. Cr. Pl.* (ed. 1860), 336; *Colby's Cr. Proc.* 285; *People v. Allen*, 43 *N. Y.* 32.

CHAPTER V.

OF THE DUTIES OF TRIAL OR PETIT JURORS.

THIS chapter consists of four parts, namely :

- 1st. Duties before trial.
- 2d. Duties during trial.
- 3d. Duties after trial.
- 4th. Charge to trial (or petit) jurors.

PART I.

OF DUTIES BEFORE TRIAL.

§ 511. After a juror has received a notice requiring him to attend at any particular court, and in response to such notice does attend, his duty as juror begins at the time he enters the court-room.

§ 512. He should first ascertain the particular court-room to which he has been summoned ; and he should do this before the expiration of the time mentioned in the notice which has called him to appear in court. After entering the proper court-room, he should take a seat, if possible, and listen attentively to the calling of the names of jurors by the clerk, which is prefaced by the following expression : "Jurors will please answer to their names when called, and save your fines," and when his name is called, should answer "here" or "present" in a loud, clear tone of voice, so that the clerk may hear him and enter his name accordingly.

§ 513. By paying particular attention to answer clearly and distinctly to the call, the juror would thereby save the court and clerk considerable trouble and annoyance, and thus avoid receiving a reprimand for either real or apparent inattention or neglect, as well as a fine by

reason of his name being entered or marked "absent" instead of "present" by the clerk, who did not hear the juror's answer.

§ 514. Should a juror wish to be excused, he will have an opportunity of stating his excuse to the court immediately after the clerk has concluded the calling of the jurors' names. It is entirely within the discretion of the judge holding the term—or presiding judge—to excuse a juror, unless the juror has legal grounds for being excused. Where the juror has no legal excuse, but still presents such reasons as should relieve him at that time from serving, the judge has the power in some counties to "set over" the juror to some other time, at which adjourned time the juror must attend without further notice.*

§ 515. There are cases in which a juryman may be privileged from serving, but in which the privilege must be set up by himself, or the court, and cannot be technically regarded as a ground of challenge. Thus, a juror may be excused from serving on the ground of old age.†

And on the ground of deafness or other infirmity incapacitating him from proper discharge of duty.‡

And on the ground of holding excusatory offices.§

And the excusing of the juror for reasons of this class is always within the discretion of the court, irrespective of the statutes relating to challenges.||

§ 516. Many persons who, on being drawn for the first time as jurors, think that the only thing necessary for them to say to the judge is, that their *business* will not allow them to attend, and upon this statement they suppose they have the right to be excused as jurors. It is time that business men should have a more reasonable and enlightened view on this subject, and that they should consider jury duty not an onerous, but an honorable one.

§ 517. If a person summoned as juror cannot attend

* See §§ 74, 75, 83, and 173, *ante*.

† *Davis v. People*, 19 *Ill.* 74; *Breeding v. State*, 11 *Tex.* 257.

‡ *Jesse v. State*, 20 *Ga.* 156.

§ *State v. Quimby*, 51 *Me.* 395.

|| *State v. Marshall*, 8 *Ala.* 302.

personally, he should send some one to answer for him, and state the excuse for such non-attendance; and if a person so summoned is sick, he should send proof from a physician of such sickness.*

§ 518. After the confusion that usually attends the calling of names and the excusing of jurors has subsided, the juror should attentively listen while the clerk calls twelve names of jurors to try a case; and should, on hearing his name called, answer in a clear voice "here," or "present," and should then take his place in the jury-box.

§ 519. A person summoned as juror, but not impaneled for the trial of any case, should take great care to avoid conversing with any person about the merits of a case to be tried at that term of the court, either before a jury is impaneled, or whilst he is awaiting the trial of another case after his return from the jury-room, or at any time when he is present in court on jury duty, though not actually engaged in the trial of any case.

§ 520. Should any person approach a juror in a manner, which, in his judgment, is intended to influence his verdict in any case for which he has been or may be impaneled, he should at once notify the judge of the court of such conduct.†

§ 521. If a juror who is called into the trial of a case is intimately acquainted with the litigants, or is well-informed as to the merits of the case, or is biased or prejudiced either for or against either party, or has had a case of a similar nature wherein he was personally interested, and is therefore biased or prejudiced for or against an action of that kind, he should decline to serve on such jury in such case, and then and there should state to the court his reasons for so doing, though he be neither questioned nor challenged before the beginning of the trial.

§ 522. When a jury has been impaneled to try a case, and when, owing to a pressure of business, a second or third

* See § 75, *ante*.

† See §§ 156 and 212, *ante*.

jury is likely to be impaneled, or when the first or second jury is deliberating in the jury-room, the remaining jurors should not leave the court-room, unless leave is given them by the judge, for they may be needed to constitute the second or third jury.

PART II.

DUTIES DURING TRIAL.

§ 523. When a juror has been called into the trial of a case, and has taken his place in the jury-box, he should pay particular attention to the oath administered to him, and especially to that part which speaks of •“trying the issues *according to the evidence*.” In some courts, however, a general oath is administered to all the jurors at the opening of the term.

§ 524. Some jurors forget that part of their oath when they see that either of the parties to the action is their friend or acquaintance, or a personal, political, or social enemy, and think that by their position as jurors they have a good opportunity of conferring a favor, or of wiping out or settling up “old scores.” Again, it often happens that lawyers are retained in cases on the day of trial, or but a short time prior to that day, who have either a very large clientage, or have occupied an important public position, such as judge, district attorney, sheriff’s counsel, &c., and who are therefore supposed to be personally acquainted with the jurors, or with some of them, who have been summoned to attend at that term of court.

§ 525. It frequently occurs that parties to actions bring into court, for the purpose of influencing one or more of the jurors, persons who appear to take great interest in either side of the controversy, who have resided a long time in the place where the case is to be tried, and therefore have an influential or extensive acquaintance. This improper course is more frequently employed in criminal than in civil trials, for the purpose of compelling,

if possible, a jury to render a verdict for a less crime than that of which the prisoner is really guilty, or to make them disagree. For these and similar reasons the juror is therefore required to pay attention, and remember the importance, sacredness, and responsibility contained in his oath, "*to render a verdict according to the evidence.*" And to the honest, faithful, conscientious, and fearless juror this expression means *according to ALL the evidence*; not according to the evidence as adduced on the side on which a good-looking woman, or one dressed in mourning, or one who shed tears, testified; not according to the evidence as adduced on the part of a lodge-brother or a person engaged in the same business or profession as the juror; not according to the sympathy that may have been aroused, but simply, solely, and only *according to all the evidence in the case.*

§ 526. The juror should bear in mind that the very essence, foundation and stability of the tribunal of which he is an honored and trusted member, are *truth, justice and impartiality.*

§ 527. After taking his seat in the jury-box, the juror should pay due and close attention to all that is said and done in the case. Should a witness speak in so low a tone of voice that the juror could not hear him, it is the duty of the juror to state that fact to the court. The juror has a right to put questions to the judge and witnesses relating to the case on trial, and has a right to receive answers, if his questions be legal and proper. The juror should note the appearance of the witnesses on the stand, their manner of giving testimony, and their willingness or unwillingness to testify. But the juror should never render a verdict upon the mere appearance, whether favorable or otherwise, of the witness. He should listen to the opening speech of counsel, and should be extremely careful to avoid the confusing or confounding the evidence as given on the trial by the witnesses, &c., with the statement which counsel in his opening speech makes in relation to evidence that he "expects to produce," but which he fails to produce. The intelligent juror will at once see the vast difference there is

between the evidence *actually* produced in many cases and such statement.*

§ 528. He should also remember that the evidence which the court has ruled out during the progress of the

* In the trial of Louis F. Therasson, a lawyer, for obtaining the signature of a Mrs. Zabriskie to a "satisfaction-piece" of a mortgage by false pretenses, which was had at the December term (1878) of the court of oyer and terminer in New York city, Mr. William A. Beach, counsel for the accused, in his summing up to the jury, reminded them in an eloquent manner of the responsibility resting upon them: "I speak," said he, in an almost tender voice, "for a lawyer, for a friend of mine, who for thirty years has been known for his probity. I cannot overlook the possibilities in this case. I do not fear them. This I know—that the judgment of men is often merciless and unjust. It is difficult for men, called, as you gentlemen, from the walks of life, to sit as judges on your fellow-men. You are empowered to return a verdict which will restore my client to honor. Did you ever reflect on the power which is given you by the people to decide upon these questions which cluster around human life? Sometimes gentlemen come into this box, thinking it is their duty to deal harshly, cruelly, and condemn. They forget the humanity and charity of the law. I look into your eyes, and believe that you will render your verdict impartially. This morning my friend stepped into the glad sunshine of the bright day from his happy home; a woman's affection cheered him, and his child bade him its tenderest farewell. Strong in that faith and devotion, he is here before you—to-night, by your verdict, you may send him to a prison cell. The interest of the public, the law, the family, all find their representative in you. There is no crime under heaven that does not come before you. If this man has violated his duty, I ask no pity for him. Let the law take its course. I do ask for him a fair consideration of the evidence before you, however. Just, noble as his Honor the judge is, he could not but see during the progress of the trial, the great personal interests involved. For fifteen years the prosecutor has confided all her troubles to my client. They were schoolmates together. She was familiar with his home—loved them all. Suddenly all this association changes; her love has turned to hate. He has been unable to meet her accusations except by his own testimony. It is wonderful to see how soon over this scene of mutual respect and good-will a shadow was thrown. A celebrated jurist of her own land has written that *a jury should not allow itself to be swayed by appeals of revenge made to it. So long as this palladium remains sacred, it will be an honored institution.*"

case must not be considered by him while deliberating upon his verdict. The judge has the exclusive right of ruling as to the admissibility and competency of the evidence on trials by jury; and the jury are obliged to accept his ruling as final and binding; and the evidence so rejected must be to the jurors as though it had never been given, no matter how great a bearing, according to *their* opinion, it might seem to have upon the case.

§ 529. The jurors must listen to the closing arguments of counsel, and note the various lights in which the evidence and witnesses are placed; and they should do this simply for the purpose of enabling themselves to arrive at a correct conclusion on the whole case as represented, but not for the purpose of being edified or amused by the eloquence or wit of counsel. There have been jurors who have paid very little attention to the evidence in the case as it progressed, but who relied upon the possibility of finding out all about it in the summing up of counsel. It is, perhaps, needless to say that such conduct is reprehensible, and cannot be too strongly condemned.

§ 530. Particular attention should be paid to the charge of the judge, as it is from him the jury must receive the law, and instructions as to the application of the law on the points in question. And they are bound to act in accordance with his charge, regardless of the consequences.

§ 531. At the conclusion of the charge, or, in some courts before the charge, the attorneys of the respective parties may request the judge to charge the jury on specific matters; and to these matters, if the judge charges on them as requested, the jury must pay particular attention.

§ 532. If any papers, maps, or diagrams have been received in evidence, and if the jury consider it necessary to take these into the jury-room, they should ask permission of the judge to do so, as it is entirely within his discretion to grant or refuse such permission.

PART III.

DUTIES AFTER TRIAL.

§ 533. On arriving in the jury-room, the jurors may facilitate their labors, and more readily and conveniently reach a just conclusion by acting as an organized association; they should therefore immediately nominate and elect a foreman to act as chairman. The duties of the foreman are: first, to keep order, second, to put questions to a vote, and third, to announce the verdict agreed upon by the jury. The jurors should also select some one of their number to act as secretary, who should immediately upon entering on his duties, take down the names of all the jurors in the case; subsequently he should take notes of the motions as made, whether carried or lost, and thereby show how each juror voted. These proceedings must take but few minutes, and the deliberations should then begin and proceed without delay.

§ 534. The reason why the proceedings in the jury-room should be regular and systematic is, that the jurors continue and carry out the proceedings in court, which are, as the jurors may see on the trial, conducted according to legal rule and system.

§ 535. If the jury are deliberating upon a criminal case, the first motion should be, "Mr. Foreman, I move that we take a vote as to the guilt or innocence of the prisoner." If they are deliberating on a civil case, and if there is no dispute as to the amount sued for, the first motion should be, "Mr. Foreman, I move that we render a verdict for the plaintiff" (or "for the defendant," at the pleasure of the mover). If the motion has been seconded, the foreman puts the question, and if it is *unanimously* carried, the jury return to the court-room, where the foreman announces the verdict; and here the jurors' duty in that case is at an end. When, however, as it sometimes happens, the vote of the jurors is not unanimous as regards

"plaintiff," "defendant," "guilty," or "not guilty," but there are votes on both sides of the question, then the foreman should direct the secretary to call out the names of the jurors, and as each name is called, the juror should answer and state how he voted, whether for "plaintiff," "defendant," "guilty," or "not guilty," and the secretary should take down on his minutes the votes as thus given. In this way, the jurors may become aware of the opinions of one another, and their duty then is to harmonize these opinions. With this purpose in view, the next motion should be, "I move that we now consider the testimony of the plaintiff," or, in a criminal case, "the testimony of the prosecuting witness" (or the testimony of any other witness which has an important bearing on the case). If the motion is carried, the mover should first state how he formerly voted, whether for "plaintiff," "defendant," "guilty," or "not guilty," and then state how he understands the testimony of the witness now to be considered, and what bearing it had upon the vote he gave. Thus, each juror should be allowed, in a brief and orderly manner, to state his understanding of the testimony.

§ 536. In this respect, the attention of the juror is called particularly to the fact, that in speaking of the evidence, *he must only speak of that which was submitted to the jury in open court.* Should any one of their number know anything about the facts in the case, outside of the knowledge which he gained on the trial, he must not communicate such information to the others; neither are the others allowed to be influenced by any such communication if made by him, unless he was sworn on the trial as a witness in the case. The intent of the law is to prevent the jury from receiving and using any evidence that does not rest on oath, and has not been duly submitted to examination in court. Any departure from, or going beyond this rule by the jury, is a violation of their solemn duty, responsibility, and oath as jurors.

§ 537. After the jurors have severally had an opportunity of expressing their understanding of the testimony under consideration, they may readily and quickly discover

whether their difference of opinion is a trifling or a vital one. If this difference is a trifling one, a motion for a vote on the main question, "plaintiff," "defendant," "guilty," or "not guilty," should again be taken; and if this vote is unanimous either way, they should report to the court; but if not unanimous, they should take a recess for a few minutes, that they may converse privately concerning this difference.

§ 538. If, again, this difference is a trifling one, and one or more jurors hold out and decline to vote with the majority, *and yet refuse to state their reasons for so doing*, the duty of that jury is thus terminated, for they evidently may never agree. An honest juror should always be willing to state his reasons in the jury-room for his vote, and should always be willing to listen to the reasons and arguments of the others; and if he does this, and is conscientious in his voting, and if the case is one in which the evidence would uphold his opinion and vote, he has a right to adhere to his opinion, even if opposed by the remaining eleven jurors.

§ 539. If, on the other hand, this difference is a vital one; if, for instance, half the jury believe that the witness testified to one thing, and the remaining half believe differently; or if it is the charge of the judge which is under consideration, and if there is contrariety of understanding as to its meaning and application; or if this difference relates to the proof or anything else regarding the trial; and if this difference can be removed by further instructions from the court, or by the reading of the stenographer's minutes of the testimony upon which there is a dispute, it is then the duty of the jury to return to the court-room, and obtain the instructions and information which they deem necessary. Having received the desired instruction, &c., they should immediately return to the jury-room and continue their deliberations in an orderly and proper manner, until they reach a unanimous conclusion, if possible.

§ 540. In a criminal case, the jury's duty is at an end when they have decided upon a verdict of either "guilty"

or "not guilty." But in a civil case, as, for instance, in an action on contract, or for damages for injuries, death, libel, slander, false imprisonment, &c., &c., there is still another and a very important question for them to settle after they conclude to find a verdict for the plaintiff, namely, the *amount of damages*.

§ 541. If the action is one known as an action on contract, such, for example, as on a promissory note, an account stated, goods sold and delivered, money loaned or advanced, work, labor and services, or any other matter in which the amount of damages is actually determinable by the evidence adduced, without compelling or necessitating the juror to form his individual opinion as to what the amount of damages should be, his duty will be comparatively light, for by strict and close scrutiny of the evidence it may not take him long to see whether the plaintiff has established the whole or only a part of his claim; in fact, it will be a matter simply of fair calculation and adjustment. Or if it is an action in which the defendant has set up a counter-claim—which means that besides denying that he is in any way indebted to the plaintiff, he asserts that the plaintiff is indebted to him—and has asked for judgment against the plaintiff for a certain sum on contract, as above explained, the jury will have no difficulty in reaching a conclusion as to the amount of the counter-claim, after they have concluded to find for the defendant.

§ 542. But when the action is one in which the amount of damages is *not* actually determinable by the evidence given on the trial, or when the determination of the amount is left entirely to the judgment of the jury, as, for example, in actions for injuries or death against railroad or steamboat companies or others, or for libel, slander, false imprisonment, malicious prosecution, breach of promise of marriage, or other actions of a similar nature, then the jury may find some difficulty in arriving at a correct conclusion. In this connection the jury are again reminded of the attention which they should give to the charge of the judge, who has exclusively the power and right to instruct the jury whether the case on trial is one in which

they may find nominal damages only, or actual damages, or actual and exemplary or punitive damages, and the jury must find in accordance with these instructions. Nominal damages are six cents; actual (or compensatory) damages mean the amount which the plaintiff actually proves he has sustained; exemplary, punitive, or vindictive damages, mean the sum which the jury may find for the purpose of punishing the defendant for malice, &c.

§ 543. It often happens that in the class of actions last mentioned, the jury arrive at the amount of damages by writing severally on a slip of paper the amount they think ought to be awarded, and then, after adding the several amounts so written on the twelve slips of paper, dividing that sum by twelve. This manner of reaching a conclusion is illegal and unjust, and cannot be reconciled with their oath as jurors, and is greatly to be deprecated and deplored; and a verdict thus rendered, if brought to the knowledge of the court, would be set aside (see *post*, § 679).

§ 544. If, for instance, one juror writes on his slip of paper the sum of \$10,000, and if another writes on his slip the sum of \$150, and if another writes on his slip six cents, and so on to the last juror, and if they then divide the entire sum by twelve and take the quotient obtained by this division as the sum of damages which they wish to award, *thus merging the three kinds of damages* mentioned above *in one conclusion* or verdict, they certainly do not act in the case either according to law or justice; neither do they by that method render a verdict according to the evidence, *but according to chance*.

§ 545. To obviate, or, if possible, abolish this practice, which is too frequently employed by juries, they will find a simpler, and certainly a just and true method of arriving at a conclusion, by taking a vote, after they have decided to find for the plaintiff, by a motion in the following manner: "I now move that we render a verdict for nominal, actual, or exemplary damages." This motion, like those above mentioned, may be briefly argued by the jurors; in this manner the jurors may, perhaps, be reminded of evi-

dence they may have forgotten, or may see the case in a different light; then if, on taking a vote, they agree to render a verdict for nominal damages only, their duty terminates. If they agree to render a verdict for actual damages only, their duty will not be more difficult than it would be in an action on contract, as the only question remaining is, "What damages has the plaintiff proved?" If they agree to render a verdict for exemplary or punitive damages, they may take another vote as to the amount, and a motion to the following effect may be made: "I move that we render a verdict for \$1,000," or any other sum which the mover thinks the plaintiff is entitled to receive; thus, by argument, reason and vote, they may come to a conclusion that will be proper and legal.

§ 546. Then again, there are occasions in which juries are called upon, under the direction of the judge, to decide specific questions of fact, which are submitted to them in writing. As, for instance, in actions for absolute divorce, questions like the following are submitted to the jury: "Was the plaintiff married to the defendant, as mentioned in the complaint?" "Did the defendant commit adultery with one ———, at ———?"

Upon these questions it is the duty of the jury to find either affirmatively or negatively. And they may pursue the same course, as to argument and vote, relative to their agreement upon these specific questions as they do in the actions hereinbefore mentioned.

A jury may also be requested to bring in what is called a sealed verdict (for definition, see § 561, *post*), which should be in the following form:

DOE v. ROE.	}	Verdict of Jury.
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We, the jurors impaneled in the above-entitled action, find a verdict (for \$1,000) in favor of the plaintiff (or, *in favor of the defendant*; or, if the action is one where the

value of property should be assessed, *and assess the value of the property [taken] at the sum of \$—— [and find the sum of \$—— damages for the detention thereof]*, or where the defendant has proven a counter-claim against the plaintiff, *in favor of the defendant against the plaintiff for the sum of \$——*), and so say we all.

Attach signatures of all the jurors.

§ 547. There is a reprehensible course, which is often taken by jurors who are in a hurry to leave for home, or for the purpose of attending to their own business, namely, the unconscientious desire or willingness to agree to *anything* for the purpose of getting away. There have been cases in which ten jurors have voted with the remaining two, not because these two had convinced the ten that their opinion or understanding was correct, but simply because the ten feared that the judge might compel them to remain in the jury-room for hours, perhaps, during the night. A gentleman, now a judge, who had, before his elevation to the bench, been a lawyer of extensive practice, particularly in criminal cases, informed us of a case in which he had defended a man charged with murder, and in which the evidence, if it was not sufficient to establish a reasonable doubt as to the guilt of the prisoner, was at least such as tended to lessen the grade of the crime with which the prisoner had been charged. The jury remained out for a long time, and then brought in a verdict of "guilty of murder in the first degree," and the prisoner was sentenced to be hung. Subsequently one of the jurors, on being questioned as to his reasons for rendering such a verdict, replied that he did not believe the prisoner guilty of murder in the first degree, and that there were two jurors besides who did not believe the prisoner guilty to that degree, but they agreed to that verdict because they were anxious and impatient to go home, as the night was near at hand, and as they thought they could not agree on a different verdict, and feared that they might be retained in the jury-room until morning. To denounce such conduct as unjust would convey but a very faint impression of the

enormity of their action in the case; such conduct should be characterized as *murderous*. We repeat what we stated before, namely, that the honest and conscientious opinion of *one* juror, founded upon evidence in the case and supported thereby, is worthy of as much consideration and respect as the opinion of the eleven jurors who are opposed to him.*

§ 548. Jurors should also be careful not to couple their verdict in a criminal case with a recommendation to mercy, unless the circumstances of the case admit of such recommendation. This is frequently done for the purpose of compromising with a few jurors, who would otherwise not agree upon a verdict. But this manner of compromising is wrong, and should be discountenanced; and at times the rendering of such a verdict places the jury in a somewhat questionable position. For instance, where a man stands charged with the crime of "indecent exposure of person," a verdict of guilty, with a recommendation to mercy, would be, to say the least, inconsistent. For a recommendation to mercy means that though the prisoner is guilty, yet there are mitigating circumstances which should recommend him to the mercy of the court; in the case instanced above there can be no mitigating circumstances; if the prisoner is guilty at all, he must stand con-

* The moral responsibility of juries in criminal cases is very great. They have the power to acquit the accused, without regard to the evidence or the judge's charge, and the only restraints upon such a verdict in the United States are their own feelings, and a regard for public opinion, and a proper sense of the general welfare and safety of the community. That well-known constitutional provision founded by the common law, that "no person shall be subject for the same offence to be twice put in jeopardy of life or limb," prevents another trial, or *any review* by writ of error or otherwise, of the act of a court or jury, when a person is tried for a crime and found "*not guilty*." If he is found *guilty*, he can have a review of the proceedings, but the *State* has no right to have a review of a verdict of "*not guilty*." Such verdict of a jury is supreme and final as to the offence for which the accused was tried (*People v. Corning*, 2 *N. Y.* 9; 4 *Black. Com.* 361; *Guernsey's Juries and Physicians on Insanity*, 10).

victed of having committed the act *deliberately*. Where mitigating circumstances, such as youth, temporary insanity, seduction, self-defence, persuasions of stronger minds, and the like exist, and the evidence tending to establish them or any of them is not strong enough to justify the jury in acquitting the prisoner, they may recommend him to the mercy of the court.

§ 549. The attention of the jurors is called to the following rules of evidence, which they should bear in mind: namely, if they come to the conclusion that a witness has testified falsely in any one thing, they may reject the whole of his testimony; in case of a conflict of evidence, they ought to be guided by that which is evidently more truthful, than by that which is clearly exaggerated or colored; they are to be guided by their reason and common sense in judging of the competency, credibility, and intelligence of the witnesses; the *truth*, and the side on which it lies, and not the *number* of witnesses that testify on either side, ought to be taken into consideration by them. In criminal cases, the jury should bear in mind and keep in view this rule, that the evidence against the accused should be such as to *exclude*, to a moral certainty, *every reasonable hypothesis but that of his guilt* of the offence imputed to him, before they can convict; or, in other words, it is not enough that the evidence goes to show his guilt, *but it must be inconsistent with the reasonable supposition of his innocence*. If the jury have a reasonable doubt of the guilt of the accused, they must acquit him. It is proper here, however, to add, that to justify an acquittal, the doubt must not be a figment of the imagination, and must be *more than plausible*—it must be *reasonable, and must arise from the evidence itself*.

§ 550. Jurors should also remember that in civil cases it is but a *probability* for them to render a *correct* decision; their duty is to arrive at a *just* decision. The minds of some men are so constituted that they are unwilling to decide when they entertain a doubt as to the *correctness* of the decision; this frequently contributes to the failure of juries to agree, and is unreasonable. All that is required

and can be expected from jurors is, that they should be satisfied, in every civil case, that the preponderance of proof justifies the decision; and when so satisfied, they should not suffer a doubt to prevent the decision from being made.

§ 551. The jury, after being impaneled, is under the control of the court, and it is usual for the judge to caution its members to hold no conversation, and receive no information with regard to the case on trial. Any misconduct in the presence of the court will be immediately corrected, and, if necessary, punished by the court, which possesses plenary powers for such a purpose.

§ 552. In concluding the first three parts of this chapter, we now briefly sum up their contents:

Before Trial, be sure to enter the proper court-room; be attentive to the calling of the jurors' names by the clerk; converse with no one about the merits of an action to be tried. *During Trial*, pay attention to your oath; also to the evidence; to the witnesses; to the arguments of counsel; to the charge of the judge. *After Trial*, remember your oath; agree on a verdict, if possible; let the conclusion you reach in the case be based upon the evidence submitted in court, and let your deliberations be governed by a sense of CONSCIENTIOUSNESS, REASON, AND JUSTICE.

PART IV.

CHARGE TO TRIAL (OR PETIT) JURORS.

§ 553. A charge should be a clear and explicit statement of the law applicable to the condition of the facts. It frequently and usually includes a *summing up* of the evidence given, to show the application of the principles involved; and in English practice, the term "*summing up*" is used instead of *charge*.

§ 554. Unless there are prohibitory statutory provisions, the judge is entitled to give his opinion on the evidence, commenting as much thereon as he deems con-

ductive to the ends of justice, and as may be necessary to explain its application.*

§ 555. He may also comment upon the presumptions of law to which the evidence gave rise; and it is for him to determine the due degree of weight to be given to such presumptions.†

§ 556. In the trial of actions for the recovery of damages for injuries done to the person or property, it is the duty of the judge to charge the jury whether the case is one in which they should find a verdict for nominal damages only, or for actual or compensatory damages, or for exemplary, punitive, or vindictive damages. And if it is an action in which the jury would be at liberty to find any of the three kinds of damages above mentioned, it is the duty of the judge to charge them in what view of the evidence adduced in that particular case they should find nominal damages only, or actual or compensatory damages only, or the latter, including exemplary, punitive, or vindictive damages.‡

* *Am. Law Reg.*, Jan., 1853; *Com. v. Child*, 10 *Pick.* 252; *State v. Smith*, 10 *Rich.* 341.

† *Attorney-General v. Good*, *McClel. & Y.* 236; *People v. Genung*, 11 *Wend.* 18; *Watson v. People*, 64 *Barb.* 130.

‡ The propriety of allowing damages to be given by way of punishment under any circumstances has been strenuously denied in many of the cases, and the question has given rise to extensive discussion; but the weight of authority is decidedly that such allowance, in a suitable case, is proper. Actions of libel, slander, assault and battery, seduction, false imprisonment, and the like, are those in which this principle is most frequently invoked. Those wishing to trace the discussion of this subject may consult *Donnell v. Jones et al.*, 13 *Ala. N. S.* 490; *Roberts v. Heim*, 27 *Id.* 678; *Hair et al. v. Little et al.*, 28 *Id.* 236; *Clarks v. Bates*, 15 *Ark.* 452; *Edwards et al. v. Beach*, 3 *Day (Conn.)* 447; *Dennison v. Hyde*, 6 *Conn.* 508; *Treat v. Barber*, 7 *Id.* 274; *Merills v. Tarriff M'fg. Co.* 10 *Id.* 384; *Linsley v. Bushnell*, 15 *Id.* 225; *Huntley v. Bacon*, *Id.* 267; *Grable v. Margrave*, 4 *Ill.* 373; *McNamara v. King*, 7 *Id.* 432; *Sherman v. Dutch*, 16 *Id.* 283; *Taber v. Hutson*, 5 *Ind.* 322; *Fleet v. Hollenkemp*, 13 *B. Mour. (Ky.)* 219; *Hawkins v. Riley*, 17 *Id.* 101; *Grant v. McDonough*, 7 *La. Ann.* 447; *Hill v. N. O. R. R. Co.*, 11 *Id.* 292; *Terry v. Fellows et al.*, 21 *Id.* 375; *Austin v. Wilson*, 4

§ 557. In the trial of criminal cases, it is the duty of the judge charging the jury to state to them that they are to give the prisoner at the bar the benefit of every reasonable doubt *arising in the case from the evidence*. And the jury must always pass upon the question whether the prisoner is guilty or not guilty. And the right to sentence the accused when found guilty belongs exclusively to the court.

Cush. (Mass.), 273; *Bell v. Morrison*, 27 *Miss.* 68; *Milburn v. Beach*, 14 *Mo.* 104; *Walker v. Borland*, 21 *Id.* 289; *Whipple v. Walpole*, 10 *N. H.* 130; 1 *Kent Com.* (10 ed.), 630, n.; *Hay v. Cohoes Co.*, 3 *Barb.* 42; *Krom v. Schoonmaker*, *Id.* 647; *King et al. v. Root*, 4 *Wend.* 13; *Fry v. Bennett*, 1 *Abb. Pr.* 289; *Vanderslice v. Newton*, 4 *N. Y.* 130; *Bush v. Prosser*, 11 *Id.* 356; 2 *Greenleaf on Ev.* §§ 253, &c., &c.

CHAPTER VI.

VERDICT AND ITS INCIDENTS—SETTING ASIDE VERDICT.

SECTION 558. *Verdict*, in practice, is the unanimous *decision* made by a jury and reported to the court, under its directions, in various forms, on matters lawfully submitted to them in the course of a trial of a cause.

§ 559. A *partial verdict* in a criminal case is one by which the jury acquit the defendant of a part of the accusation against him, and find him guilty of the residue.*

§ 560. A *public verdict* is one delivered in open court. This verdict has its full effect, and unless set aside, is conclusive on the facts, and when judgment is entered upon it, bars all future controversy in personal actions.

§ 561. A *sealed verdict* is one agreed upon during the adjournment of the court for the day. The strict rule requires that a sealed verdict should be signed by *all the jurors*; but an irregularity in this respect is waived by not objecting to its reception on that ground.†

§ 562. *General and special verdicts* are defined in section 572, *post*, and do not differ from those at common law. The verdict remains to some extent in the power of the jury, and within the direction of the court, *until* the polling of the jury takes place, and until the assent, either express or tacit, is given by the jurors to the verdict, and until the jury is discharged, *and until the jury has ceased to be a jury in the case.*‡

§ 563. In case of mistake, the jury may correct their

* In actions *ex delicto* against several defendants, the jury may acquit some and convict others (*Lockwood v. Bull*, 1 *Com.* 322; *Drake v. Barrymore*, 14 *Johns.* 166; *Lansing v. Montgomery*, 2 *Id.* 382).

† *Green v. Bliss*, 12 *How.* 428.

‡ *Warner v. N. Y. Central Railroad Co.*, 52 *N. Y.* 437.

verdict, after it has been pronounced, before it has been received and recorded; and for the same reason, the court may send them out again to reconsider it.*

§ 564. A court shall not be opened, or transact any business on Sunday, except to receive a verdict or discharge a jury.†

§ 565. Where the foreman of a jury by mistake announces a verdict different from that agreed to by the jury, and the erroneous statement is taken and recorded, the court, upon application made at the same circuit immediately after the entry of the erroneous verdict, has power to correct the record so as to make the verdict conform to the actual finding.‡

§ 566. The rule prohibiting jurors from being heard to impeach or affect a verdict rendered by them does not apply to the case mentioned in the last section, as this application is not to *reverse* their action, but to *establish* it. Upon such application, affidavits of the jurors showing the mistake may be received.§

§ 567. Where a jury is impaneled to try an issue, to make an inquiry, or to assess damages in an action in a court of record or not of record, or in a special proceeding before an officer, if the jurors cannot agree, after being kept together for such a time as is deemed reasonable by the court before which, or the officer before whom they were impaneled, the court or officer may discharge them, and issue a precept for a new jury, or order another jury to be drawn, as the case requires; and the same proceedings

* *Blackley v. Sheldon*, 7 *Johns.* 32; *Wells v. Cox*, 1 *Daly*, 515; *Moss v. Priest*, 19 *Abb.* 314; S. C., 1 *Rob.* 632.

After the jury have rendered a verdict, and are discharged, the court has no power to recall them to amend their verdict (*Levells v. State*, 32 *Ark.* 585).

† *New Code*, § 6; 2 *R. S.* 275, § 7; 3 *R. S.* 6 ed. 438, § 21.

‡ *Dalrymple v. Williams*, 63 *N. Y.* 361.

§ *Ibid*; *Cogan v. Ebdon*, 1 *Burr*, 383; *Sargent v. Dunnison* (defendant's name not mentioned in reports), 5 *Cow.* 106; *Jackson v. Dickenson*, 15 *J. R.* 309; *Roberts v. Hughes*, 7 *M. & W.* 399; *Prussel v. Knowles*, 4 *How. (Miss.)* 90.

must be had before the new jury, as if it was the jury first impaneled.*

§ 568. It is not necessary, in an action in a court of record, to call the plaintiff, when the jurors are about to deliver their verdict; and the plaintiff in such an action cannot submit to a nonsuit after the cause has been committed to the jury to consider of the verdict.†

§ 569. In an action to recover a sum of money only, if a verdict is found, either in favor of the plaintiff, or in favor of a defendant who has set up a counter-claim for a sum of money, the jury must assess the amount of damages. The jury may also, under the direction of the court, assess the amount of the damages where the court directs judgment for the plaintiff on the pleadings.‡

§ 570. Where double, treble, or other increased damages are given by statute, single damages only are to be found by the jury, except in a case where the statute prescribes a different rule. The sum so found must be

* *New Code*, § 1181; 2 *R. S.* 554, § 26 (2 *Edm.* 575), amended.

Where there is a defect in plaintiff's proof, or where there is mistake or surprise, even where defendant has not willfully misled him, the court may allow the plaintiff to withdraw a juror (*People ex rel. Perkins v. Judges, &c.*, 8 *Cow.* 127).

A judge has no right to threaten or intimidate a jury in order to affect their deliberations; they should be left to feel that they act with entire freedom in their deliberations; that, should they continue to disagree, they are not to be exposed to unreasonable inconvenience, nor to receive the animadversion of the court (*Green v. Telfair*, 11 *How.* 262).

The court has no right to inquire into the deliberations of the jury, or to examine any member of that body in regard to the foundation of their finding (*Norton & Co. v. Breitenbach*, 1 *Penn.* [*Pearson*], 467).

† *New Code*, § 1182; *S. C.* Rule 38, made general in its application.

‡ *New Code*, § 1183; part of § 263, *Old Code*.

In an action where the amount in controversy is admitted, and a special verdict establishes the fact that the defendant is liable, there is no necessity to have an assessment of the amount due by the jury (*Bulkley v. Marks*, 15 *Abb. Pr.* 454).

increased by the court, and judgment rendered accordingly.*

§ 571. Where, upon the trial of an issue by a jury, the case presents only questions of law, the judge may direct the jury to render a verdict subject to the opinion of the court.† Notwithstanding that such a verdict has been rendered, the judge holding the trial term may at the same term set aside the verdict, and direct judgment to be entered for either party, with like effect, and in like manner, as if such a direction had been given at the trial. The exception to such a direction may be taken as prescribed in section 994 of this act.

§ 572. A general verdict is one by which the jury pronounces generally, upon all or any of the issues, in favor either of the plaintiff or of the defendant. A special verdict is one by which the jury finds the facts only, leaving the court to determine which party is entitled to judgment thereupon.‡

* *New Code*, § 1184. As rule in *Newcomb v. Butterfield*, 8 *Johns.* 264; *King v. Havens*, 25 *Wend.* 420. As to damages, see *Livingston v. Platner*, 1 *Cow.* 175; *Dubois v. Beaver*, 25 *N. Y.* 123.

† *New Code*, § 1185, as amended in 1879; part of § 265, *Old Code*. See *Mallory v. Wood*, 6 *Duer*, 657; *S. C.*, 3 *Abb. Pr.* 369; 14 *How.* 67.

The proper mode of review of decision of judge on cause tried by him without a jury is by appeal under section 348 of Code (*Id.*).

The facts must be undisputed to permit a direction of a verdict subject to opinion of court (*Partridge v. Norton*, 9 *Hun.* 582; *Wilcox v. Hoch*, 62 *Barb.* 509; *Gilbert v. Beach*, 16 *N. Y.* 608; *Sackett v. Spencer*, 29 *Barb.* 180; *Dickerson v. Watson*, 48 *Barb.* 412).

‡ *New Code*, § 1186; *Old Code*, § 260, amended; *Austin v. Ahearn*, 61 *N. Y.* 6; *Jones v. Brooklyn Life Ins. Co.*, *Id.* 79.

The effect of a general verdict is to settle every question of fact which has been litigated, in favor of the prevailing party (*Wolf v. Goodhue Fire Ins. Co.*, 43 *Barb.* 400; *Murphy v. Lippe*, 35 *N. Y. S. C.* 542).

For definition of special verdict, see *Carr v. Carr*, 52 *N. Y.* 256.

A special verdict should find all the facts, and should state the facts proved, not the evidence (*Eiseman v. Swan*, 6 *Borw.* 669; *Birckhead v. Brown*, 5 *Hill*, 635).

The rendering of a general verdict by the jury, and its reception

§ 573. In an action to recover a sum of money only, or real property, or a chattel, the jury may render a general or a special verdict, in its discretion. In any other action, except where one or more specific questions of fact, stated under the direction of the court, are tried by a jury, the court may direct the jury to find a special verdict upon all or any of the issues. Where the jury finds a general verdict, the court may instruct it to find also specially upon one or more questions of fact stated in writing. The special verdict or special finding must be in writing; it must be filed with the clerk and entered in the minutes.*

§ 574. In Indiana the jury have the right to determine, in their verdict, that a defendant, whom they have convicted of murder in the first degree, shall be punished by death; but the statute alone prescribes the mode in which the penalty shall be inflicted.†

§ 575. Where a special finding is inconsistent with a

by the court without objection either by the judge or the parties, is good, notwithstanding the failure of such jury to find upon certain special questions of fact upon which the court directed them to find (*Moss v. Priest*, 1 *Rob.* 632; *S. C.*, 19 *Abb.* 314).

* *New Code*, § 1187; part of § 261, *Old Code*, remodeled.

As to severing damages where there are several defendants, see *Beal v. Finch*, 11 *N. Y.* 128; *O'Shea v. Kirker*, 8 *Abb. Pr.* 69; *Mitchell v. Milbank*, 6 *T. R.* 199.

The court has no right to require a jury to find a special verdict in an action to recover specific real property; it is their right to find either a general or special verdict (*Griswold v. Dexter*, 62 *Barb.* 648).

As to irregular verdicts, see *Carr v. Carr*, 52 *N. Y.* 251; *Manning v. Monaghan*, 23 *Id.* 539; *Parker v. Laney*, 58 *Id.* 469.

In an action for personal property, the jury should not find general verdict for damages, but should assess value of property and find damages for detention (*Philips v. Melville*, 10 *Hun.* 211; *Glann v. Younglove*, 27 *Barb.* 480).

Interest is always allowed by way of damages; and on promissory notes, goods sold, or money loaned on specified time (*Dox v. Dey*, 3 *Wend.* 356; *Amory v. McGregor*, 15 *Johns.* 24, 38; *Dana v. Fielder*, 12 *N. Y.* 40).

† *Greenley v. State*, 60 *Ind.* 141.

general verdict, the former controls the latter, and the court must render judgment accordingly.*

§ 576. When the jury renders a verdict or finds upon one or more specific questions of fact, stated under the direction of the court, the clerk must make an entry in his minutes, specifying the time and place of the trial, the names of the jurors and witnesses, the verdict, or the questions and findings thereupon, as the case requires; and the direction, if any, which the court gives with respect to the subsequent proceedings; upon the application of the party in whose favor a general verdict is rendered, the clerk must enter judgment in conformity to the verdict, unless a different direction is given by the court, or it is otherwise specially prescribed by law.†

New Trial—Setting aside Verdict.

§ 577. A new trial is a re-hearing of the legal rights of the parties upon disputed facts before another jury, granted by the court on motion of the party dissatisfied with the result of the previous trial, upon a proper case being presented for the purpose. It is either upon the same or different or additional evidence, before a new jury, and probably, but not necessarily, before a different judge.‡

* *New Code*, § 1188; *Old Code*, § 262; *Franchieras v. Henriques*, 6 *Abb. Pr. N. S.* 251; *Dalrymple v. Williams*, 63 *N. Y.* 361; *Collins v. Hasbrouck*, 56 *Id.* 157, rev'g 1 *S. C. (T. & C.)* 36.

On the trial, the judge has no power to change the verdict from one party to the other on the ground that the general verdict is inconsistent with the special finding (*U. S. Trust Co. v. Harris*, 2 *Bosw.* 75; see also *Baker v. Rand*, 13 *Barb.* 153; *Dalrymple v. Williams*, 63 *N. Y.* 361; *Franchieras v. Henriques*, 6 *Abb. Pr. N. S.* 251).

† *New Code*, § 1189; part of § 264, *Old Code*, amended.

When it appears to the court that the verdict of the jury (before it is recorded) is a mistaken one, it may send them back to reconsider it (*Hegeman v. Cantrell*, 40 *N. Y. S. C.* 381; see also *Warner v. N. Y. Central R. R. Co.*, 52 *N. Y.* 437).

‡ 4 *Chitty, Genl. Pract.* 30.

§ 578. The origin of the practice of granting new trials is of extremely ancient date, and consequently involved in some obscurity. Blackstone gives the most connected and satisfactory account of it of any writer.*

§ 579. Courts have in general a discretionary power to grant or refuse new trials according to the exigency of each particular case, either on motion to set aside the verdict, or on appeal, upon principles of substantial justice and equity. The reasons which will induce them to exercise this power are as follow :

- I. Insufficient notice of time and place of trial.
- II. Mistake or omissions in summoning, drawing, excusing or discharging jurors.
- III. Disqualifications of jurors.
- IV. Tricks practiced or attempts made to prejudice the jury.
- V. Misconduct of jury.
- VI. Error of judge.
- VII. Surprise.
- VIII. Newly discovered evidence.
- IX. Excessive damages.
- X. Verdict against the law.
- XI. Verdict against the evidence.
- XII. Obscure or uncertain verdict.

§ 580. The granting of new trials is not limited to civil cases. Where a defendant in a criminal case is convicted, a new trial may be granted him at his solicitation.

§ 581. The only reasons for granting new trials which will be considered in this treatise, are those above mentioned, particularly relating to jurors and juries.†

§ 582. It is well settled that if a jury, after they are sworn in a case and before rendition of verdict, hear other testimony than that rendered in the case, or converse

* 3 *Black. Comm.* 387 &c.

† An order denying a new trial on account of the alleged misconduct of a juror cannot be reviewed in the court of appeals (*Gale v. N. Y. C. & H. R. R. R.*, 8 *N. Y. Weekly Digest*, 245).

with strangers on the subject of the case, it will vitiate the whole procedure.*

§ 583. Thus, where one of the jurors separated from the rest, and obtained from a broker information as to the price of certificates at a particular period, and communicated the same to his fellows, the verdict was set aside on motion.†

§ 584. In an action for damages caused by the poisoning of a brook by defendant, out of which plaintiff's cattle drank, where a juror, while the case was on trial, visited the location and investigated matters about which there was conflicting testimony, and imparted his supposed knowledge to his fellow jurors, it was held ground for a new trial. Jurors must decide cases upon such evidence as is brought before them by the parties to the litigation.‡

§ 585. But where the jury had retired to consider on their verdict, and afterwards came into court to hear explanations from a witness who stated an additional and important fact, not before stated by him, but which fact the court immediately told the jury they were to disregard, it was held that the affidavit of a juror, stating that he founded his verdict entirely upon this additional fact, would not authorize a new trial.§

§ 586. Where a medical witness for the commonwealth, being accidentally present at the hotel when the jury were brought there by the sheriff to be lodged for the night, invited the jury, in the presence of the sheriff, to drink with him, and some of them accepted the invitation, it was ruled that, as this act was inadvertent, but intended only as an act of courtesy, and as it was all in the

* *Hudson v. State*, 9 *Yerg.* 408 ; *Perkins v. Knight*, 2 *N. H.* 474 ; *Bennett v. Howard*, 3 *Day*, 223 ; *Knight v. Freeport*, 13 *Mass.* 218 ; *State v. Tilghman*, 11 *Ired.* 513. As to English practice, see *R. v. Martin*, *Law Rep.*, 1 *C. C.* 378.

† *Brunson v. Graham*, 2 *Yeates*, 166.

‡ *Heffron v. Gallupe*, 55 *Me.* 563 ; *Bowler v. Washington*, 62 *Id.* 312 ; *Winslow v. Morrill*, 68 *Id.* 362.

§ *Hudson v. State*, 9 *Yerg.* 408 ; see *State v. Noblett*, 2 *Jones' Law (N. C.)*, 418.

presence of the sheriff, it was not sufficient to set aside the verdict.*

§ 587. Nor is it any ground for a new trial that the jury passed through crowds of people going to the hotel where they dined, or that they dined at the public table at the hotel under the charge of their officer, no one speaking to or tampering with them.†

§ 588. Nor does the visiting of the jury by a stranger with reasonable refreshments, under the supervision of the officer in charge, vitiate the verdict—no conversation as to the case having taken place.‡

§ 589. But the mere presence of a party to the cause exercises such undue influence as to vitiate the procedure. Thus, where it appeared that the prosecutor had been in the room with the jury during their deliberations, it was held ground for a new trial, though he was acting officially as high sheriff, and though there was no misconduct shown.§

§ 590. If any testimony material to the issue be acted on by the jury, without having been previously submitted in evidence, but be communicated to the jury by one of their number, it will avoid the verdict, if such testimony thus submitted were operative.||

* Thompson's Case, 8 *Gratt.* 638.

† Rowe v. State, 11 *Humph.* 491; Adams v. People, 47 *Ill.* 376; Browning v. State, 33 *Miss.* 47; Jumpertz v. People, 21 *Ill.* 375; see also Gale v. N. Y. C. & H. R. R. R., 13 *Hun.* 1.

‡ Com. v. Roby, 12 *Pick.* 496.

§ McElrath v. State, 2 *Swan*, 378.

It is the duty of the courts to enforce a rigid observance of the provisions of the statutes designed to preserve inviolate the right of trial by jury; and the presence of an unauthorized person during the deliberation of the jury, without any explanation by the State that the rights of the prisoner were *not* prejudiced thereby, is sufficient ground for setting aside the verdict and granting a new trial (*State v. Snyder*, 20 *Kans.* 306).

A communication by a sheriff to a sheriff's jury vitiates the verdict (*Read v. Cambridge*, 124 *Mass.* 567; *S. C.*, 26 *Am. Rep.* 690).

|| Sam v. State, 1 *Swan (Tenn.)*, 61.

§ 591. And so, where an unsworn bystander during the trial stated to one of the jury that the testimony of a witness under examination was true.*

§ 592. And so, where the sheriff handed to the jury, while deliberating, loose papers, purporting to be the evidence in the case, not knowing what the papers consisted of.†

§ 593. But it does not follow that a new trial will be ordered because the jury take into consideration general knowledge of the character of the transaction. Thus, in an indictment for a seditious libel tending to excite public outrages, they referred to the personal knowledge of the jury for proof of the fact that serious riots had for some time back been occurring in the particular neighborhood, and it was held that such a reference was right, such riot forming part of the history of the country.‡

§ 594. Where one of the jury communicated to his fellows mere opinions as to witnesses in the case, this has been ruled to be no ground for a new trial.§

§ 595. But the case is different where the issue is affected by the irregular submission by one juror to the others of material facts connected with the merits.||

§ 596. Thus, where one juror stated to his fellows after they had retired, that he had heard a witness whose credibility was attacked at the trial sworn before the grand jury, and that his statement was the same as he had made on the trial, and it appeared that this statement had much influence in producing the verdict of guilty, it was held that this proceeding was illegal and vitiated the verdict.¶

§ 597. If a juror improperly converses with persons about the case, concerning the character or conduct of

* *Dempsey v. People*, 47 *Ill.* 323.

† *Pound v. State*, 43 *Ga.* 88; *People v. Carnal*, 1 *Park. Cr.* 256.

‡ *R. v. Sutton*, 4 *M. & S.* 532.

§ *Nolen v. State*, 2 *Head.* 520; *Purrinton v. Humphreys*, 6 *Greenl.* 379; *Price v. Warren*, 1 *Hin. & Munf.* 385.

|| *Martin v. State*, 25 *Ga.* 494; *Talmadge v. Northrup*, 1 *Root*, 522; *State v. Andrews*, 29 *Conn.* 100.

¶ *Donston v. State*, 6 *Humph.* 275.

either of the parties to the action, it is good ground to set aside the verdict and grant a new trial.*

§ 598. Where, after a jury has been impaneled and a witness sworn, one of the defendants demands and is granted a separate trial, the jury and witnesses must be re-sworn. To swear the jury and witnesses in a case against two defendants, when only one was on trial, is a mis-trial, and a new trial should follow.†

§ 599. Visiting the scene of the *res gestæ* by a part of a jury under an officer's charge after the case is submitted to them is ground for a new trial.‡

§ 600. The accidental intrusion of a stranger, unless an improper communication is made, will not exact a new trial. Thus, in a Tennessee case, after the jury had retired to a room in the care of an officer to consider their verdict, a person, during the temporary absence of the officer, entered the room, and was seated by invitation from the jury, but no other communication was had with him, and the officer upon his return removed him. A new trial upon that ground was refused, it not appearing that there was any improper motive for the intrusion, or that he made any effort to confer with the jury.§

§ 601. *A fortiori* is this the case when the "visitor" is a qualified officer present for a moment, though specially unsworn, no interference being proved.||

§ 602. After a verdict of guilty had been returned by a jury against an accused, for the offense of obtaining, by false pretenses, the signature of a firm to a check of \$850, and in support of a motion for a new trial affidavits were filed, proving that the bailiff who had the jury in charge, and who had testified on the trial, on the part of

* Sparks v. Wakely, 7 N. Y. Weekly Dig. 80; but see Shomo v. Zeigler, 10 Phila. Rep. 611.

† Babcock v. People, 15 Hun, 347.

‡ Eastwood v. People, 3 Park. Cr. 25; Ruloff v. People, 18 N. Y. (4 E. D. Smith), 179.

§ Luster v. State, 11 Humph. 169; see Hilliard on New Trials (1873), 206.

|| Trim v. Com., 18 Gratt. 983.

the prosecution, to material facts against the prisoner, was with the jury in their room the greater part of the time while they were deliberating on their verdict, and no explanation was made of the presence of the officer with the jury in their consultations together, and the State made no showing that the rights of the prisoner were not prejudiced by the acts and conduct of such officer and witness: *Held*, that the verdict should have been set aside, and a new trial granted.*

§ 603. The mere casual exhibition of evidence is not fatal. Thus, where burglar's tools found on the defendant were, during a recess of the court while the cause was on trial, exhibited, and their use explained in the presence of one of the jurors, with the knowledge of the defendant and his counsel, and no objection is made until after verdict, it was held that the objection was to be regarded as waived.†

§ 604. Even where, during the trial and before verdict, inadvertent remarks to the prejudice of the defendant are made by strangers in the hearing of jurymen, this will not operate to disturb the verdict, if it be shown that such remarks were not promoted by the prosecution or voluntarily entertained and weighed by the jurymen.‡

§ 605. In Connecticut, on the trial of an indictment for an assault with intent to kill, a similar distinction was accepted. Remarks, conveying information disparaging to the defendant, were inadvertently made by a stranger in a stage-coach, in the presence of two of the jurors, while the trial was in progress. This was held to be no reason for new trial, on the ground that the remarks were not invited by the jurors, nor intended to influence them, nor listened to with attention. But it was held to be otherwise as to the same kind of remarks made confidentially by a juror for the term, who was not impaneled in the case, to a juror impaneled, which remarks the latter

* *State v. Snyder*, Sup. Ct. Kansas, June 19, 1878, *Centl. L. J. S. C.*, 20 *Kan.* 306.

† *State v. Rand*, 33 *N. H.* 216.

‡ *State v. Ayer*, 3 *Foster (N. H.)*, 301; *State v. Circuit*, 2 *Vroom*, 249; *Hall's Case*, 6 *Leigh*, 615.

entertained and discussed. A new trial was held to be necessitated by this discussion, since it exhibited a condition of mind on the juror's part inconsistent with an unbiased consideration of the case.*

§ 606. And there is sound reason for this distinction. If jurors are allowed voluntarily to receive and weigh evidence not rendered on trial, no case could be decided fairly. On the other hand, if casual remarks as to the case, made in the presence of a juror, should require a new trial, no case would be decided at all, for there is no case in which one of the parties could not manage to have such remarks made, and thus vitiate the whole proceeding.

§ 607. It is also clear, that as a general rule, the accidental approach of strangers and trivial conversation, unless improper conversation as to the case is entertained, will not avoid the verdict.†

§ 608. Handing five dollars casually to a juror in payment of a debt, by a bystander, without any reference or connection with the case under trial, is no ground for a new trial.‡

§ 609. The presumption of law, however, when an outside communication is proved, is against the privity of the verdict; but this presumption may be overcome by positive evidence.§

§ 610. The court will not permit affidavits to be read imputing improper motives to the jury or tending to impeach their integrity.||

§ 611. Affidavits of third persons as to loose talk of

* *State v. Andrews*, 29 *Conn.* 100.

† *Rowe v. State*, 11 *Humph.* 491; *Stanton v. State*, (8 *Eng.*) 13 *Ark.* 317; *Coker v. State*, 20 *Ark.* 53; *McCann v. State*, 9 *S. & M.* 465; *State v. Tilghman*, 11 *Ired.* 513; *Ned v. State*, 33 *Miss.* 364; *State v. Baker*, 63 *N. C.* 276; *Hilliard on New Trials* (1873), 212; *Eppes v. State*, 19 *Ga.* 102.

‡ *Martin v. State*, 54 *Ill.* 225.

§ *Pope v. State*, 36 *Miss.* 122; *People v. Hartung*, 4 *Park. Cr.* 256; *State v. Anderson*, 4 *Nev.* 265.

|| *Hartwright v. Badham*, 11 *Price*, 383; *Cook v. Green*, *Id.* 736; *Onions v. Naish*, 7 *Id.* 203; *People v. Carnal*, 1 *Park. Cr.* 256.

the jurors respecting their verdict cannot be admitted to impeach the verdict.*

§ 612. It is held, that where a juror has denied on oath before the triers that he formed and expressed an opinion in a criminal case, the affidavit of a single witness to the contrary will not impeach the verdict.†

§ 613. Any misconduct by the prevailing party, intended to affect the jury, and tending so to affect them, will be cause for a new trial.‡

§ 614. An acquittal obtained by fraud or embracery will be no bar to a subsequent indictment.§

§ 615. It is not necessary that such conduct should be traced directly to the prevailing party. Any perversion by means outside of the trial, against which ordinary care could not guard, will justify the court in setting the verdict aside.||

§ 616. Evidence that the prosecutor, by exhibiting papers at places where the jury boarded, had been attempting to bias and influence them, will be sufficient to sustain a motion for a new trial.¶

§ 617. Where papers not in evidence are surreptitiously handed to the jury the verdict will be avoided.**

§ 618. A new trial will be granted when it appears that any unfair trick or artifice had been employed, resulting in a verdict in favor of the party using it.††

* *Drummond v. Lessie*, 5 *Blackf.* 453.

† *Epp's Case*, 19 *Ga.* 102.

‡ 2 *Hale P. C.* 308; *State v. Hascall*, 6 *N. H.* 352; *Knight v. Inhabitants, &c.*, 13 *Mass.* 218; *Bennett v. Howard*, 3 *Day*, 223; *Jeffries v. Randall*, 14 *Mass.* 205; *Amherst v. Hadley*, 1 *Pick.* 38-42; *Cottle v. Cottle*, 6 *Greenl.* 140; *Ritchie v. Holbrook*, 7 *Serg. & R.* 458; *Blaine v. Chambers*, 1 *Id.* 169.

§ *Hilliard v. Nichols*, 2 *Root*, 176.

|| *Willis v. People*, 32 *N. Y.* 715.

¶ *State v. Marshall*, 6 *N. H.* 352; *Coster v. Merset*, 3 *Brod. & Bing.* 272; *Spinely v. De Willott*, 7 *East.* 108.

** *Graves v. Short*, *Cro. Eliz.* 616.

†† *Anderson v. George*, 1 *Burr*, 332; *Boddington v. Harris*, 1 *Bing.* 187; *Jackson v. Warford*, 7 *Wend.* 62; *Hilliard v. Nichols*, 2 *Root*, 176; *Trubody v. Brain*, 9 *Price*, 76; *Niles v. Brackett*, 15 *Mass.* 378.

§ 619. For third parties to communicate with a jury when engaged in its deliberations is an indictable offence, when such communications touch the subject-matter of the trial. In August, 1872, congress passed a stringent act to prevent the continuance of this pernicious practice, as well as to prevent any attempt to influence the administration of justice corruptly, or by the intimidation of jurors. It is entitled "An act to prevent and punish obstruction of the administration of justice in the courts of the United States."

§ 620. A person may be examined as a witness in a cause on which he is sitting as a juror.*

§ 621. A witness whose credibility is impeached is still competent; the jury may disregard his testimony, but are not bound to do so.†

§ 622. The affidavits of jurors are not admissible to impeach their verdict for mistake or error in respect to the merits of the case, or for their own misconduct or that of their fellows.‡

§ 623. So held, on a motion for a new trial made upon affidavits, among them affidavits of jurors, upon the ground of misconduct of the defendant and others interested with him, in conversing with the jurors, of misconduct of the jurors, and of the constable having them in charge.§

§ 624. Jurors cannot be received to qualify by parol testimony matters of record; nor can they be permitted to state matters concerning their deliberations which may be proved (*aliunde*) in another way. From necessity, however, when gross injustice has been wrought from misconduct or misapprehension in their deliberations, they are to be permitted to prove such misconduct or misapprehension. Thus, they are permitted to prove that the case was decided by lot. They may prove that the instructions of the court

* *Manley v. Shaw*, 1 *Car. & M.* 361.

† *Lee v. Schadsey*, 2 *Keyes*, 543; *S. C.*, 3 *Id.* 223.

‡ *Green v. Bliss*, 12 *How.* 428; *Thomas v. Chapman*, 45 *Barb.* 98; *People v. Carnal*, 1 *Park. Cr.* 256.

§ *Williams v. Montgomery*, 60 *N. Y.* 648; *Coster v. Merset*, 3 *Brod. & Bing.* 272; *Clum v. Smith*, 5 *Hill*, 560.

were misunderstood. They may prove that the verdict was agreed to on the representation that the governor would grant a pardon on the jury's recommendation. It is commonly held that a juror, though he cannot be admitted to stultify his own action, may be permitted to prove gross misconduct in his fellows. As a rule, in the United States, an affidavit of the juror cannot be admitted to free his conduct from the imputation of impropriety.*

§ 625. It is not an error for the court to permit the jury when they retire for deliberation to take with them documents and papers read on the trial.†

§ 626. Improper interference with the jury by either party will vitiate the verdict.‡

Polling the Jury.

§ 627. It is the absolute right of a party against whom a verdict is declared, to have the jury polled at any time before the verdict is entered. In polling the jury the inquiry is, "Is this your verdict?" And the court cannot be required to direct the question to be put, "Is this your verdict against each and both the defendants?"§

§ 628. Even when a sealed verdict is rendered the jury may be polled.||

§ 629. In Massachusetts, it has been held that the polling of the jury is not a matter of right.¶

* *Organ v. State*, 26 *Miss.* 78 ; *Ray v. State*, 15 *Ga.* 223 ; *McGuffie v. State*, 17 *Ga.* 497 ; *Sheldon v. Perkins*, 32 *Vt.* 550 ; *Thomas v. Chapman*, 45 *Barb.* 98 ; *People v. Hughes*, 29 *Cal.* 257 ; *Wright v. Ill. Tel. Co.*, 20 *Iowa*, 19 ; *Packard v. United States*, 1 *Iowa*, 225 ; *Crawford v. State*, 2 *Yerg.* 60 ; *Aylett v. Jewell*, 3 *W. & Bl.* 1299 ; *Deacon v. Shreve*, 2 *Zab. N. J.* 176 ; *United States v. Reid*, 12 *How.* 361 ; *French v. Smith*, 4 *Vt.* 363 ; *People v. Backus*, 5 *Cal.* 275.

† *Howland v. Willets*, 9 *N. Y.* 170 ; *Shappener v. Second Ave. R. R. Co.*, 55 *Barb.* 497.

‡ *Reynolds v. Champlain Transportation Co.*, 9 *How.* 7 ; *Dorlon v. Lewis*, *Id.* 1 ; *Nesmith v. Clinton Fire Ins. Co.*, 8 *Abb. Pr.* 141.

§ *John v. State*, 8 *Ired.* 330 ; *Labar v. Koplin*, 4 *N. Y. (4 Comst.)* 547.

|| *Stewart v. People*, 23 *Mich.* 63.

¶ *Com. v. Roby*, 12 *Pick.* 496 ; and see *Wise v. State*, 7 *Rich.* 412.

§ 630. If each juror, on being polled, does not say the verdict is his, the counsel for the unsuccessful party should call the attention of the court to the fact, otherwise he would lose the right to raise the objection.*

§ 631. The right to have a jury polled is recognized in civil as well as criminal cases; and the refusal of the court to allow a jury to be polled, upon the request of one of the parties to the litigation, is error, for which a new trial will be granted.†

§ 632. Either party may require that the jury be polled, and any juror may then dissent from the verdict.‡

§ 633. If, on polling the jury, any juror dissents from the verdict, the jury may be sent out again for further deliberations.§

Separation of Jurors.

§ 634. The general rule is, that the verdict will not be set aside on account of inadvertent irregularity in a jury, even in a capital case, unless it be such as might affect their impartiality, or disqualify them for the proper exercise of their functions.||

§ 635. The separation of the jury without leave is not *per se* a ground for a new trial.¶

§ 636. The doctrine that mere separation should be

* *Green v. Bliss*, 12 *How.* 428.

† *James v. State*, 55 *Miss.* 57.

‡ *Blackley v. Sheldon*, 7 *Johns.* 32; *Fox v. Smith*, 3 *Cow.* 23.

§ 2 *Hale P. C.* 299; *Douglass v. Tousey*, 2 *Wend.* 352; *Burns v. Hoyt*, 3 *Johns.* 255; *Hilliard on New Trials* (1873), 242.

|| *Com. v. Roby*, 12 *Pick.* 496-519; *People v. Douglass*, 4 *Cow.* 26; *State v. Babcock*, 1 *Conn.* 401; *State v. Prescott*, 7 *N. H.* 290; *Beebe v. People*, 5 *Hill.* 32; *Tooele v. Com.*, 11 *Leigh*, 714; *Martin v. Com.*, 2 *Id.* 745; *McCarter v. Com.*, 11 *Id.* 633; *R. v. Woolf*, 1 *Chitty*, 401; *Stone v. State*, 4 *Humph.* 27; *Whitney v. State*, 8 *Mo.* 165; *State v. Fox*, *Ga. Decis.* part 1, 35; *State v. Peter*, *Id.* 46; *State v. Barton*, 19 *Mo.* (4 *Bennett*), 227; *State v. Igo*, 21 *Mo.* (6 *Bennett*), 459.

¶ *Anthony v. Smith*, 4 *Bosw.* 503.

ground for new trial, was pressed with great vigor by the early common-law authorities in all cases, both civil and criminal; it being agreed that by the law of England, "a jury, after the evidence given upon the issue, ought to be kept together in some convenient place, without meat or drink, fire or candle, which some books call an imprisonment, and without speech with any, unless it be the bailiff, and with him only if they be agreed."*

§ 637. A more humane system has since been organized: and in all cases not capital (and in some States even in capital cases) it appears that juries are permitted to separate whenever, in the discretion of the court, it seems proper.†

§ 638. In a capital case before the supreme court of Pennsylvania in 1851, it appeared by the record that "on the 15th of March, 1851, after the jury were sworn, it was agreed by the counsel of the commonwealth and the counsel of the defendant, and agreed by the court, that the jurors sworn in this case be permitted to separate and return to their respective homes, and return to the jury-box on Tuesday morning next, March 18th," when they all attended, and a verdict of murder in the first degree was rendered. The judgment was reversed, and the prisoner ordered back for another trial.‡

§ 639. In Virginia the weight of authority is that in cases of felony it is not necessary, in order to set aside the verdict, to show actual tampering or conversation on the subject of a trial with a jurymen, but that the mere fact of the separation from the custody of the officer is *prima facie* sufficient.§

§ 640. In Tennessee, it has been determined that where there is an unauthorized separation of a jury for fifteen or twenty minutes, it is not necessary for the prisoner to prove that they were tampered with during their

* *Co. Litt.* 227; *Bac. Ab. Verdicts*, pl. 19; *Com. Dig., Inquest F.*

† 1 *Ch. C. L.* 664.

‡ *Peiffer v. Com.*, 3 *Harris*, 471.

§ *Phillips v. Com.*, 19 *Gratt.* 485.

absence; it is sufficient if they might have been. When, however, it was affirmatively shown that no communication with other persons was had, a new trial was refused. In felonies, however, a separation from day to day, even with the prisoner's consent, vitiates the verdict.*

§ 641. During a recess of the court, the jury, without consent of the parties, returned their verdict to the clerk, and then separated for a short time and discussed the verdict with strangers; after recess, the jury was recalled, and in response to the question by the court, stated that they had agreed upon a verdict, which was then handed to the court. *Held*, that such conduct on the part of the jurors did not vitiate the verdict.†

§ 642. Four jurors, having been accepted by both parties, were allowed to separate before the whole jury was completed. *Held*, that when jurors are accepted, they are impeached, though not sworn; and the separation of such accepted jurors is error, for which a new trial will be granted.‡

§ 643. In Louisiana, it is said that in all criminal cases, the separation of the jury, though by leave of the court, and with the consent of the accused and his counsel, will vitiate the verdict if such separation take place after the evidence had been closed and the charge given.§

§ 644. In Minnesota, when the court, after charging the jury, gave them a recess of five minutes, in which they were allowed to leave the court-room and go at large without being in charge of an officer, and without objection from either side, this was held to be ground for a new trial.||

§ 645. In New York, mere separation without permission appears formerly to have been considered *prima*

* *McLain v. State*, 10 *Yerg.* 241; *Jainagin v. State*, *Id.* 529; *Stone v. State*, 4 *Humph.* 27; *Hines v. State*, 8 *Id.* 597; *Wiley v. State*, 1 *Swan (Tenn.)*, 256.

† *James v. State*, 55 *Miss.* 57.

‡ *Grisson v. State*, 4 *Tex. Ct. of App.* 374.

§ *State v. Populus*, 12 *La. Ann.* 710; *State v. Evans*, 21 *Id.* 321.

|| *State v. Parrant*, 16 *Minn.* 178.

facie evidence of misbehavior; but the better opinion now is, that to vitiate the verdict, reasonable suspicion of abuse must exist. "The conclusion from these cases," said SUTHERLAND, J., in the case of *People v. Ransom* (7 *Wend.* 423), "appears to me to be this, that any mere informality or mistake of an officer in drawing a jury, or any irregularity or misconduct in the jury themselves, will not be a sufficient ground for setting aside a verdict, either in a criminal or civil case, where the court are satisfied that the party complaining has not and could not have sustained any injury from it." But where a jury impaneled to try a prisoner upon an indictment for murder were allowed to leave the court-house during the trial, under the charge of two sworn constables, and having left the court-house, two of them separated from their fellows, went to their lodgings, a distance of thirty rods, ate cakes, took some with them on their return, and drank spirituous liquor, though not enough to affect them in the least, and one of them conversed with strangers on the subject of the trial, it was held that though the mere separation was not in itself fatal, the drinking of spirituous liquor, and the conversing on the case were sufficient reasons for a new trial.*

§ 646. After the evidence in a trial for murder had all been submitted, six of the jury, leaving their fellows, went under the charge of an officer on a walk for exercise, in the course of which they visited and viewed the premises where the homicide was alleged to have been committed, and returned after an absence of an hour. No person had been permitted to speak to them, and no improper conduct had taken place. But after conviction and sentence, this was ruled to be good ground for a new trial.†

§ 647. In New Hampshire, Connecticut, North Carolina, Indiana and Missouri, something beyond mere separation must be shown to set aside a verdict.‡

* See SPENCER, Ch. J., 18 *Johns.* 218; *People v. Douglass*, 4 *Cow.* 26; *Horton v. Horton*, 2 *Id.* 589; *Oliver v. Trustees*, 5 *Id.* 284; *People v. Ransom*, 7 *Wend.* 423; *People v. Bebee*, 5 *Hill*, 32.

† *Eastwood v. People*, 3 *Park. Cr.* 25.

‡ *State v. Prescott*, 7 *N. H.* 290; *State v. Babcock*, 1 *Conn.* 401;

§ 648. In South Carolina, the jury, it is said, are not required to remain together, even after they are charged, though the case be capital; and it is ruled that it is within the sound discretion of the presiding judge to allow a juror to leave the jury-box for a brief time, even during the trial of a capital case.*

§ 649. In Mississippi, the tendency of authority is to set aside a verdict after separation, unless it affirmatively appear there was nothing communicated to the jury on the subject of the trial.†

§ 650. In Ohio, by the Code of Criminal Procedure, sections 164-165, "in the trial of felonies, the jury shall not be permitted to separate, after being sworn, until discharged by the court. In the trial of misdemeanors, they shall not be permitted to separate after receiving the charge of the court until discharged."‡

§ 651. In Indiana, a statute exists permitting separation during trial, and before submission of the case.§

§ 652. In Illinois and Arkansas, in case of separation, the burden is said to be on the prosecution to show that the defendant was not prejudiced by the separation.||

§ 653. In California, it was decided that separation without permission does not vitiate a verdict, if it be shown that no injury resulted thereby to the defendant.¶

§ 654. In Georgia, the keeping of the jury in five different rooms in a hotel (that being the most suitable and convenient place which could be provided for them) after

State v. Miller, 1 *Dev. & Bat.* 500; *Wyatt v. State*, 1 *Blackf.* 257; *Porter v. State*, 2 *Carter*, 435; *State v. Brannon*, 45 *Mo.* 329; *Creek v. State*, 24 *Ind.* 151.

* *State v. McKee*, 1 *Bailey*, 651; *State v. McElmurray*, 3 *Strobh.* 33.

† *McCann v. State*, 9 *S. & M.* 465; *Nelms v. State*, 13 *Id.* 500; *Boles v. State*, *Id.* 398; *Hare v. State*, 4 *How.* 194; *Browning v. State*, 33 *Miss.* 48.

‡ *Davis v. State*, 15 *Ohio*, 72; *Hurley v. State*, 6 *Id.* 399; *Poage v. State*, 3 *Ohio St.* 229; *Dobbins v. State*, 14 *Id.* 493.

§ *Evans v. State*, 7 *Ind.* 271.

|| *Jumperty v. State*, 21 *Ill.* 375; *Russell v. People*, 44 *Id.* 508; *Adams v. People*, 47 *Id.* 376; *Cornelius v. State*, 7 *Eng. (Ark.)* 782.

¶ *People v. Symonds*, 22 *Cal.* 348.

adjournment of court, during the trial of a case which lasted several days, it was held was not such a separation as would entitle the prisoner to a new trial.*

§ 655. Separation before case is opened or any evidence given, is always permissible.†

§ 656. In misdemeanors, it is the general practice to permit the jury to separate during the trial.‡

§ 657. Even in felonies less than capital, the jury are generally permitted to separate at the adjournments of the court until the period when, at the close of the trial, the case is finally committed to their charge.§

§ 658. Separation after the jury are sworn, and the case opened, has in capital cases been considered a ground for new trial, even without any evidence that the jury were communicated with concerning the case. And if the object is to exclude tampering, such a precaution is as necessary *before* as *after* the final committal of the case. Yet lately a laxer practice has arisen, based on the difficulty of keeping juries together without sickness or great business inconvenience during protracted trials; and cases are not unfrequent in which, even on capital issues, juries have been permitted to separate at the adjournments of the court down to the period in which the case is finally committed to their deliberation. Nor can it be denied that there is a growing reason for the acceptance of this view. No juries *composed of right materials* can be kept together day and night during the trial of a case which lasts for days, if not for weeks, without great discomfort and risk to themselves, and positive damage to the business community. We have therefore to decide between one of

* *Roberts v. State*, 14 *Ga.* 8; *Burtine v. State*, 18 *Id.* 534; *Epps v. State*, 19 *Id.* 102.

† *McFadden v. Com.*, 11 *Harris*, 12; *Martin v. Com.*, 2 *Leigh*, 745; *Cohron v. State*, 20 *Ga.* 752; *State v. Cucuel*, 2 *Vroom*, 249.

‡ *R. v. Woolf*, 1 *Chitty*, 401; *State v. McKee*, 1 *Bailey*, 651; *Wyatt v. State*, 1 *Blackf.* 157; *State v. Miller*, 1 *Dev. & Bat.* 500; *Ex parte Hill*, 3 *Cow.* 355; *State v. Carstaphen*, 2 *Hayw.* 238; *State v. Bonwell*, 2 *Harrington*, 529.

§ *McCreary v. Com.*, 29 *Penn. St.* 323.

three courses. We must go on with the case, according to the old English fashion, day and night until its termination, or we must make up our juries from idlers, if not vagrants, whose seclusion will be no public loss, and perhaps not much inconvenience to themselves; or if we summon business and family men charged with other duties, and thus competent to decide difficult issues, we must permit such adjournments and separation during trial as will preserve the health and protect the business relations of the jurors. Of course, stringent charge should be made in the latter case to the jurors to listen to nothing out of court on the subject of the case; and these admonitions should be followed not only by new trials, but by severe punishment of the offending jurors if the injunction be not obeyed.*

§ 659. The weight of authority is that the defendant, even in capital cases, can legalize the separation of the jury during the recesses of the court, down to the period when the case is given to them for deliberation by the charge of the court. But such consent does not, it has been held, operate to legalize a trial by eleven instead of twelve jurors in criminal cases. And supposing it to be a fundamental principle of the common law that a jury, when its deliberations once commence, must be kept together in seclusion until they terminate, it must on like reasoning be held that consent would not validate or legalize a separation of the jury between the charge of the court and the verdict.†

§ 660. During a trial of a civil action, the court having adjourned, one of the jurors, who lived twelve miles

* *Peiffer v. Com.*, 3 *Harris*, 471; *Westley v. State*, 11 *Humph*, 502; *Quinn v. State*, 14 *Ind.* 589; *Woods v. State*, 43 *Miss.* 364; *Jumpertz v. People*, 21 *Ill.* 375; *McLean v. State*, 8 *Mo.* 153; *State v. Frank*, 23 *La. Ann.* 213; *Ponge v. State*, 3 *Ohio St.* 229; *State v. Felton*, 25 *Iowa*, 67; *State v. Anderson*, 2 *Bailey*, 565; *State v. McKee*, 1 *Id.* 651; *State v. Ryan*, 13 *Minn.* 370; *State v. Babcock*, 1 *Conn.* 401; *Eastwood v. People*, 3 *Park. Cr.* 25; *Stephens v. People*, 19 *N. Y.* 549; *State v. McElmurray*, 3 *Strobh.* 33; *Johnson v. State*, 32 *Ark.* 309.

† *Stephens v. People*, 19 *N. Y.* 549; *Ruloff v. People*, 18 *Id.* 279; *Walrath v. State*, 8 *Neb. (Brown)*, 81.

from the court-house, asked the plaintiff to let him ride home with him. The plaintiff assented, and the juror rode with him about ten miles in a three-seated sleigh, plaintiff and the driver on the front seat, two other persons on the middle seat, and the juror and another person on the back seat. Nothing was said about the trial. Subsequently, and before the testimony had been closed, the defendant's counsel became acquainted with these facts, whereupon plaintiff's counsel offered to allow this juror to be excused if defendant's counsel so desired. Defendant's counsel stated he was willing to leave it to the juror's sense of propriety whether he should or should not remain in the jury-box. *Held*, that even if the irregularity would in any event have justified the setting aside of the verdict, the acts and statements of the defendant's counsel constituted a waiver thereof.*

§ 661. There are, however, irregularities other than that of separation, which are considered grounds for new trial. Thus, if the jury receive papers or articles not submitted in evidence, or imperfectly submitted, the verdict will be set aside in civil cases, if resulting from the party concerned in the irregularity; and in all criminal cases, it would seem, if there be a conviction, unless it appear that the error was the result of the misconduct of the defendant himself.†

§ 662. After the jury had been charged and the court adjourned for the day, the jury, occupying the court-room, found the minutes of the trial of the judge holding the court, which were read and commented upon by some of the jurors. These minutes did not contain all the testimony taken on the trial; neither did counsel consent that

* *Gale v. N. Y. Central & H. R. R. Co.*, 13 *Hun*, 1.

† *R. v. Sutton*, 4 *Maule & Sel.* 532; 2 *Hale P. C.* 306; *Whitney v. Whitman*, 3 *Mass.* 405; *Co. Litt.* 297; *Purinton v. Humphreys*, 6 *Greenl.* 379; *Benson v. Fish*, *Id.* 141; *Talmage v. Northrup*, 1 *Root*, 522; *Price v. Warren*, 1 *Hen. & Munf.* 385; *Thompson v. Mallet*, 2 *Bay*, 94; *Jessup v. Eldridge*, *Coze*, 401; *Atkins v. State*, 16 *Ark.* 568; *People v. Page*, 1 *Idaho*, 114; *Yates v. People*, 38 *Ill.* 527; *Com. v. Edgerly*, 10 *Allen*, 263.

they should be used; it was held that the verdict subsequently arrived at by this jury was properly set aside on account of this irregularity.*

§ 663. It was held, however, that where the paper was taken out by the jury through accident, and it was shown that it was not opened, this of itself did not vitiate the verdict; but where it was delivered by design, or where, being opened, it made for the prevailing party, the case was otherwise.†

In New York and Pennsylvania the same distinction has been followed; and such may be considered settled law.‡

§ 664. The prevailing doctrine is that the whole question of the submission of books and papers is for the discretion of the court.§

§ 665. In case of sickness or temporary incapacities as do not permanently touch the competency of the jury, the court may adjourn the jury from day to day until the incapacity is removed.||

§ 666. During the progress of a trial for murder, one of the jurors, while one of the counsel for the prisoner was addressing the jury, had a chill, and was by order of the court placed upon a pallet; during a part of the time he was in a slumber, and did not fully comprehend the whole of the argument, though he had understood the whole of the evidence and all that had been said by counsel previously. The fact that he was asleep was known to the prisoner at the time, but the attention of no one was called to it. It was held that this was not sufficient cause for setting aside the verdict.¶

* *Mitchell v. Carter et al.*, 14 *Hun*, 448.

† *Hix v. Drury*, 5 *Pick*. 296.

‡ *Hackley v. Hastie*, 3 *Johns*. 252; *Sheaff v. Gray*, 2 *Yeates*, 273; *Vicary v. Farthing*, *Cro. Eliz.* 411; *Lonsdale v. Brown*, 4 *Wash. C. C. R.* 148; *Alexander v. Jamieson*, 5 *Binney*, 238; *State v. Tindall*, 10 *Rich. Law (S. C.)*, 212; *Hilliard on New Trials* (1873), 218.

§ *Hilliard on New Trials* (1873), 217.

|| *United States v. Coolidge*, 2 *Gallison*, 364.

¶ *Baxter v. People*, 3 *Gilman*, 368; *S. P., United States v. Boyden*, 1 *Lowell's Dec.* 266.

§ 667. By the constitution of the State of Texas (art. 5, § 13), it is declared that "when pending the trial of any case, one or more jurors, not exceeding three, may die or be disabled from sitting, the remainder of the jury shall have the power to render the verdict. But when the verdict shall be rendered by less than the whole number, it shall be signed by every member concurring in it." Accordingly, held that where a juror became sick so as to be unable to sit longer, and was discharged by the court, and the defendant objected to being tried by eleven men, that such objection was properly overruled, and a new trial properly refused.*

§ 668. Cases may occur in which a juror, by his contumacious disregard of the directions of the court, may make a new trial necessary. This was ruled to be the case in Indiana, where a juror, in disobedience to the repeated directions of the court, took notes of the evidence, which notes he retained.†

Intoxication of Juror.

§ 669. In New York, New Hampshire, Indiana, and Iowa, verdicts have been set aside because spirituous liquor was given to the jury during their deliberations.‡

§ 670. In New York, however, the contrary doctrine is now accepted.§

§ 671. And it was declared by Judge STORY, in a capital case, not to be sufficient to avoid the verdict to show that some of the jurors drank ardent spirits during the trial when the prisoner's counsel consented in open court to this indulgence to those whose health might require it,

* *Ray v. State*, 4 *Tex. Ct. of App.* 450.

† *Cheek v. State*, 35 *Ind.* 492.

‡ *Denison v. Collins*, 1 *Cow.* 111; *Rose v. Smith*, 4 *Id.* 17; *Brant v. Fowler*, 7 *Id.* 562; *State v. Bullard*, 16 *N. H.* 139; *State v. Baldy*, 17 *Iowa*, 39; *Ryan v. Harrow*, 27 *Id.* 494; *Davis v. State*, 35 *Ind.* 496.

§ *Wilson v. Abrahams*, 1 *Hill*, 207.

unless it was also shown that the indulgence was grossly abused and operated injuriously to the prisoner.*

§ 672. In Virginia, it is not misbehavior in a juror, between adjournment of the court in the evening and its meeting next morning, to drink spirituous liquors in moderation.†

§ 673. In Tennessee, where spirituous liquors were furnished by the officer to the jury, during the trial, of which they drank, but not to excess, or so as to disqualify them from an intelligent performance of their duty, it was held no ground for a new trial.‡

§ 674. And in Pennsylvania, New Jersey, Indiana, Nevada, Mississippi, Louisiana, Illinois and Missouri, the same opinion has recently been held.§

§ 675. Though in capital cases it seems otherwise in Texas.||

§ 676. Clearly, however, intoxication by any of the jury during their deliberations is ground for setting aside the verdict.¶

§ 677. And so it has been properly held in Ohio, that the separation of a juror from his fellows, after the case has been finally submitted, and before they have agreed upon a verdict, for the purpose of obtaining and drinking intoxicating liquors, when not explained or shown to be excusable, is such misconduct of the juror as will entitle the prisoner to a new trial.**

§ 678. If a juror, during the progress of a trial for

* *Coleman v. Moody*, 4 *H. & M.* 1; *United States v. Gilbert et al.*, 2 *Sumner*, 21; *Stone v. State*, 4 *Humph.* 27; *Com. v. Roby*, 12 *Pick.* 496.

† *Thompson's Case*, 8 *Gratt.* 638.

‡ *Rowe v. State*, 11 *Humph.* 491.

§ *Pope v. State*, 36 *Miss.* 121; *State v. Upton*, 20 *Mo.* 397; *State v. Cucuel*, 2 *Vroom, N. J.* 249; *Creek v. State*, 24 *Ind.* 151; *Richardson v. Jones*, 1 *Nev.* 403; *State v. Caulfield*, 23 *La. Ann.* 140; *Davis v. People*, 19 *Ill.* 74; *Com. v. Beale*, *Phila.* 1854.

|| *Jones v. State*, 13 *Tex.* 168.

¶ *Hogshead v. State*, 6 *Humph.* 59; *Pelham v. Page*, 1 *Eng. (Ark.)* 535.

** *Weis v. State*, 22 *Ohio St.* 486.

homicide, should drink intoxicating liquor, with other curative agents, as a medicine, without medical advice, he does not thereby vitiate the verdict when there is nothing to show that the effects of the liquor which he drank were intoxicating, or when there is nothing to show that he drank the liquor without the knowledge of the prisoner or his counsel.*

Casting Lots and Other Irregularities.

§ 679. Where the jury have cast lots, or resorted to chance in any way whatever to determine their verdict, a new trial will be ordered.†

§ 680. Where each of the jurors made an estimate of what he thought proper as damages, and an average was struck between the whole, which they had agreed upon beforehand to adopt, and did ultimately render as their verdict, the court held the result as void.‡

§ 681. Where, however, such a method of arriving at an estimate is taken, without any previous agreement by which the jurors bind themselves individually to adopt the quotient, but where each juror reserves to himself the right of dissenting, and where all after consideration elect the result as a reasonable measure of damages, this is no objection to the verdict.§

§ 682. The same distinction will apply to cases where the indictment covers several degrees, and where, if the result be produced by lot, the verdict will be set aside; but where the result is a compromise, *e. g.*, where murder

* *State v. Murphy*, 33 *Iowa*, 270.

† *Hale v. Cove*, 1 *Strange*, 642; *Parr v. Seames*, *Barnes*, 438; *Mellish v. Arnold*, *Bunb.* 51; *Crabtree v. State*, 3 *Sneed (Tenn.)*, 302; *Birchard v. Booth*, 4 *Wis.* 67; see also *Monroe v. State*, 5 *Ga.* 85; *Hilliard on New Trials* (1873), 160.

‡ *Smith v. Cheetham*, 3 *Caines*, 57; *Roberts v. Failis*, 1 *Cow.* 238; *Harvey v. Rickett*, 15 *Johns.* 87; *Warner v. Robinson*, 1 *Root*, 194.

§ *Dana v. Tucker*, 4 *Johns.* 487; *Shobe v. Bell*, 1 *Randolph*, 39; *Grinnell v. Phillips*, 1 *Mass.* 541; *Cowperthwaite v. Jones*, 2 *Dallas*, 55; *Dooley v. State*, 28 *Ind.* 239.

in the second degree is found as a mean between murder in the first degree and manslaughter, the finding will rarely be disturbed.*

§ 683. And where one of the jury through a mistaken sense of duty thought he ought to assent to the views of a majority, and thereby concurred in a verdict of murder, such mistake was held no ground for a new trial.†

§ 684. And so where the jury concurred in opinion as to the guilt of the prisoner, but differed as to the length of the time for which he should be sentenced to the penitentiary; and they agreed that each one should state the time for which he would send him to the penitentiary, and that the aggregate of these periods divided by twelve should be the verdict. After it was done, they struck off the odd months, and all agreed to the verdict, understanding what it was. It was held that this was not misbehavior in the jury for which the verdict would be set aside and a new trial awarded.‡

§ 685. Where, however, a juror was not satisfied of the guilt of the prisoner, but assented to a verdict of guilty under an impression (suggested by his fellow-jurors) that the governor would pardon the defendant if the jury by their verdict recommended it; it was held in Tennessee that this was sufficient cause to set aside the verdict.§

§ 686. In the same State, where great levity was exhibited by the jury in their deliberations, and where the result, though not produced by lot, was reached by a course of frivolous experiments having but an imperfect bearing on the issue, the verdict was set aside.||

§ 687. And so a juror's affidavit that he believed the prisoner was innocent, and that he assented to a verdict of guilty under the belief induced by the assertions of his

* *Dooley v. State*, 28 *Ind.* 239; *Hilliard on New Trials* (1873), 161.

† *Com. v. Drew*, 4 *Mass.* 391; *Galvin v. State*, 6 *Cald. (Tenn.)* 283.

‡ *Thompson's Case*, 8 *Gratt.* 638.

§ *Crawford v. State*, 2 *Yerg.* 60.

|| *Jim v. State*, 4 *Humph.* 289.

fellow-jurors that there were fatal defects in the proceedings which would prevent the prisoner from being sent to the penitentiary, and that the governor would pardon the defendant if recommended to mercy in the verdict, was held in the same State sufficient to set aside the verdict.*

§ 688. And so, where the juror's affidavit was that he yielded against his judgment and conscience, because a great majority of the jury favored the verdict.†

§ 689. Collateral levity on the part of the jury will be no ground to set aside a verdict, unless it appeared that such levity interfered with their deliberations.‡

Pre-adjudication.

§ 690. When it appears, after trial, that a juror had beforehand prejudged the case, but had omitted to avow such conclusion before the trial, or when asked as to opinion on *voir dire* had given false answers, and such formation of opinion was unknown to the party at the time, a new trial will be granted.§

§ 691. Thus, it was held a sufficient reason for a new trial that one of the jurors, some time before the trial, had

* *Cochran v. State*, 7 *Humph.* 544; approving *Crawford v. State*, 2 *Yerg.* 60.

† *Galvin v. State*, 6 *Cold. (Tenn.)* 283.

‡ *Com. v. Beale*, *Phila.* 1854.

§ *Dent v. Hundred, &c.*, 2 *Salk.* 645; *People v. Bodine*, 1 *Den.* 281; *United States v. Fries*, 1 *Whart. St. Tr.* 606; *People v. Vermilyea*, 7 *Cow.* 108; *Com. v. Jones*, 1 *Leigh*, 598; *Presburg v. Com.*, 9 *Dana*, 203; *State v. Hopkins*, 1 *Bay*, 373; *Busick v. State*, 19 *Ohio*, 198; *Wade v. State*, 12 *Ga.* 25; *Ray v. State*, 15 *Id.* 223; *State v. Patrick*, 3 *Jones Law (N. C.)*, 443; *Com. v. Gallagher*, 4 *Penn. Law Jour.* 512; *Parks v. State*, 4 *Ohio (N. S.)*, 234; *Keener v. State*, 18 *Ga.* 194; *Heath v. Com.*, 1 *Robin.* 735; *State v. Gillick*, 7 *Clark (Iowa)*, 289; *Norfleet v. State*, 4 *Sneed*, 340; *Brakefield v. State*, 1 *Id.* 215; *Sellers v. People*, 3 *Scam.* 412; *Cody v. State*, 3 *How. (Miss.)* 27; *State v. Burnside*, 37 *Mo.* 343; *Hanks v. State*, 21 *Tex.* 526; *Hilliard on New Trials* (1873), 174-5.

declared "such a man as Fries (the defendant) ought to be hung, who brings on such a disturbance."*

§ 692. The same ruling took place where the foreman had declared that the plaintiff should never have a verdict, whatever witnesses he produced.†

§ 693. And where a juror had stated, on the morning of the trial, that he had come from home for the purpose of hanging every counterfeiting rascal, and that he was determined to hang the prisoner at all events.‡

§ 694. A qualified opinion, however, dependent on a particular state of facts, will be no ground for new trial; and thus, where a juror stated that if it was true the prisoner had made the attempt to commit the crime charged upon him, he would go to the penitentiary, it was held not sufficient ground for a new trial.§

§ 695. A new trial will not be granted because of vague opinions against the prisoner, existing in the minds of several of the jury, in particular.¶

§ 696. Neither will a new trial be granted because a general excitement exists against the prisoner in the community at large at the time of trial.¶

§ 697. Though, if such excitement pervade the jury-box and work an unjust result, the verdict should be set aside.**

* *United States v. Fries*, 1 *Whart. St. Tr.* 606.

† *Dent v. Hundred, &c.*, 2 *Salk.* 645.

‡ *State v. Hopkins*, 1 *Bay*, 373.

§ *Kennedy v. Com.*, 2 *Virg. Cas.* 510; *Com. v. Hughes*, 5 *Rand.* 655; *Brown v. Com.*, 2 *Virg. Cas.* 516; *Poore v. Com.*, *Id.* 474; *Mitchum v. State*, 11 *Ga.* 616; *State v. Ayer*, 3 *Foster (N. H.)*, 301; *Anderson v. State*, 14 *Ga.* 709; *Howerton v. State*, 1 *Meigs*, 262; *Jim v. State*, 15 *Ga.* 535; *Thompson v. State*, 24 *Id.* 297; *State v. Davis*, 29 *Mo.* 391; *State v. Ward*, 14 *La. Ann.* 673; *Com. v. Flanagan*, 7 *Watts & Serg.* 421.

¶ *Poore v. Com.*, 2 *Virg. Cas.* 474; *Com. v. Flanagan*, 7 *Watts & Serg.* 422; *State v. Howard*, 17 *N. H.* 171; *State v. Fox*, 1 *Dutch.* 566; *People v. King*, 27 *Cal.* 507; *Wright v. State*, 18 *Ga.* 383; *Rice v. State*, 7 *Ind.* 332.

¶ *Com. v. Flanagan*, 7 *Watts & Serg.* 422.

** *People v. Acosta*, 10 *Cal.* 195.

§ 698. That a petit juror in a trial for assault and battery had been a member of the grand jury which returned a true bill against the defendant for the same assault and battery, if a sufficient objection, should have been urged when the jury was impaneled, or the respondent should have presented his affidavit that the fact was not then known to him.*

§ 699. It is now well settled that a new trial will not be granted on the ground that the juror was liable to be challenged, if the party had had an opportunity of making his challenge, and knew the facts beforehand.†

§ 700. So where after verdict it was discovered that one of the jurors was an alien, and therefore totally disqualified, it has been held that this is no cause for a new trial. But this question depends chiefly upon statute laws.‡

§ 701. Although prejudice, interest, or relationship is good cause for challenge, yet if the party is aware of this, and does not except when the jury is impaneled, he is deemed to have waived his challenge; and if he learns before the rendering of the verdict that one of the jury had declared that he had made up his mind against him before he was impaneled, he must object at once without waiting for the verdict. After verdict, however, this objection may be taken, if accompanied by affidavit of the party that the fact was not known before the trial.§

* *McGehee v. Shafer*, 9 *Tex.* 20; *State v. Madoil*, 12 *Fla.* 151.

† *R. v. Sutton*, 8 *B. & C.* 417; *George v. State*, 39 *Miss.* 570; *Given's v. State*, 6 *Tex.* 344; *McAllister v. State*, 17 *Ala.* 434; *Hilliard on New Trials* (1873), 163; *Tomer v. Dinsmore*, 8 *Neb.* (Brown), 384.

‡ *State v. Quarrel*, 2 *Bay*, 150; *Chase v. People*, 40 *Ill.* 352; *Brown v. La Crosse*, 21 *Wis.* 51; *Hill v. People*, 16 *Mich.* 351, *contra*; *Hilliard on New Trials* (1873), 167.

§ *Lisle v. State*, 6 *Mo.* 426; *State v. Patrick*, 3 *Jones' Law (N. C.)*, 443; *Keener v. State*, 18 *Ga.* 194; *Parks v. State*, 4 *Ohio (N. S.)* 234; *Romaine v. State*, 7 *Ind.* 63; *Burroughs v. State*, 33 *Ga.* 403; *State v. Parks*, 21 *La. Ann.* 251; *McCorkle v. Binns*, 5 *Binn.* 340; *McKinley v. Smith*, *Hardin*, 167; *Pierce v. Bush*, 3 *Bibb*, 347; *Duning v. Hurlbut*, 2 *Chip.* 45; *Herndon v. Bradshaw*, 4 *Bibb*, 45;

Irregularities in Impaneling.

§ 702. It is a good ground of objection at common law to the jury that they have been improperly chosen, or chosen by an unauthorized officer, or that the officer in attendance had permitted irregularities. Where one who had been on the principal panel was afterwards sworn in under another name as talesman; and where talesmen were summoned, and returned, and placed on the trial, who were incompetent, or who had not been drawn according to the statute, a new trial was ordered.*

If the party, however, is aware of the objections to a juror or talesman and neglects his challenge, no new trial will be granted, as the objection that the juror had not been drawn and returned according to law comes too late after the verdict. Thus, where one of the jury had been drawn more than twenty days before the time when the *venire* was made returnable, exception not having been made till after verdict, a new trial was refused.†

§ 703. And a new trial will not be granted because the clerk, in calling over the jury, pursued the order in which they were impaneled, instead of that in which their names appeared in the *venire*.‡

§ 704. Nor is it ground for new trial that jurors and witnesses in a criminal case are sworn by an acting deputy clerk, who has not been appointed regularly or sworn in.§

Craig v. Elliott, *Id.* 272; Wade v. State, 12 Ga. 25; Miley v. Lebanon Nat. Bank, 1 Penn. (Pearson), 541, § 313 ante.

* Parker v. Thornton, 2 Ld. Raym. 1410; R. v. Hunt, 4 B. & A. 430; R. v. Tremaine, 7 D. & R. 684; Kennedy v. Williams, 2 Nott & McCord, 79; Com. v. Gallagher, 4 Pa. Law Jour. 520.

† State v. Hascall, 6 N. H. 352; R. v. Sullivan, 1 P. & D. 96; Jordan v. Meredith, 3 Yeates, 318; Howland v. Gifford, 1 Pick. 43; State v. Quarrel, 2 Bay, 150; Amherst v. Hadley, 1 Pick. 38.

‡ State v. Slack, 1 Bailey, 330.

§ Mobley v. State, 46 Miss. 501.

§ 705. The setting aside of a verdict on the ground that, from a similarity of names, the wrong juror was served and acted innocently in the matter, rests in the discretion of the court.*

* *Boyer v. Philadelphia & Reading R. R. Co.*, 6 *N. Y. Weekly Dig.* 295.

CHAPTER VII.

MODE OF SELECTION, DUTIES, QUALIFICATIONS, AND CHARGING OF GRAND JURORS.

SECTION 706. It is absolutely necessary that the persons summoned to serve as grand jurors attend promptly at the time mentioned in the notice which they receive requiring them to appear in court, so that the court may, at the earliest possible moment, ascertain whether the number required by statute, which is twenty-three, are present. When, in response to this notice, they have entered the proper court-room, they should be seated, if possible, and be attentive while the clerk calls the names of the jurors.

§ 707. In courts where grand and petit (or trial) jurors are attending the names of the grand jurors are usually called before those of the petit (or trial) jurors. Every grand juror should, on hearing his name called by the clerk, answer "here" or "present" in a loud voice, then take the seat which will be pointed out to him by one of the officers of the court, that he may be impaneled with the other grand jurors.

§ 708. Every grand juror who may desire to be excused from serving, will have the opportunity of stating his reasons therefor to the court before he is sworn. It is entirely within the discretion of the presiding judge to excuse the juror or not, unless he presents a legal excuse to the court. It is, however, within the discretion of the foreman of the grand jury to excuse members thereof after the jurors have been sworn and impaneled, at any time while they are attending to their duties; but in exercising this privilege or authority, he must be careful not to reduce the remaining number below sixteen.*

* See § 713, *post*.

709. After the jurors have been assembled, the court selects one of them to act as foreman, if no challenges are made or exceptions taken. This is the practice in the United States courts, in New York, in Pennsylvania, and in most of the remaining States (see § 753, *post*). In New England, however, the members of the grand jury select their own foreman. The clerk of the court then administers the usual oath to the foreman, which is substantially the same in most of the States. After the foreman has been sworn, the other grand jurors are sworn (for form of oath, see Appendix). The presiding judge then delivers his charge, to which every member of the jury should pay particular attention; they should rise and remain standing during the charge. They then retire to the grand jury room.

§ 710. Upon arriving in their jury-room the foreman calls them to order, and they should immediately proceed to select a clerk or secretary, in accordance with the requirements of the statute (see § 757, *post*). The person so selected should be a correct, ready, and rapid penman. It is his duty to keep the minutes of their proceedings; he is to record the testimony as given by the witnesses; he is to enter the full description and value of the articles or property alleged to have been stolen; he is also to mention the exact time, place and date of the commission of the crime; besides every other particular that he may be advised by the district attorney to record, as being necessary for the drawing of an indictment.*

§ 711. These particulars are essential, because it very frequently happens that a person arrested for the commission of a crime, and brought before a justice of the peace, *waives examination*, as it is called; the effect of this waiving is, that the justice, without examining any witnesses or taking any proof, holds the prisoner to await the action of the grand jury. In such cases, the only records

* Indictment is an accusation by a grand jury to a court having jurisdiction to take proceedings for the arrest and punishment of the offender (*People v. Quigg*, 59 *N. Y.* 86, *ALLEN*, J.).

upon which the district attorney can prepare a proper indictment are the minutes of the grand jury. For that reason, therefore, if for no other, the clerk or secretary should be particular and careful in writing the minutes.

§ 712. In the State of New York, the foreman of every grand jury is, from the time of his appointment to his discharge, authorized to administer the oath to any witness who appears before such grand jury for the purpose of giving evidence in any matter cognizable by them (see § 756, *post*). In some States, any member of the grand jury has the power to administer such oath; but in other States the oath is administered by a magistrate.

§ 713. Sixteen grand jurors must be present to form a quorum for the transaction of business; no business can be transacted by them when there is a smaller number than this present.

§ 714. To find a bill of indictment, it is necessary that at least twelve of the grand jurors should agree or concur in such finding, otherwise the bill is not found or presented, but is ignored (see § 763, *post*).

§ 715. They are authorized to examine evidence for the purpose of determining whether a bill of indictment should be found or ignored; and they are the exclusive judges of the weight and force of the evidence before them.

§ 716. Their duty is neither to try a case or to render a verdict. In considering the evidence while deliberating upon the finding of an indictment, they should ask themselves this question: "If we were sitting as a trial or petit jury for the trial of the person here accused, and if the evidence now before us were presented there, and if it remained uncontradicted, would it be sufficient to convict?" If they can answer this question in the affirmative, they should find a bill of indictment, otherwise they should ignore the bill and not present it.

§ 717. It is usual for the officer of the government, who is called in some States "Prosecuting Attorney," and in others "District Attorney," to bring before the grand jury a case of supposed wrong, with the evidence pertain-

ing thereto, which evidence they consider, without, however, hearing the person or persons accused. If they deem the evidence *sufficient*, the prosecuting officer prepares a bill of indictment according to their direction. It is his duty, when the grand jury require it, to advise them upon all questions of law which arise during the examination of witnesses, or during their deliberations. And it is usual for him to examine the witnesses, though the foreman may discharge this duty, and any juror may question the witnesses (see § 759, *post*).

§ 718. The statute of the State of New York gives the district attorney the right at all times to be present with the grand jury, and give them instructions and information relative to any matter cognizable by them; except when they are expressing an opinion or taking a vote upon any matter before them, at which time neither district attorney, constable, or any other person is permitted to be present. In some States, the district attorney or prosecuting officer may be present, even when they are discussing the propriety of finding an indictment, or when voting upon it; but he must not participate in either the finding or voting. The grand jury should not be *controlled* by this officer, but should act according to their own judgment and reason; moreover, they have the right to refuse such officer's advice, and if in their opinion he is guilty of wrong, they may indict him.

§ 719. The attention of every grand juror is here particularly called to the important parts of the oath which he took, namely: "*You will diligently inquire and true presentment make of such matters, &c., as shall be given you in charge.*" This does not mean that they should find an indictment because a great hue and cry have been raised in the newspapers about the commission of *some* crime, and there is clamor for the indictment of *some* one; but it means that the grand jurors, every one of them, should diligently inquire into the circumstances of every complaint, the credibility of the witnesses who support it, and thereby judge whether the person accused ought to be put on trial or not." This also means that their investigations

should be limited to such matters as may be submitted by the court, or to such as may be left to their consideration by the district attorney or prosecuting officer, or such as may come to their knowledge either from their investigations or from their own observations. But they should not allow private prosecutors in their presence for the purpose of prosecuting accusations. They should particularly scrutinize the evidence submitted to them, charging a person with fraud or false pretences, as the presentment of such charges is frequently used by persons to collect a debt. The criminal law should not be invoked for the collection of debts, and grand jurors should be careful that, by a failure to carefully examine the evidence, they may become parties to such action.

§ 720. They are bound to take the best legal proof of which the case admits, and not to find an indictment upon rumors, reports, probabilities or inferences; and it is the duty of the prosecuting officer to prevent them from receiving any evidence which would not be admissible on the trial. Grand jurors should bear in mind that, though a person against whom they find an indictment is not necessarily guilty, and has an opportunity of proving his innocence before a trial jury, yet, even if he is acquitted at trial, the disgrace of having had an indictment found against him, and of having been compelled to defend himself, will rest upon him. Therefore, the grand jury are again reminded of the words in their oath, to "*diligently inquire.*"

§ 721. The next part of the oath demanding their attention is, "*The counsel of the people (or commonwealth), your fellows and your own, you shall keep secret.*" The obligation imposed upon grand jurors by this, the most important part of their oath, is frequently misunderstood by them. There are many important considerations which require the proceedings of the grand jury to be entirely secret. One object is to prevent the testimony produced before them from being contradicted by subornation of perjury on the part of the persons against whom the bills of indictment were found. Grand jurors may be required

to testify whether the testimony of a witness examined before them is consistent with or different from the evidence given by such witness on the trial of the accused; and they may also be required to disclose the testimony given before them by any person, upon a complaint against such person for perjury, or upon his trial for such offence. In some instances the individual against whom the accusation is made may have great power and influence in the community, and it might be injurious, or even dangerous, to make known the names of those whose arguments or votes, in the secret recess of the grand-jury room, caused that body to agree in finding the bill against him. Besides, such disclosure might expose those who, from a sense of duty and the obligations of conscience, have been compelled to decide against him, to inconveniences, perhaps oppressions and dangers, from which it is intended by this part of their oath surely and effectually to secure every member of that body. Some grand jurors might, through fear of such consequences, be deterred from taking an independent and conscientious course in the discharge of their duty, if the proceedings in their room were not secret, and if that secrecy were not secured by oath; and thus the greatest offenders might, in some instances, escape the punishment which they in justice should receive.

§ 722. By law, it is a misdemeanor for a grand juror to divulge or disclose the finding of any indictment for a *felony* (see § 765, *post*). A felony is an offense for which a person convicted may be sentenced to a State prison. But it is the safest course, and one more in accordance with the oath of the grand juror, not to divulge the finding of *any* indictment; because it may be of as much importance that a person guilty of a misdemeanor be arrested and punished as one guilty of a felony. Another important consideration is to prevent escapes. In many instances, complaints are preferred to the grand jury without any previous proceedings before a magistrate, and before the person against whom complaint is made is in custody. In such case a disclosure of the proceedings in the grand jury room might give the person against whom a bill is found a

chance to escape, and thereby avoid punishment. And in this connection the attention of the grand jurors is called to another reason for secrecy, namely: that where a complaint has been made to them, and the testimony was insufficient to warrant the finding of an indictment, the reputation of the accused ought not to suffer by making known that he had been under suspicion. This injunction of secrecy is not confined to any particular length of time, but is *perpetual*; neither is it confined to a prohibition of a general account of a transaction, or whether a bill is or is not found against a particular individual, but it precludes them from disclosing *anything respecting their finding*.

§ 723. The meaning of the last part of their oath is obvious: "*You shall present no one from envy, hatred or malice, neither shall you leave any one unrepresented for fear, favor, affection, reward, hope of reward or gain; but shall present all things truly as they come to your knowledge, according to the best of your understanding.*" And in connection with this part of their oath, it is but necessary to remark, that the juror, while deliberating upon the finding of an indictment, should examine himself closely, to see whether there is not lurking in the deep recesses of his mind a feeling of enmity, malice, hate, spite, or prejudice, or friendship, love, sympathy, or compassion, which clouds his sense of right and justice, and prevents the honorable discharge of his duty; and if, while thus closely scrutinizing and examining himself he finds that any of these elements are present in his mind, he should at once proceed to divest himself of the same; yet, if this feeling that is present within him is so strong that he is unable to rid himself of it, he should not vote on the question at all.

§ 724. In their deliberations, &c., grand jurors may facilitate their labors by acting in accordance with the instructions herein given to trial jurors (see §§ 533, &c., *ante*). They must be orderly, willing to listen to reason and argument, and willing also to give the same; they must not make long speeches, but in their argument must be brief and pointed.

§ 725. When the grand jury approve or find a bill of indictment, the foreman writes on the back of the bill these words, "A true bill," the date of the finding, and his signature;* when the grand jury "ignore" a bill of indictment, by which is meant that they fail or refuse to find a bill, then the foreman writes on the back of it "We ignore," or "Not a true bill," or the word "Ignoramus," or "Not found," and the date of the ignoring, with his signature. After these indorsements have been made on the bills, the grand jury bring them publicly into court, and the clerk of the court calls all the jurymen by name, who severally answer; then the clerk asks them whether they have agreed upon any bills, and requests them to present the same to the court, thereupon the foreman of the jury hands the indictments to the clerk.

In addition to bills of indictment and specific offences, the grand jury have the right to present to the court such *public wrongs* as in their judgment should be brought to the notice of the court.

§ 726. The substance of the foregoing may be stated in few words, namely: *diligently inquire and deliberate*; prosecute the guilty, protect the innocent. If the evidence is satisfactory, prosecute; if the complaint is urged through

* In the case of *Brotherton v. People*, decided in the New York court of appeals, November 12, 1878, it appeared that the copy of the indictment in the record did not contain the indorsed certificate of the foreman of the grand jury that it was "a true bill," and it was claimed that this might be availed of to prove that there was no certificate. No such point was made on the trial, and the record states that the grand jury appeared in open court, and duly presented the indictment, a copy of which is set forth. It was held that it must be assumed that the indictment was presented according to law; that the certificate of the foreman is no part of the indictment, but is a statutory mode of authenticating it, and the record furnishes evidence that it was so authenticated (7 *N. Y. Weekly Digest*, 445; see, to the same effect, *State v. Freeman*, 13 *N. H.* 488; *State v. Cox*, 6 *Ired.* 440; *Com. v. Walters*, 6 *Dana*, 290; *State v. Creighton*, 1 *N. & McC.* 256; *McGuffie v. State*, 17 *Ga.* 497; *Cherry v. State*, 6 *Fla.* 679; *State v. Calhoun*, 1 *Dev. & Bat.* 374; *State v. Collins*, 3 *Devereaux*, 117; *contra*, *Com. v. Sargent*, *Thach. Crim. Cas.* 116).

improper or malicious motives, or without sufficient evidence, reject the accusation. The jury should remember that the main object of their organization is to have an intelligent and impartial tribunal, inaccessible to any improper influence, to determine the propriety of public prosecutions. They should, therefore, honestly, faithfully, and conscientiously discharge the duties intrusted to them.

The following are the Statutes of the State of New York relating to the Grand Jury.

§ 727. No person can be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in case of the militia when in actual service, and of the land and naval forces in time of war, or which this State may keep, with the consent of congress, in time of peace; and in cases of petit larceny under the regulation of the legislature), unless on presentment or indictment of a grand jury; and in every trial on impeachment or indictment, the party accused is to be allowed counsel, as in civil actions, or he may appear and defend in person.*

§ 728. The supervisors of the several counties of this State, except the city and county of New York, at their annual meetings in each year shall prepare a list of the names of three hundred persons to serve as grand jurors at the courts of oyer and terminer and courts of sessions, to be held in their respective counties during the then ensuing year, and until new lists shall be returned.†

§ 729. The mayor, recorder, and aldermen of the city of New York shall meet on the second Monday of July in each year, as a board of supervisors of that city and county, and shall prepare a list of the names of six hundred persons to serve as grand jurors at the different courts of oyer and terminer and general sessions, to be held in that city during the then ensuing year, and until new lists shall be returned.‡

* 1 R. S. 6 ed. § 12, p. 376; Const. art. 7, § 7.

† 3 R. S. 6 ed. § 1, p. 1015; People v. Harriott, 3 Park. Cr. 112.

‡ 3 R. S. 6 ed. § 2, p. 1015.

§ 730. In preparing such lists, the said boards of supervisors shall select such persons only as they know or have good reason to believe are possessed of the qualifications by law required of persons to serve as jurors for the trial of issues of fact, and are of approved integrity, fair character, sound judgment, and well informed.*

§ 731. Persons exempt by law from serving as jurors for the trial of issues of fact shall not be placed on any lists of grand jurors required by the preceding provisions.†

§ 732. The lists so made out by the said boards of supervisors shall contain the christian and surnames at length of the persons named therein, their respective places of residence, and their several occupations; it shall be certified by the clerk of the board of supervisors, and shall be filed in the office of the clerk of the county within ten days after the first day of the meeting at which the same is herein directed to be made.‡

§ 733. On receiving such list, the county clerk shall write the names of the persons contained therein, with their additions and places of residence, on separate pieces of paper, and shall roll up or fold such pieces of paper, each in the same manner, as near as may be, so that the name written thereon shall not be visible; and shall deposit such pieces of paper in a sufficient box, from which they shall be drawn, as hereinafter provided.§

§ 734. If any justice of the supreme court elected for the district, the mayor and recorder of the city of New York, or any two of them, shall at any time be of opinion that a greater number of persons than that herein required should be returned to serve as grand jurors, they may, by an order under their hands, direct such number to be increased, but such increase shall not exceed one-half the

* 3 R. S. 6 ed. § 3, p. 1015; *People v. Jewett*, 6 *Wend.* 386; see §§ 60 to 86, *ante*.

† 3 R. S. 6 ed. § 4, p. 1015; see §§ 60 to 86, *ante*.

‡ 3 R. S. 6 ed. § 5, p. 1016; *Watkins v. Wilcox*, 6 *N. Y. S. C. (T. & C.)* 544.

§ 3 R. S. 6 ed. § 6, p. 1016.

number herein required to be selected for that city and county.*

§ 735. If the county judge of any other county of this State shall at any time be of opinion that a greater number of persons than that herein required should be returned to serve as grand jurors in their county, he may, by an order under his hands, direct such number to be increased; but such increase shall not exceed one-half the number herein required to be selected for such county.†

§ 736. Upon any order which is authorized by the two last sections being served upon the board of supervisors, they shall, at their next annual meeting, increase the number of persons returned by them to serve as grand jurors pursuant to such order.‡

§ 737. At the time of drawing the names of jurors for the trial of issues of fact in any court of oyer and terminer, and at the time of drawing such jurors for the general sessions in the city of New York, or for any term of the county court in any county at which a sessions may be held by law, the county clerk, in the presence and with the assistance of the sheriff or under-sheriff, and of a county judge or justice of the peace, or two county judges or justices of the peace, who shall have attended for the purpose of drawing the petit jury for such court, shall proceed and draw in and for the city of New York the names of thirty-six persons, and in every other county the names of twenty-four persons, from the box in which the pieces of paper shall have been deposited for that purpose, to serve as grand jurors at such court of oyer and terminer or general sessions, or sessions, as the case may be.§

§ 738. Such drawing shall be conducted, in all respects, in the manner prescribed by law for drawing petit jurors; a minute of such drawing shall be kept, signed, and filed in the like manner; and a list of the persons so drawn, with

* 3 *R. S.* 6 ed. § 7, p. 1016.

† 3 *R. S.* 6 ed. § 8, p. 1016.

‡ 3 *R. S.* 6 ed. § 9, p. 1016.

§ 3 *R. S.* 6 ed. § 10, p. 1016; *People v. Cyphers*, 5 *Park. Cr.* 681.

their additions and places of residence, and specifying for what court they shall have been drawn, shall be made and certified by the clerk and the attending officers, and shall be delivered to the sheriff of the county.*

§ 739. The sheriff shall summon the persons named in such list to attend such court as grand jurors at least six days previous to the sitting of such court, by giving personal notice to each person, or by leaving a written notice at his place of residence with some person of proper age. He shall return such list to the court at the opening thereof, specifying those who were summoned, and the manner in which each person was notified.†

§ 740. The court to which any list of grand jurors so drawn shall be returned by the sheriff shall impose a fine not exceeding twenty-five dollars for each day that any person duly summoned as a grand juror shall, without reasonable cause, neglect to attend. But if it appear that any such person was notified by leaving a written notice at his place of residence, the court shall suspend such fine until the defaulting grand juror shall be notified as provided by law.‡

§ 741. The court may discharge any person from serving as a grand juror in the same cases in which petit jurors may by law be discharged.§

§ 742. When any person drawn as a grand juror shall not attend the court for which he was drawn, or shall be excused for the term only, his name shall be returned into the box of undrawn ballots for that year.||

§ 743. When any person drawn as a grand juror shall have attended and performed his duty as such at any court, the ballot containing his name shall be destroyed, and he shall not be again required to serve as a grand juror during the year for which his name was returned.¶

* 3 R. S. 6 ed. § 11, p. 1016.

† 3 R. S. 6 ed. § 12, p. 1016.

‡ 3 R. S. 6 ed. § 13, p. 1017.

§ 3 R. S. 6 ed. § 14, p. 1017.

|| 3 R. S. 6 ed. § 15, p. 1017.

¶ 3 R. S. 6 ed. § 16, p. 1017.

§ 744. When any person drawn as a grand juror shall be discharged by the court, or excused from attending on account of any disqualification, or for any other cause not being of a temporary nature, the ballot containing his name shall be destroyed.*

§ 745. When the same person shall be drawn as a grand juror and as a petit juror to attend the same court, his name shall be omitted from the list of petit jurors, and another name shall be drawn from the box containing the names of persons returned to serve as petit jurors, and after the completion of the drawing of the petit jurors, the name of such person drawn for the grand jury shall be returned into the box containing the undrawn names of petit jurors.†

§ 746. If any new list of persons to serve as grand jurors shall not be returned to the county clerk before he shall have completed the drawing of the grand jurors for any court, he shall proceed to draw grand jurors, in the manner herein provided, from the box containing the names of those already returned for that purpose, notwithstanding they may have been returned for a year then expired, or which will expire before the end of the term or sitting of the court for which they shall be drawn; and such persons shall be summoned, and shall serve in the same manner and be subject to the same penalties for neglect as if such year had not expired.‡

§ 747. When it shall appear, upon the representation of a county clerk, that there are less than fifty names remaining in the box containing the names of persons returned to serve as grand jurors, any county judge may select from the citizens of the county qualified to serve as grand jurors, and who shall not have served during the preceding twelve months, the names of fifty persons to serve as grand jurors.§

* 3 R. S. 6 ed. § 17, p. 1017.

† 3 R. S. 6 ed. § 18, p. 1017.

‡ 3 R. S. 6 ed. § 19, p. 1017.

§ 3 R. S. 6 ed. § 20, p. 1017.

§ 748. Such names shall be certified to the county clerk, who shall file such certificate in his office, and shall cause such names to be written on distinct pieces of paper, and deposited in the box containing any undrawn names of persons returned to serve as grand jurors, or if there be none, then in a proper box; and from such box, in either case, the clerk shall draw a grand jury to serve for any court of oyer and terminer or sessions, to be held immediately after such drawing.*

§ 749. Such drawing shall be made at the time, and in the same manner, in all respects, as herein provided in respect to persons returned by the supervisors, and the persons drawn shall be summoned in like manner and subject to the same penalties for neglect.†

§ 750. If, at any court of oyer and terminer, or court of sessions, there shall not appear at least sixteen persons duly qualified to serve as grand jurors, who shall have been summoned for that purpose, or if the number of grand jurors attending shall be reduced below sixteen by any of them being discharged or otherwise, such court shall, by an order to be entered in its minutes, require the clerk of the county to draw, and the sheriff to summon, such additional number of grand jurors as it shall deem necessary, which number shall be specified in said order. The clerk of the county in which such court is held shall forthwith, in the presence of said court, proceed publicly to draw from the jury-box containing the names of all persons in attendance, and not excused, who have been drawn to serve as petit jurors for that term of court, the names of as many persons as there shall be additional grand jurors required by said order, and, when such drawing is completed, the said clerk shall make duplicate lists of the persons so drawn, each of which shall be certified by him to be a correct list of the names of the persons so drawn by him, one of which he shall file in his office, and the other he shall deliver to the sheriff of the county. The sheriff shall thereupon proceed

* 3 R. S. 6 ed. § 21, p. 1017.

† 3 R. S. 6 ed. § 22, p. 1018.

to summon the persons mentioned in such list to appear forthwith in the court in which the order requiring the attendance of such jurors shall have been made, and the persons so drawn and summoned, unless excused, shall be grand jurors of said court for every purpose and in every respect as though they had been drawn and summoned as members of the regular panel of grand jurors for said term, and said court is hereby prohibited from completing said grand jury in any other way than under the provisions of this act. After the discharge of said grand jury by the court, the names of the persons so drawn as aforesaid shall be returned to the jury-box from which they were drawn, and said persons shall discharge their duties as petit jurors for the remainder of said court.*

§ 751. The sheriff shall summon such persons accordingly, who shall be bound forthwith to attend and serve, unless excused by the court, in the same manner and subject to the same penalties for neglect as persons duly drawn by the county clerk and summoned by the sheriff as herein provided.†

§ 752. It shall not be necessary for the judges of the county courts, or the justices of the peace of any county, to issue any precept to the sheriff to summon any grand juror for any court of sessions; but the list of persons certified to be drawn for that purpose, by the county clerk and the officers attending such drawing, shall authorize and make it the duty of the sheriff to summon and return such persons as grand jurors.‡

§ 753. There shall not be more than twenty-three nor less than sixteen persons sworn on any grand jury; and from the persons summoned to serve as grand jurors and appearing, the court shall appoint a foreman, and they shall always appoint a foreman in every case where any person

* 3 R. S. 6 ed. § 23, p. 1018; as amended by *Laws of 1876*, c. 366, p. 341.

† 3 R. S. 6 ed. § 24, p. 1018.

‡ 3 R. S. 6 ed. § 25, p. 1018.

already appointed shall be discharged or excused before the grand jury are dismissed.*

§ 754. A person held to answer to any criminal charge may object to the competency of any one summoned to serve as a grand juror before he is sworn, on the ground that he is the prosecutor or complainant upon any charge against such person, or that he is a witness on the part of the prosecution, and has been subpoenaed or been bound in a recognizance as such; and if such objection be established the person so summoned shall be set aside.†

§ 755. No challenge to the array of grand jurors, or to any person summoned to serve as a grand juror, shall be allowed in any other cases than such as are specified in the last section.‡

§ 756. The foreman of every grand jury, from the time of his appointment to his discharge, shall be authorized to administer any oath, declaration or affirmation, in the manner prescribed by law, to any witnesses who shall appear before such grand jury for the purpose of giving evidence in any matter cognizable by them.§

§ 757. Every grand jury may appoint one of their number to be a clerk thereof, to preserve minutes of their proceedings and of the evidence given before them, which minutes shall be delivered to the district attorney of the county, when so directed by the grand jury.||

* 3 *R. S.* 6 ed. § 26, p. 1018; *R. v. Marsh*, 6 *A. & E.* 236.

† 3 *R. S.* 6 ed. § 27, p. 1018; *McNevens v. People*, 61 *Barb.* 308; *Dawson v. People*, 25 *N. Y.* 305; *People v. Jewett*, 3 *Wend.* 314; *S. C.*, 6 *Wend.* 386.

Every grand juror who, with knowledge that a challenge, interposed against him by a defendant, has been allowed, is present at or takes part, or attempts to take part, in the consideration of the charge against the defendant who interposed the challenge, or the deliberations of the grand jury thereon, is guilty of a misdemeanor (*Penal Code, N. Y.* [not yet adopted] § 203).

‡ 3 *R. S.* 6 ed. § 28, p. 1019.

§ 3 *R. S.* 6 ed. § 29, p. 1019.

|| 3 *R. S.* 6 ed. § 30, p. 1019; *People v. Van Horne*, 8 *Barb.* 158; *People v. Dixon*, 3 *Abb. Pr.* 395; *People v. Baker*, 10 *How. Pr.* 567; *People v. Cunningham*, 3 *Park. Cr.* 531.

§ 758. Members of the grand jury may be required by any court to testify whether the testimony of a witness examined before such jury is consistent with or different from the evidence given by such witness before such court, and they may also be required to disclose the testimony given before them by any person, upon a complaint against such person for perjury, or upon his trial for such offence; but in no case can a member of a grand jury be obliged or allowed to testify or declare in what manner he or any other member of the jury voted on any question before them, or what opinions were expressed by any juror in relation to any such question.*

* 3 *R. S.* 6 ed. § 31, p. 1019; *People v. Hulbut*, 4 *Den.* 133-135.

Upon the hearing of a motion to quash an indictment, made on the ground that such indictment was found without the concurrence of twelve of the grand jury, grand jurors may be examined as witnesses to testify before the court as to whether twelve of their number did actually concur or not in the finding of the bill.

The objection that no member of the grand jury could be sworn to disclose their deliberations does not apply to this case; but applies to a case where it is sought to impeach the record in some collateral proceeding; but this is a direct motion before the court in which the record remains, to have it set aside as void or erroneous, and it is necessary that some grand juror must be called upon to testify as to whether a vote was taken, and the result; otherwise the investigation as to those facts would be futile (*People v. Shattuck*, 6 *Abb. New Cas.* 33; *Lowe's Case*, 4 *Greenl.* 439; *contra*, *State v. Fassett*, 16 *Conn.* 457; *State v. Baker*, 20 *Mo.* 238; *People v. Hulbut*, 4 *Den.* 133; *State v. Oxford*, 30 *Tex.* 428; *State v. Brewer*, 8 *Mo.* 373; *Burnham v. Hatfield*, 5 *Blackf. [Ind.]* 21).

The court will not receive an affidavit of a grand juror as to the number of grand jurors who concurred in finding a bill, or for the purpose of impeaching or affecting such finding (*R. v. Marsh*, 6 *Ad. & El.* 236).

But affidavits of grand-jury men in exculpation of members of the jury have been received (*R. v. Upon St. Leonards*, 10 *Q. B.* 827).

Every grand juror who, except when required by a court, willfully discloses any evidence adduced before the grand jury, or anything which he himself or any other member of the grand jury may have said, or in what manner he or any other grand juror may have voted on a matter before them, is guilty of a misdemeanor (*Penal Code*, *N. Y.* [not yet adopted], § 218).

§ 759. Whenever required by the grand jury, it shall be the duty of the district attorney of the county to attend them for the purpose of examining witnesses in their presence, or of giving them advice upon any legal matter, and to issue subpoenas and other process to bring up witnesses.*

§ 760. The district attorney of the county shall be allowed at all times to appear before the grand jury on his request, for the purpose of giving information relative to any matter cognizable by them, and may be permitted to interrogate witnesses before them when they shall deem it necessary, but no district attorney, constable, or any other person except the grand jurors shall be permitted to be present during the expression of their opinion or the giving of their votes upon any matter before them.†

§ 761. If any offence shall be committed during the sitting of any court of oyer and terminer or court of sessions, after the grand jury attending such court shall have been discharged, such court may, in its discretion, by an order to be entered in its minutes, direct the sheriff to summon another grand jury.‡

§ 762. The sheriff shall accordingly forthwith summon such grand jury from the inhabitants of the county qualified to serve as petit jurors, who shall be returned and sworn, and shall proceed in the same manner in all

Grand jurors cannot be examined as witnesses, to impeach their finding, but may be examined in support thereof (*Turner v. State*, 57 *Ga.* 107; *Simms v. State*, 60 *Ib.* 145; *Loyd v. State*, *Ib.*).

Witnesses who have falsely testified before a grand jury may be indicted for perjury, and grand jurors are competent witnesses to prove the facts (*State v. Fassett*, 16 *Conn.* 457; 1 *Ch. C. L.* 322; *Thomas v. Com.*, 2 *Rob.* 795; *State v. Offutt*, 4 *Blackf.* 355; *Huydekoper v. Cotton*, 3 *Watts*, 56; *People v. Young*, 31 *Cal.* 564; *Crocker v. State*, *Meigs*, 127; *State v. Broughton*, 7 *Ired.* 96; *Com. v. Mead*, 12 *Gray*, 167; *Com. v. Hill*, 11 *Cush.* 137; *Perkins v. State*, 4 *Ind.* 222; *contra*, *Imlay v. Rogers*, 2 *Halst.* 347; *State v. Baker*, 20 *Mo.* 338).

* 3 *R. S.* 6 ed. § 32, p. 1019.

† 3 *R. S.* 6 ed. § 33, p. 1019; *People v. Griffin*, 38 *How. Pr.* 477.

‡ 3 *R. S.* 6 ed. § 34, p. 1019.

respects as provided by law in respect to other grand jurors.*

§ 763. No indictment can be found without the concurrence of at least twelve grand jurors; when so found, and not otherwise, the foreman of the grand jury shall certify under his hand that such indictment is a true bill.†

§ 764. Indictments found by a grand jury shall be presented by their foreman, in their presence, to the court, and shall be there filed and remain as public records; but such as are found against any person for a felony, not being in actual confinement, shall not be opened to the inspection of any person except the district attorney until the defendants therein respectively shall have been arrested.‡

§ 765. No grand juror, constable, district attorney, clerk or judge of any court, shall disclose the fact of an indictment having been found against any person for a felony, not in actual confinement, until the defendant in such indictment shall have been arrested thereon; every person violating this provision shall be deemed guilty of a misdemeanor.§

§ 766. The last section shall not extend to any district attorney, sheriff, or other officer making any such disclosure by the issuing or in the execution of any process on such indictment, or in any other way when it shall become necessary in the discharge of any official duty.||

* 3 *R. S.* 6 ed. § 35, p. 1019.

† 3 *R. S.* 6 ed. § 36, p. 1020; *Dawson v. People*, 25 *N. Y.* 403; *People v. Van Horne*, 8 *Barb.* 158; see § 725, *ante*.

‡ 3 *R. S.* 6 ed. § 38, p. 1020; *Dawson v. People*, 25 *N. Y.* 405.

§ 3 *R. S.* 6 ed. § 39, p. 1020; *R. S. Mass.* c. 136, § 13; *Gen. Stat.* c. 171, § 13.

|| 3 *R. S.* 6 ed. § 40, p. 1020.

Every grand juror, district attorney, clerk, judge, or other officer, who, excepting by issuing or in executing a warrant to arrest the defendant, willfully discloses the fact of a presentment or indictment having been made for a felony, until the defendant has been arrested, is guilty of a misdemeanor (*Penal Code, N. Y.* [not yet adopted], § 217).

Statutory Requirements of Presiding Judges of Criminal Courts to Charge Grand Juries.

§ 767. Respecting disclosure of the fact of the finding of any indictment for a felony.*

§ 768. Respecting any offence committed in violation of the law to preserve the purity of elections.†

§ 769. Respecting the violation of law by public officers in demanding, charging, or receiving fees to which they are not entitled by law.‡

§ 770. Respecting the violation of the law against lotteries, and against the unlawful selling of tickets in lotteries.§

§ 771. Respecting the violation of the laws regulating the sale of intoxicating liquors.||

§ 772. Respecting the violation of the laws against usury, which consists of the taking of interest at the rate of more than seven per cent. per annum.¶

§ 773. Respecting frauds in the sale of passenger tickets.**

§ 774. Respecting the violation of the law prohibiting the sale of obscene prints, pictures, literature, &c.††

* 3 R. S. 6 ed. § 39, p. 1021.

† 1 R. S. 6 ed. § 15, p. 453.

‡ 3 R. S. 6 ed. § 8, p. 923.

§ 2 R. S. 6 ed. § 66, p. 925.

|| 2 R. S. 6 ed. § 37, p. 941.

¶ 2 R. S. 6 ed. § 16, p. 1166. This has been changed to *six per cent.* by laws of 1879, to take effect on the 1st day of January, 1880.

** 2 R. S. 6 ed. § 11, p. 1019. Applies to counties of Erie, Albany, and New York.

†† 3 R. S. 6 ed. § 84, p. 981.

CHAPTER VIII.

JURORS IN UNITED STATES COURTS, IN CIVIL AND CRIMINAL
ACTIONS AND PROCEEDINGS.

SECTION 775. The cases brought by the constitution within the judicial power of the United States courts are classified as follows : first, subject matter of jurisdiction ; and second, mode of proceeding. Under the jurisdictional head they are of four classes, *e. g.* : 1. Cases of every description in law and equity arising under the constitution, laws, and treaties of the United States ; 2. Cases of every description affecting and concerning ambassadors, consuls, and other public ministers ; 3. All cases of admiralty and maritime jurisdiction ; 4. Cases and controversies between citizens of different States. The other classification depends solely upon the *mode of proceeding*, and embraces three classes, *e. g.* : *common law cases*, by which are meant cases in which legal rights, duties and offences are to be ascertained in courts of law ; *equity cases*, by which are meant cases in which equitable rights and duties are to be ascertained in courts of equitable jurisdiction ; *and admiralty and maritime cases*, by which are meant cases in which maritime rights, duties, and offences become the subject of judicial cognizance in courts of admiralty and maritime jurisdiction.

§ 776. Jurors, to serve in the courts of the United States, in each State respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned ; and they shall be designated by ballot, lot, or otherwise, according to the mode of forming such juries then practiced in such State court, so far as such mode may be practicable by the courts

of the United States or the officers thereof. And for this purpose, the said courts may by rule or order conform the designation or impaneling of juries, in substance, to the laws and usages relating to jurors in the State courts from time to time in force in such State.*

§ 777. No citizen, possessing all other qualifications, which are or may be presented by law, shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars.†

§ 778. That the per diem pay of each juror, grand or petit, in any court of the United States, shall be two dollars; and that the last clause of section eight hundred of the Revised Statutes of the United States, which refers to the State of Pennsylvania, and sections eight hundred and one, eight hundred and twenty, and eight hundred and twenty-one of the Revised Statutes of the United States, are hereby repealed.‡

§ 779. And that all such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in section eight hundred of the Revised Statutes (§ 776, *ante*), which names shall have been placed therein by the clerk of such court and a commissioner, to be appointed by the judge thereof, which commissioner shall be a citizen of good

* *U. S. R. S.*, title XIII. c. 15, § 800, as amended in 1879; see §§ 778 to 780, *post*.

This act only requires substantial, not literal conformity, and that only as far as practicable (*United States v. Tallman*, 10 *Blatchf.* 21).

† Act of March 1, 1875, c. 114, § 4; *U. S. S.* p. 336.

‡ See note to § 780, *post*.

standing, residing in the district in which such court is held, and a well known member of the principal political party in the district in which the court is held, opposing that to which the clerk may belong, the clerk and said commissioner each to place one name in said box alternately, without reference to party affiliations, until the whole number required shall be placed therein.*

§ 780. But nothing herein contained shall be construed to prevent any judge from ordering the names of jurors to be drawn from the boxes used by the State authorities in selecting jurors in the highest courts of the State; and no person shall serve as a petit juror more than one term in any one year, and all juries to serve in courts after the passage of this act shall be drawn in conformity herewith. *Provided*, That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States on account of race, color, or previous condition of servitude.†

* See note to next section.

† *U. S. Session Laws, Extra Session, 1879; Public Laws, No. 42, § 2.* Approved June 30.

The following are the repealed sections referred to :

§ 800. The last clause of this section read as follows: This section shall not apply to juries to serve in the courts of the United States in Pennsylvania.

§ 801. Jurors, to serve in the courts of the United States in Pennsylvania, shall be designated by lot or otherwise in each district respectively, according to the mode of forming juries to serve in the highest courts of law therein which was practiced before the passage of the act of July 20, 1840, chapter 47, so far as the same shall render such designation practicable by the courts and marshals of the United States. But this provision is subject to the provisions relating to the qualifications and oath of jurors hereinafter contained.

§ 820. The following shall be causes of disqualification and challenge of grand and petit jurors in the courts of the United States, in addition to the causes existing by virtue of section 812 (see § 801, *post*), namely: without duress and coercion to have taken up arms, or to have joined any insurrection or rebellion, giving it aid and comfort; to have given, directly or indirectly, any assist-

§ 781. Jurors shall be returned from such parts of the district from time to time as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur any unnecessary expense or unduly to burden the citizens of any part of the district with such services.*

§ 782. Writs of *venire facias* (see Form, Appendix), when directed by the court, shall issue from the clerk's office, and shall be served and returned by the marshal in person, or by his deputy; or in case the marshal or his deputy is not an indifferent person, or is interested in the

ance in money, arms, horses, clothes, or anything whatever, to or for the use or benefit of any person whom the giver of such assistance knew to have joined, or to be about to join, any insurrection or rebellion, or to have resisted, or to be about to resist, with force of arms, the execution of the laws of the United States, or whom he had good ground to believe to have joined, or to be about to join, any insurrection or rebellion, or to have resisted, or to be about to resist, with force of arms, the execution of the laws of the United States; or to have counseled or advised any person to join any insurrection or rebellion or to resist with force of arms the laws of the United States.

§ 821. At every or any court of the United States, the district attorney, or other person acting on behalf of the United States in said court, may move, and the court in their discretion may require the clerk to tender to every person summoned to serve as a grand or petit juror, or venireman or talesman, in said court, the following oath or affirmation, namely: "You do solemnly swear (or affirm) that you will support the Constitution of the United States of America; that you have not, without duress and constraint, taken up arms or joined any insurrection or rebellion against the United States; that you have not adhered to any insurrection or rebellion, giving it aid and comfort; that you have not, directly or indirectly, given any assistance, in money or any other thing, to any person or persons whom you knew or had good ground to believe to have joined, or to be about to join, said insurrection or rebellion, or to have resisted, or to be about to resist, with force of arms, the execution of the laws of the United States; and that you have not counseled or advised any person to join any insurrection or rebellion against, or to resist with force of arms the laws of the United States." Any person declining to take said oath shall be discharged by the court from serving on the grand or petit jury or *venire* to which he may have been summoned.

* U. S. R. S., title XIII., c. 15, § 802.

event of the cause, by such fit person as may be specially appointed for that purpose by the court, who shall administer to him an oath that he will truly and impartially serve and return the writ.*

§ 783. When, from challenges or otherwise, there is not a petit jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court in which such defect of jurors happens, return jurymen from the bystanders sufficient to complete the panel; and when the marshal or his deputy is disqualified as aforesaid, jurors may be so returned by such disinterested person as the court may appoint, and such person shall be sworn as provided in the preceding section.†

§ 784. When special juries are ordered in any circuit court, they shall be returned by the marshal, in the same manner and form as is required in such cases by the laws of the several States.‡

§ 785. No jury shall be drawn for service exclusively in the circuit court for the northern district of New York, at the adjourned terms thereof required by law to be held at Albany and Utica, but the jury drawn to serve in the district court, held at the same times and places with said adjourned terms, shall be used for the trials of issues of fact arising in civil causes in said circuit court, and the verdicts of said jury and all proceedings upon the trial of said issues shall be of the same effect as if the said jury had been drawn to serve in the said circuit court.§

§ 786. The clerk of the district court for Vermont shall not cause a petit jury to be summoned or returned to any session in which there shall appear to be no issue proper for trial by jury, unless by special order of the judge.||

§ 787. Every grand jury impaneled before any district or circuit court shall consist of not less than sixteen nor more than twenty-three persons. If of the persons summoned less than sixteen attend, they shall be placed on the

* *Id.* § 803.

† *Id.* § 804.

‡ *Id.* § 805.

§ *Id.* § 806.

|| *Id.* § 807.

grand jury, and the court shall order the marshal to summon, either immediately or for a day fixed, from the body of the district, and not from the bystanders, a sufficient number of persons to complete the grand jury. And whenever a challenge to a grand juror is allowed, and there are not in attendance other jurors sufficient to complete the grand jury, the court shall make a like order to the marshal to summon a sufficient number of persons for that purpose.*

§ 788. From the persons summoned and accepted as grand jurors the court shall appoint the foreman, who shall have power to administer oaths and affirmations to witnesses appearing before the grand jury.†

§ 789. No indictment shall be found, nor shall any presentment be made, without the concurrence of at least twelve grand jurors.‡

§ 790. No grand jury shall be summoned to attend any circuit or district court, unless one of the judges of such circuit court or the judge of such district, in his own discretion, or upon a notification by the district attorney that such jury will be needed, orders a *venire* to issue therefor. And either of the said courts may in term order a grand jury to be summoned at such time, and to serve such time as it may direct whenever in its judgment it may be proper to do so. But nothing herein shall operate to extend, beyond the time permitted by law, the imprisonment before indictment found of a person accused of a crime or offence, or the time during which a person so accused may be held under recognizance before indictment found.§

§ 791. The circuit and district courts, the district courts of the Territories, and the supreme court of the District of Columbia may discharge their grand juries whenever they deem a continuance of the sessions of such jurors unnecessary.||

The general term in and for the District of Columbia

* *Id.* § 808.

† *Id.* § 809.

‡ *Id.* c. 18, § 1021.

§ *Id.* c. 15, § 810.

|| *Id.* § 811.

may order two terms of the circuit court to be held at the same time, whenever the business therein shall require it, &c. And petit juries shall be drawn therefor, in the same manner as is provided for in such circuit court, at least ten days before the commencement of any such sitting.*

§ 792. The grand jury impaneled and sworn in any district court may take cognizance of all crimes and offences within the jurisdiction of the circuit court for said district, as well as of said district court.†

§ 793. In the western district of Arkansas, such number of jurors shall be summoned at every term of the district court thereof, to be held at Helena, as may have been ordered at a previous term or by the district judge in vacation. And a grand jury may be summoned to attend any such term when ordered by the court or by the judge in vacation. In case of a deficiency of jurors, talesmen may be summoned by order of the court.‡

§ 794. In the several districts of Kentucky and Indiana, such number of jurors shall be summoned by the marshal, at every term of the circuit and district courts respectively, as may have been ordered of record at the previous term; and in case there is not a sufficient number of jurors in attendance at any time, the court may order such number to be summoned as in its judgment may be necessary to transact the business of the court. And a grand jury may be summoned to attend every term of the circuit or district court, by order of the court. The marshal may summon juries and talesmen in case of a deficiency, pursuant to an order of the court made during the term, and they shall serve for such time as the court may direct.§

§ 795. The circuit and district courts, for either of the districts of North Carolina, may order a grand or petit jury, or both, to attend any special term thereof, by an

* *U. S. Stat.* 1878, 1879, c. 99, § 3, p. 321.

† *U. S. R. S.*, title XIII., c. 15, § 813.

‡ *Id.* § 814.

§ *Id.* § 815.

order to be entered of record thirty days before the day on which such special term is appointed to convene.*

§ 796. The grand and petit jurors for the district court sitting in the western district of South Carolina shall be drawn from the inhabitants of said district who are liable, according to the laws of said State, to do jury duty in the courts thereof; and all jurors shall be drawn during the sitting of the court for the next succeeding term.†

§ 797. In the district of Vermont, it shall be the duty of the circuit court, at its regular sessions, to give in charge to the grand juries all crimes, offences, and misdemeanors which are cognizable, as well in the district court thereof as in the said circuit court.‡

Fees.

§ 798. For actual attendance at any court or courts, and for the time necessarily occupied in going to and returning from the same, jurors shall be allowed three dollars a day during such attendance.§

For the distance necessarily traveled from their residence, in going to and returning from said court by the shortest practicable route, five cents a mile.||

§ 799. The fees and costs to be allowed to the United States attorneys and marshals, to the clerks of the supreme and district courts, and to jurors, witnesses, commissioners, and printers in the Territories of the United States, shall be the same for similar services by such persons as prescribed in chapter 16, title, "THE JUDICIARY," and no other compensation shall be taxed or allowed.¶

Challenges, &c.

§ 800. All artificers and workmen employed in the armories and arsenals of the United States shall be exempted

* *Id.* § 816.

† *Id.* § 817.

‡ *Id.* § 818. § But see § 778, *ante*.

|| *Id.* c. 16, § 852.

¶ *U. S. R. S.*, title XXIII., c. 1, § 1883, see last section.

during their time of service from service as jurors in any court.*

§ 801. No person shall be summoned as a juror in any circuit or district court more than once in two years, and it shall be sufficient cause of challenge to any juror called to be sworn in any cause that he has been summoned and attended said court as a juror at any term of said court held within two years prior to the time of such challenge.†

§ 802. Where the offence charged is treason or a capital offence, the defendant shall be entitled to twenty, and the United States to five peremptory challenges. On the trial of any other felony, the defendant shall be entitled to ten, and the United States to three peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section. All challenges, whether to the array or panel, or to individual jurors for cause or favor, shall be tried by the court, without the aid of triers.‡

§ 803. If, in the trial of a capital offence, the party indicted peremptorily challenges jurors above the number allowed him by law, such excess of challenges shall be disallowed by the court, and the cause shall proceed for trial in the same manner as if they had not been made.§

§ 804. At the trial in summary cases, if by jury, the United States and the accused shall each be entitled to three peremptory challenges. Challenges for cause in such cases shall be tried by the court, without the aid of triers.||

§ 805. No person shall be a grand or petit juror in any court of the United States upon any inquiry, hearing or trial of any suit, proceeding or prosecution based upon or

* *Ib.* title XVII., § 1671.

† *Ib.* title XIII., § 812. See § 780, *ante*.

‡ *Ib.* § 819.

§ *Ib.* title XIII., c. 18, § 1031.

|| *Ib.* title XLVIII., c. 9, § 4303.

arising under the provisions of title "CIVIL RIGHTS" [U. S. R. S. § 1980 (§ 806), *post*], and of title "CRIMES" [U. S. R. S. title LXX., c. 4., § 5404 (§ 808), *post*], for enforcing the provisions of the Fourteenth Amendment to the Constitution, who is in the judgment of the court in complicity with any combination or conspiracy in said titles set forth; and every grand and petit juror shall, before entering upon any such inquiry, hearing or trial, take and subscribe an oath, in open court, that he has never, directly or indirectly, counseled, advised, or voluntarily aided any such combination or conspiracy.*

Wrongfully Influencing Jurors, &c.

§ 806. If two or more persons, in any State or Territory, conspire to deter, by force, intimidation or threat, any party or witness in any court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property, on account of his having so attended or testified, or to influence the verdict, presentment or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating in any manner the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person or class of persons to the equal protection of the laws; the party so injured or deprived of any of his rights or privileges as a citizen of the United States, may have an action for the recovery of damages occasioned by such injury or deprivation against any one or more of the conspirators.†

* *Ib.* § 822.

† U. S. R. S. title XXIV., § 1980, subdivisions second and third.

§ 807. If two or more persons in any State or Territory conspire to deter, by force, intimidation or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property, on account of his having so attended or testified, or to influence the verdict, presentment or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment or indictment lawfully assented to by him, or of his being or having been such juror; each of such persons shall be punished by a fine of not less than five hundred dollars, nor more than five thousand dollars, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment.*

§ 808. Every person who corruptly or by threats or force, or by threatening letters, or any threatening communications, endeavors to influence, intimidate, or impede any grand or petit juror of any court of the United States in the discharge of his duty; or who corruptly, or by threats or force, or by threatening letters, or any threatening communications, influences, obstructs, or impedes, or endeavors to influence, obstruct or impede, the due administration of justice therein, shall be punishable by a fine of not more than one thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment.†

§ 809. Every person who attempts to influence the action or decision of any grand or petit juror upon any issue or matter pending before such juror, or before the jury of which he is a member, or pertaining to his duties, by writing or sending to him any letter or any communication, in print or writing, in relation to such issue or matter, without the order previously obtained of the court before which the juror is summoned, shall be punishable by a fine of not more than one thousand dollars, or by imprisonment not more than six months, or by both such fine and imprisonment.‡

* *Id.* § 5406.

† *Id.* § 5404.

‡ *Id.* § 5405.

Accused to Receive List of Jurors, &c.

§ 810. When any person is indicted of treason, a copy of the indictment and a list of the jury and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each juror and witness, shall be delivered to him at least three entire days before he is tried for the same. When any person is indicted of any other capital offence, such copy of the indictment and list of the jurors and witnesses shall be delivered to him at least two entire days before the trial.*

When Indictment not Necessary.

§ 811. At the summary trial of offences against the laws for the protection of person or property engaged in commerce or navigation, it shall not be necessary that the accused shall have been previously indicted, but a statement of complaint, verified by oath, in writing, shall be presented to the court, setting out the offence in such manner as clearly to apprise the accused of the character of the offence complained of, and to enable him to answer the complaint. The complaint or statement shall be read to the accused, who may plead to or answer the same, or make a counter-statement.

The trial shall thereupon be proceeded with in a summary manner, and the case shall be decided by the court, unless, at the time for pleading or answering, the accused shall demand a jury, in which case the trial shall be upon the complaint and plea of not guilty.†

Trial by Jury.

§ 812. The trial of issues of fact in circuit courts shall

* *U. S. R. S.*, title XIII. c. 18, § 1033.

† *U. S. R. S.*, title XLVIII., c. 9, § 4301.

be by jury, except in cases of equity and of admiralty and maritime jurisdiction, and except as otherwise provided in bankruptcy, and by the next section.*

§ 813. Writs of error, bills of exception and appeals shall be allowed in all cases from the final decisions of the district courts to the supreme courts of all the Territories, respectively, under such regulation as may be prescribed by law; but in no case removed to the supreme court shall trial by jury be allowed in that court.†

Trial by the Court—Waiving Jury.

§ 814. Issues of fact in civil cases in any circuit court

* *U. S. R. S.*, title XIII., c. 7, § 648.

There cannot be a second trial by a jury drawn from the same panel the first jury were drawn from at the same term of court, except by consent of parties (*Wilson v. Barnum*, 1 *Wall. Jr.* 347).

A jury may be discharged from giving any verdict when the court deems such act necessary, and to further the ends of justice (*United States v. Perez*, 9 *Wheat.* 579).

To allow the withdrawal of a juror is entirely within the discretion of the court; and surprise arising out of the exclusion of evidence is not good ground for such withdrawal (*Foote v. Silsby*, 1 *Blatchf.* 445; aff'g 14 *How.* 281).

But this discretion should only be exercised in extraordinary circumstances (*United States v. Coolidge*, 2 *Gall.* 364).

Where a juror was withdrawn from a jury impaneled to try an indictment, without the consent of the accused, and the court not deeming such withdrawal a necessity, it was held that the defendant was entitled to be acquitted (*United States v. Watson*, 8 *Int. Rev. Rec.* 170).

During the opening of the case by plaintiff's counsel, one of the jurors fell ill; it was held proper for the court to discharge him and have another impaneled in his stead (*Ib.*).

In a United States court, where, in an action of tort, a defendant allows a default to be taken, the plaintiff has no constitutional right to an assessment of damages by a jury—that being a matter of practice, and dependent, to some extent, on the practice of the State courts in which the Federal court is held. In Connecticut, it is proper that such assessment be made by the court (*Raymond v. Danbury & N. R. R. Co.*, 14 *Blatchf.* 133).

† *U. S. R. S.*, title XXIII., c. 1, § 1869.

may be tried and determined by the court, without the intervention of a jury, whenever the parties or their attorneys of record file with the clerk a stipulation, in writing, waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury.*

Admiralty.

§ 815. In admiralty cases the judge is not separately commissioned, neither is the court separately constituted. When sitting to try an admiralty cause, the court is an admiralty court, and when sitting to try a criminal it is a criminal court; and the court passes from the trial of an admiralty cause to a common law cause, and *vice versa*, and becomes alternately at the same sitting, according to the nature of the cause on trial, an admiralty court, an equity court, and a common law court of civil or criminal jurisdiction, without any change of style, form, officers or records, except that each case is conducted according to the established course of proceeding appropriate to its class. It is thus always the same court, whether acting in one class of cases or another.†

§ 816. Before the passage of the act of 1875 (see next section), it was well settled that, although the Constitution provided that all crimes shall be tried by a jury, and that in all suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and omitted to include in the same provision admiralty and maritime civil cases and cases in equity, that this omission proved that it was not intended to include them, and that the proper force of that amendment to the Constitution is that in all cases, *except equity and admiralty cases*, the parties shall have the right to a trial by jury, if they demand it.‡

* *U. S. R. S.*, title XIII., c. 7, § 649.

† *Benedict's Admiralty*, § 200.

‡ *Ib.* § 202.

§ 817. In the year 1875, an "Act to facilitate the disposition of cases in the supreme court of the United States and for other purposes" was passed, by which the following was enacted: That the circuit courts of the United States, in deciding causes of admiralty and maritime jurisdiction on the instance side of the court, shall find the facts and conclusions of law upon which it renders its judgments and decrees, and shall state the facts and conclusions of law separately. And in finding the facts, as before provided, said court may, upon the consent of the parties who shall have appeared and put any matter of fact in issue, and subject to general rules in the premises, as shall be made and provided from time to time, impanel a jury of not less than five and not more than twelve persons, to whom shall be submitted the issues of fact in such cause under the direction of the court, as in cases at common law. And the finding of such jury, unless set aside for lawful cause, shall be entered of record and stand as the finding of the court, upon which judgment shall be entered according to law. The review of the judgments and decrees entered upon such findings by the supreme court upon appeal shall be limited to a determination of the questions of law arising upon the record, and to such rulings of the circuit court, excepted to at the time, as may be presented by a bill of exceptions, prepared as in actions at law.*

§ 818. That said courts, when sitting in equity for the trial of patent causes, may impanel a jury of not less than five and not more than twelve persons, subject to such general rules in the premises as may from time to time be made by the supreme court, and submit to them such questions of fact arising in such cause as such circuit court shall deem expedient; and the verdict of such jury shall be treated and proceeded upon in the same manner and with the same effect as in the case of issues sent from chancery to a court of law and returned with such findings.†

* *U. S. S. c. 77*, vol. 18, p. 315, § 1.

† *Id.* § 2.

Involuntary Bankruptcy.

§ 819. On the return day or adjourned day of the order requiring the debtor to appear and show cause why he should not be declared a bankrupt, if the notice has been duly served or published, or is waived by the appearance and consent of the debtor, the court shall proceed summarily to hear the allegations of the petitioner and debtor, and may adjourn the proceedings from time to time on good cause shown, and shall, if the debtor on the same day so demands, in writing, order a trial by jury at the first term of the court at which a jury shall be in attendance to ascertain the fact of the alleged bankruptcy.*

* *U. S. R. S.* title LXI. c. 3, § 5026.

A jury can only be demanded on return day, except by consent of parties, when an adjourned day may be held to be the same as the return day (*Matter of Pupke*, 1 *Benedict*, 342).

Where a petition in involuntary bankruptcy alleged that the bankrupt had concealed himself, to avoid service of legal process, and the debtor demanded a trial by jury, it was held that on such trial the creditor must prove the facts alleged in his petition, notwithstanding the forty-first section of the bankruptcy act (*U. S. R. S.* § 5027), which provides that "if, on such hearing or trial, the debtor proves to the satisfaction of the court, or of the jury, as the case may be, that the facts set forth in the petition are not true," the proceedings shall be dismissed (*Matter of Hoppock*, 2 *Benedict*, 478).

A jury trial may be allowed when a petition is filed to obtain rent which became due while the premises were occupied by the assignee (*Buckner v. Jewell*, 14 *Nat. Bank. Reg.* 286).

Where the allegations are that the bankrupt, in contemplation of bankruptcy, had made a fraudulent preference, creditors are entitled to jury trial without having previously specially prayed therefor (*In-re Lawson*, 2 *Nat. Bank. Reg.* 396).

There is no provision for the trial of specifications, filed in opposition to the discharge of a bankrupt, by jury (*Coit v. Robinson*, 9 *B. R.* 289).

CHAPTER IX.

JURIES IN JUSTICES' COURTS AND COURTS OF SPECIAL SESSIONS.

PART I.

JURIES IN JUSTICES' COURTS.

SECTION 820. After issue joined, and before the justice shall proceed to an investigation of the merits of the cause by an examination of a witness or the hearing of any other testimony, either of the parties, or the attorney of either of them, may demand of the justice that the cause be tried by a jury.*

§ 821. Upon the demand of a trial by jury, the justice shall issue a *venire*, directed to any constable of the county wherein the cause is to be tried, commanding him to summon twelve good and lawful men, in the town where such justice resides, qualified to serve as jurors, and not exempt from serving on juries in courts of record, who shall be in nowise of kin to the plaintiff or defendant, nor interested in such suit, to appear before such justice, at a time and place to be named therein, to make a jury for the trial of the action between the parties named in such *venire*.†

§ 822. No constable who shall have been employed to act, or who shall have acted, as attorney or agent in respect to any claim or matter in controversy, shall summon any jury, in any justice's court, which shall be summoned to try any question in relation to any such claim or matter.‡

§ 823. The parties may agree on a number of jurors less than six to try the cause. And the justice shall direct

* 3 R. S. 6 ed. § 84, p. 413; *Bank of United States v. Davis*, 2 Hill, 461.

† 3 R. S. 6 ed. p. 413, § 85; *Baxter v. Putney*, 37 How. Pr. 140; *Robbins v. Gorham*, 26 Barb. 588; *Rice v. Buchanan*, 41 Id. 148.

‡ 3 R. S. 6 ed. p. 413, § 86.

in the *venire* the summoning of so many jurors as shall be double the number so agreed upon.*

§ 824. If the action in which such issue shall be joined be between two towns, the *venire* shall direct the constable to summon twelve good and lawful men of the county, qualified, and not exempt, and not interested, as hereinbefore provided, to make a jury for the trial of such action.†

§ 825. The justice issuing a *venire* shall deliver, or cause the same to be delivered, to some constable of the county, disinterested between the parties, and against whom no reasonable objection shall have been made by either party.‡

§ 826. The constable to whom any *venire* shall be delivered shall execute the same fairly and impartially, and shall not summon any person whom he has reason to believe biased or prejudiced for or against either of the parties; he shall summon the jurors personally, and shall make a list of the persons summoned, which he shall certify and annex to the *venire* and return to the justice.§

§ 827. It is ground of challenge to the array, that the constable who served the *venire* acted as advocate for the other party, unless the defendant expressly agreed that such constable might summon the jury. ||

§ 828. It is no ground of challenge to the array, that the constable who served the summons appeared and pleaded for the defendant, nor that he had retained an attorney to appear for the defendant. ¶

§ 829. An objection that the jury is irregularly summoned must be made before the jurors are sworn.**

§ 830. At the trial of the cause, the names of the persons so returned, and who shall appear, shall be respectively

* 3 R. S. 6 ed. p. 413, § 87; *Cannan v. Newell*, 1 Den. 26.

† 3 R. S. 6 ed. p. 413, § 88.

‡ 3 R. S. 6 ed. p. 414, § 89.

§ 3 R. S. 6 ed. p. 414, § 90; *Brisbane v. Macomber*, 56 Barb. 376; *Porter et al. v. Cass*, 7 How. Pr. 443.

|| *Watkins v. Weaver*, 10 Johns. 107.

¶ *Mills v. Pulver*, 3 Den. 84.

** *New York v. Mason*, 4 E. D. Smith, 142; S.C., 1 Abb. Pr. 344.

written on several and distinct pieces of paper, as nearly of one size as may be. And the constable, in the presence of the justice, shall roll up or fold such pieces of paper, as nearly as may be in the same manner, and put them together in a box, or some convenient thing.*

§ 831. The justice shall then draw out six (or such number as the parties may have agreed upon) of such papers, one after another; and if any of the persons whose names shall be so drawn shall be challenged and set aside, then such further number shall be drawn as will make up the number required, after all legal causes of challenge allowed by the justices. The persons so drawn appearing, and approved as indifferent, shall compose the jury to try the cause.†

§ 832. The justice may, of his own motion, set aside a juror for intoxication.‡

§ 833. If the justice improperly overrule a challenge to a juror, it may be assigned for error, after a trial on the merits.§

§ 834. If a sufficient number of competent jurors shall not be drawn, the justice may supply the deficiency by directing the constable to summon any of the bystanders or others, who may be competent, and against whom no cause of challenge shall appear, to act as jurors in the cause.||

§ 835. If the constable to whom the *venire* shall have been delivered do not return the same as thereby required, or if a full jury shall not be obtained in the manner

* 3 R. S. 6 ed. p. 414, § 91; *People ex rel. Livermore v. Hamilton, Jr.*, 39 N. Y. 107; *Baxter v. Putney*, 37 How. Pr. 141; *Brisbane v. Macomber*, 56 Barb. 377.

† 3 R. S., 6 ed., p. 414, § 92; *People ex rel. Livermore v. Hamilton, Jr.*, 39 N. Y. 110; *Brisbane v. Macomber*, 56 Barb. 379; *Baxter v. Putney*, 37 How. Pr. 141.

‡ *Bullard v. Spoor*, 2 Cow. 430.

§ *Blake v. Millspaugh*, 1 Johns. 316.

|| 3 R. S. 6 ed. p. 414, § 93; *Brisbane v. Macomber*, 56 Barb. 379; *Robbins v. Gorham*, 26 Barb. 590; *People v. Webster*, 14 How. Pr. 245.

declared in the preceding section, the justice shall issue a new *venire*.*

§ 836. To each juror the justice shall administer an oath or affirmation, well and truly to try the matter in difference between — —, plaintiff, and — —, defendant, and, unless discharged by the justice, a true verdict to give, according to evidence.†

§ 837. After the jury shall be duly sworn, they shall sit together and hear the proofs and allegations of the parties, which shall be delivered publicly in their presence.‡

§ 838. After hearing the proofs and allegations, the jury shall be kept together in some convenient place under the charge of a constable, until they all agree upon their verdict. And for that purpose, the justice shall administer to such constable the oath, as prescribed by statute (see form, Appendix, *post*).§

§ 839. If the parties agree that the jury may retire without the attendance of a constable, it is a waiver of all irregularity in the conduct of the jury in the room.||

§ 840. Unless the jury retire to consider their verdict, the constable need not be sworn to attend them.¶

§ 841. If, after the jury have retired, they request the justice to inform them whether a certain point of evidence had been given, it is an error for him to answer their inquiry, except by the consent or in the presence of the parties.**

* 3 *R. S.* 6 ed. p. 414, § 94; *Brisbane v. Macomber*, 56 *Barb.* 379; *Robbins v. Gorham*, 26 *Barb.* 590; *People v. Webster*, 14 *How. Pr.* 245.

† 3 *R. S.* 6 ed. p. 414, § 95; *Brisbane v. Macomber*, 56 *Barb.* 379; *Robbins v. Gorham*, 26 *Barb.* 590; *People v. Webster*, 14 *How. Pr.* 245.

‡ 3 *R. S.* 6 ed. p. 414, § 96.

§ 3 *R. S.* 6 ed. p. 415, § 101; *Durfee v. Eveland*, 8 *Barb.* 46; *Hancock v. Salmon*, *Id.* 564; *Duglass v. Blackman*, 14 *Barb.* 381.

|| *Tower v. Hewitt*, 11 *Johns.* 134.

¶ *Fink v. Hall*, 8 *Johns.* 437; *Douglass v. Blackman*, 14 *Barb.* 38.

** *Bunn v. Crowl*, 10 *Johns.* 239; *Rogers v. Mouthrop*, 13 *Wend.* 274.

§ 842. If the justice give the jury his minutes of the trial after they have retired, it is ground for reversing the judgment.*

§ 843. With the consent of the parties, a witness may be privately re-examined by the jury after they have retired.†

§ 844. The fact that the jury, during their deliberations, had in their possession the notes of testimony taken by the counsel for the successful party is ground for reversing the judgment.‡

§ 845. The justice may send the jury back to reconsider their verdict before it is recorded. The general law as to trial by jury applies to justices' courts.§

§ 846. After the case has been submitted to the jury the justice cannot withdraw it and nonsuit the plaintiff.||

§ 847. When the jurors have agreed on their verdict, they shall deliver the same to the justice publicly, who shall enter it in his docket. Previous to receiving it, the justice shall call the plaintiff; if he be absent, and no one appear for him, the verdict shall not be received.¶

§ 848. Whenever any justice shall be satisfied that a jury sworn in any cause before him cannot agree on their verdict, after having been out a reasonable time, he may discharge them, and shall issue a new *venire*, returnable within forty-eight hours, unless the parties shall have consented that the justice may render judgment on the evidence already before him, which in such cases he may do.**

§ 849. Whenever any person who shall be duly sum-

* *Neil v. Abel*, 24 *Wend.* 185.

† *Brown v. Cowdole*, 12 *Johns.* 384.

‡ *Durfee v. Eveland*, 8 *Barb.* 46.

§ *Blackly v. Sheldon*, 7 *Johns.* 32; *Henlon v. Leonard*, *Id.* 200; *Donahue v. Henry*, 4 *E. D. Smith*, 162.

|| *Young v. Hubbell*, 3 *Johns.* 430.

¶ 3 *R. S.* 6 ed. p. 415, § 103; *Oakley v. Van Horn*, 21 *Wend.* 305; *Shove v. Raynor*, 3 *Den.* 78; *Douglass v. Blackman*, 14 *Barb.* 381; *Board of Excise of Marion v. Tuck*, 2 *N. Y. S. C. R. (T. & C.)* 368; *Baum v. Tarpenny*, 3 *Hill*, 76; *Stephens v. Santee*, 49 *N. Y.* 35-38.

** 3 *R. S.* 6 ed. p. 415, § 103; *Furo v. Reynolds*, 20 *Barb.* 275; *Hard v. Shipman*, 6 *Id.* 630.

moned as a juror shall not appear, or, appearing, shall refuse to serve, the justice before whom the *venire* is returnable, upon the certificate of the constable that such juror was personally summoned as a juror, may issue an attachment, to any constable authorized to summon the juror, to bring the person so summoned as a juror, at the time to be named in said precept, before the said justice, and if said juror shall not render a reasonable excuse for his default, at the time named in said precept, the said justice may impose a fine upon him in a sum not to exceed ten dollars. And the justice imposing any fine shall make up and enter in his docket a minute of the conviction, and the cause thereof, and the same shall be deemed a judgment in all respects at the suit of the overseers of the poor of the town. Such judgment may be enforced in manner provided in section eighty-eight of article six of this title. In case the constable to whom such attachment was issued shall make a return to the said justice that the person so summoned as a juror and not appearing cannot be found, the said justice shall issue an attachment to compel the attendance of the defaulting juror, at a future day, to be named in said attachment, which shall be not less than two or more than four days thereafter, and on the appearance of such defaulting juror before such justice under such attachment, the same proceedings shall be had as hereinbefore provided, and the said justice may issue like attachments from time to time, until any or all of said defaulting jurors shall be brought before him.*

The following fees shall hereafter be allowed to jurors for services rendered in justices' courts: For attending to serve as a juror, although not sworn, ten cents; for attending and trying a cause, twenty-five cents.†

* 3 R. S. 6 ed. p. 415, § 104.

† Laws of 1866, c. 692, § 9; 3 R. S. 6 ed. p. 425, § 156.

After an issue of fact has been joined, and at any time before the justice proceeds to an investigation of the merits of the action, by swearing a witness, or receiving evidence, either party, or his attorney, may demand a trial by jury (*New Code*, § 2990).

Where a trial by jury is duly demanded, the justice must issue a

PART II.

JURIES IN COURTS OF SPECIAL SESSIONS.

§ 850. The court of sessions was first created by the colonial legislature, in the year 1744. It, therefore, existed

venire, directed generally to any constable of the county wherein the action is to be tried, commanding him to notify twelve men of the town or city where the justice resides, qualified to serve, and not exempt from serving, as trial jurors in courts of record ; not of kin to the plaintiff or defendant, and not interested in the action, to appear before the justice, at a time and place specified therein, to form a jury for the trial of the action. But if the parties agree upon a number of jurors, less than six, to try the action, the *venire* must direct the constable to notify twice the number so agreed upon (*New Code*, § 2991).

Where the action is between two towns or cities, or between a town and a city, the *venire* must direct the constable to notify twelve men of the county, who are qualified and not exempt, as prescribed in the last section, and who are not interested in the matter at issue, to form a jury for the trial of the action (*New Code*, § 2992).

The justice must deliver the *venire*, or cause it to be delivered, to a constable of the county, disinterested between the parties, who has not acted, or been employed to act, as the attorney or agent of either party, with respect to any claim or matter in controversy in the action, and to whom neither party offers any other reasonable objection. The constable shall not notify any person whom he has reason to believe to be biased or prejudiced, in favor of or against either party ; and he must, in all other respects, execute the *venire* fairly and impartially. He must notify the jurors personally, and indorse upon or annex to the *venire*, and deliver to the justice, a return under his hand, containing a list of the persons notified (*New Code*, § 2993).

For the purpose of procuring a jury to try the action, the justice must prepare, or cause to be prepared, ballots, uniform, as nearly as may be, in appearance, by writing the name of each person returned, who appears, on a separate piece of paper ; the constable, in the presence of the justice, must roll up or fold each ballot, in the same manner as nearly as may be, so as to resemble the others, and so that the name is not visible. The ballots must be deposited in a box, or other convenient receptacle (*New Code*, § 2994).

The justice must then openly draw out, one after another, six of

prior to the first Constitution of this State, which was adopted in the year 1777, and has, ever since, with various

the ballots, or such smaller number thereof as the parties have agreed upon. If a person, whose name is drawn, is challenged and set aside, or is excused, another ballot must be drawn ; and so on successively until the required number of persons is obtained. Those persons constitute the jury to try the action (*New Code*, § 2995).

If a sufficient number of competent jurors is not drawn, the justice may, in his discretion, either issue a new *venire*, or direct the constable to require the attendance of such a number of talesmen from the bystanders, or others, duly qualified, and against whom no cause of challenge appears, as the justice deems sufficient for the purpose (*New Code*, § 2996).

If the constable, to whom the *venire* is delivered, does not return it as required thereby, or if a full jury is not obtained in the manner prescribed in the foregoing sections of this title, the justice must issue a new *venire* (*New Code*, § 2997).

The justice must administer an oath or affirmation to each juror, well and truly to try the matter in difference between — —, plaintiff, and — —, defendant, and, unless discharged by the justice, a true verdict to give, according to the evidence (*New Code*, § 2998.)

After the jurors have been duly sworn, they must sit together and hear the allegations and proofs of the parties, which must be made publicly, in their presence (*New Code*, § 2999).

After hearing the allegations and proofs, the jury must be kept together in a private and convenient place, under the charge of a constable, until they all agree upon their verdict ; and, for that purpose, the justice shall administer to the constable the following oath : “ You swear, in the presence of Almighty God, that you will, to the utmost of your ability, keep the persons sworn as jurors upon this trial together, in a private and convenient place, without any meat or drink, except such as shall be ordered by me ; that you will not suffer any communication to be made to them, orally or otherwise ; that you will not communicate with them yourself, orally or otherwise, unless by my order, or to ask them whether they have agreed upon their verdict, until they are discharged ; and that you will not, before they render their verdict, communicate to any person the state of their deliberations, or the verdict they have agreed upon” (*New Code*, § 3006).

When the jurors have agreed upon their verdict, they must publicly deliver it to the justice, who must enter it in his docket-book. It is not necessary to call the plaintiff before receiving the verdict,

changes and modifications made by the legislature, existed in this State.

§ 851. Trial by jury was wholly unknown in that court until it was created, *sub modo*, by the act of 1824.

The common-law jury, however, has never existed in that tribunal.*

§ 852. If a person arrested upon any charge which may be tried before a court of special sessions, shall elect to be tried by a jury, the justice composing the court shall issue a *venire*, directed to any constable of the county or marshal of the city where the offence is to be tried, commanding him to summon twelve good and lawful men,

and the plaintiff cannot submit to a nonsuit or withdraw the action, after the cause has been committed to the jury (*New Code*, § 3007).

When the justice is satisfied that the jurors cannot agree upon a verdict, after having been out a reasonable time, he may discharge them, and issue a new *venire*, returnable within forty-eight hours; unless the parties consent, and their consent is entered in the justice's docket-book, that the justice may render judgment upon the evidence already before him, which he may do in that case (*New Code*, § 3008).

A person duly notified to attend as a juror, and who fails to attend, or, attending, refuses to serve, without a reasonable excuse, proved by his oath, or the oath of another person, is liable to the same fine, to be imposed and collected, with costs, in like manner, and applied to the same use, as is prescribed in article second of title fourth of this chapter, with respect to a person subpoenaed as a witness, and not attending, or attending and refusing to testify (*New Code*, § 3009).

In an action in a justice's court, of the city of Brooklyn, a trial by jury is waived, unless a party demands it at the time when an issue of fact is joined, and at the same time deposits, with the clerk, one dollar and fifty cents, for the juror's fees, and also one dollar and twenty-five cents for the officer's fees, for notifying the jurors and taking charge of the jury. Where a jury trial is so demanded, the trial may be adjourned until a time fixed for the return of the *venire* (*New Code*, § 3127).

[The sections in this note have not yet been adopted.]

* *Matter of Sweatman*, 1 *Cow.* 144, 151, note *e*; *Murphy v. People*, 2 *Id.* 815, 818, note *b*; *People v. Riley*, 5 *Park. Cr.* 401; *People ex rel. Walker v. Special Sessions*, 4 *Hun*, 442.

qualified to serve as jurors, and not exempt from such service by law, and who shall be in nowise of kin either to the complainant or defendant, to be and appear before such court, at a time no more than three days from the date of the *venire*, and at a place to be named therein, to make a jury for the trial of such offence. The officer to whom such *venire* shall be delivered shall execute the same fairly and impartially, and shall not summon any person whom he shall suspect to be biased or prejudiced for or against the defendant. He shall summon the jurors personally, and shall make a list of the persons summoned, which he shall certify and annex to the *venire*, and return with it to the court.*

§ 853. The names of the persons so returned shall be respectively written upon several and distinct pieces of paper, as nearly of one size as may be, and the officer by whom the *venire* was served, in the presence of the court, shall roll up or fold such pieces of paper, as nearly as may be in the same manner, and put them together in a box, or other convenient thing. The court shall then draw six of such papers, one after another, and if any of the persons whose names shall be so drawn shall not appear, or, appearing, shall be challenged and set aside, then such further number shall be drawn as will be sufficient to make up the number of six, after all legal causes of challenge shall have been allowed. After the jury shall be sworn, they shall sit together and hear the proofs and allegations in the case, which shall be delivered in public, and in the presence of the defendant.†

§ 854. If a sufficient number of competent jurors shall not be drawn, the court may supply the deficiency by directing the constable to summon any of the bystanders or others who may be competent, and against whom no cause of challenge shall appear, to act as jurors in the cause. If the officer to whom the *venire* shall have been delivered

* See note to § 855, *post* ; as to challenges, see § 456, *ante*.

† See note to § 855, *post*. For form of oath, see forms, Appendix, *post*.

shall not return the same as thereby required, the court shall issue a new *venire*, upon which the same proceedings shall be had as upon the first *venire*.*

§ 855. After hearing the proofs and allegations, the jury shall be kept together in some convenient place, until they agree upon a verdict or are discharged by the court, and a constable or marshal shall be sworn, to attend upon the jury, in like manner as upon trials in justices' courts. When the jurors have agreed on their verdict, they shall deliver the same to the court publicly, who shall enter it in the minutes of their proceedings, to be kept by them.†

§ 856. Whenever a magistrate or jury, before whom a criminal cause shall be tried, as aforesaid, shall be satisfied from the evidence and proceedings had before them that the person or persons so charged and tried were complained of and proceeded against without probable cause, and with malicious intent to injure or harass, they may render a verdict for costs against the complainant: whereupon the magistrate shall enter judgment for the amount of such costs, upon which an execution may issue against the property or person of such complainant, in the same manner as upon a judgment rendered for tort by a justice of the peace.‡

No fees shall be allowed to or taken by any juror or witness for any services under this title.§

* See note to next section.

† 3 R. S. 6 ed. p. 1007, §§ 9, 10, 11, 12, 13, 14, 16, 17 and 18; *Vanderwerker v. People*, 5 *Wend.* 530; *People ex rel. Murray v. Justice of Special Sessions*, 12 *Hun*, 533.

‡ 3 R. S. 6 ed. p. 1008, § 22.

§ 3 R. S. 6 ed. p. 1012, § 49; *Laws of 1824*, p. 267, § 50.

CHAPTER X.

SPECIAL JURIES IN SPECIAL MATTERS AND PROCEEDINGS.
(INCLUDING CORONERS' JURIES.)*

- I. Juries in Equity Cases—Waiver of Jury.
- II. Coroner's Jury.
- III. Struck Jury.
- IV. Juries in Surrogates' Courts.
- V. Sheriffs' (or Constables') Jury to Try Title to Personal Property taken under Execution or Attachment.
- VI. Jury to Inquire into Insanity of Person in Confinement under Criminal or Civil Process.
- VII. Jury to Inquire into Insanity of Convict after Sentence of Death.
- VIII. Jury to Inquire into Pregnancy of Female Convict.
- IX. Jury to Appraise Value of Property held under Homestead Exemption Law.
- X. Jury in Proceedings *De Lunatico Inquirendo*.
- XI. Juries in Cases of Forcible Entry and Detainer.
- XII. Jury in Summary Proceedings to Dispossess Tenant.
- XIII. Jury in Proceedings to Lay Out Roads and Highways.
- XIV. Jury to Assess Damages when Highways are Laid Out through Unclosed Lands.
- XV. Juries in Plank Road and Turnpike Cases.
- XVI. Juries in *Ad Quod Damnum* Proceedings.
- XVII. Juries in Highway Encroachment Proceedings.
- XVIII. Juries in Insolvent Debtors' Proceedings.
- XIX. Juries in Creditors' Proceedings to Compel Assignments by Imprisoned Debtors.
- XX. Juries in Habitual Drunkard Proceedings, instituted by the Overseers of the Poor.
- XXI. Juries to Investigate the Origin of Fires.
- XXII. Jury of Inquiry to Assess Damages on Defaults.

Juries in Equity Cases—Waiver of Jury.

§ 857. In each of the following actions an issue of fact

* See § 141, *ante*, as to fine for special jurors failing to attend.

must be tried by a jury, unless a jury trial is waived, or a reference is directed :

1. An action in which the complaint demands judgment for a sum of money only.

2. An action of ejectment; for dower; for waste; for a nuisance; or to recover a chattel.*

§ 858. Feigned issues have been abolished. In a case where neither party can, as of right, require a trial by jury of an issue of fact arising upon the pleadings, or where a question of fact, not in issue upon the pleadings, is to be tried, an order for the trial thereof by a jury may be made, stating distinctly and plainly the questions of fact to be tried. Such an order is the only authority necessary for the trial.†

§ 859. Where a party is entitled by the Constitution, or by express provision of law, to a trial by a jury, of one or more issues of fact in an action not specified in section 968 of this act (§ 857, *ante*), he may apply upon notice to the court for an order, directing all the questions arising upon those issues to be distinctly and plainly stated for trial accordingly. Upon the hearing of the application, the court must cause the issues, to the trial of which by a jury the party is entitled, to be distinctly and plainly stated. The subsequent proceedings are the same as where questions arising upon the issues are stated for trial by a jury, in a case where neither party can as of right require such a trial; except that the finding of the jury, upon each question so stated, is conclusive in the action, unless the verdict is set aside or a new trial is granted.‡

* *New Code*, § 968; *Old Code*, §§ 253, 254; *Vermilyea v. Palmer*, 52 *N. Y.* 471; *People v. Northern R. R. Co.*, 42 *N. Y.* 217; *Parker v. Laney*, 58 *N. Y.* 469; *Hewlett v. Wood*, 62 *N. Y.* 75.

† *New Code*, § 823; *Old Code*, § 72; *Brinkley v. Brinkley*, 56 *N. Y.* 192; *Vermilyea v. Palmer*, 52 *N. Y.* 471; as to former practice, see *Snell v. Louckes*, 12 *Barb.* 385.

‡ *New Code*, § 970; *Old Code*, § 254.

The provision of the Constitution of the United States which guarantees trials by jury has no application to trials in State courts (*Joseph v. Bodwell*, 28 *La. Ann.* 382; *S. C.*, 26 *Am. Rep.* 102).

A proceeding in the nature of a *quo warranto* is a civil action,

§ 860. The joinder of equitable with legal causes of action does not deprive the defendant of the right of trial by jury.*

§ 861. In an action triable by a jury, if the parties waive the trial, by a jury, of the issues of fact, the action must be tried by the court without a jury ; unless a reference is directed, in a case prescribed by law. But such an action, other than to recover damages for breach of a contract, cannot be tried by the court, without a jury, unless the judge, presiding at the term where it is brought on for trial, assents to such a trial. *His refusal so to assent annuls a waiver, made as prescribed in subdivision second, third, or fourth of the next section.*†

§ 862. A party may waive his right to the trial of the issue of fact, by a jury, in any of the following modes :

1. By failing to appear at the trial.
2. By filing with the clerk a written waiver, signed by the attorney for the party.
3. By an oral consent in open court, entered in the minutes.
4. By moving the trial of the action, without a jury ; or, if the adverse party so moves it, by failing to claim a

and either party thereto is entitled to a trial by jury ; and a refusal of a court to grant such a trial to a party entitled thereto and demanding it (notwithstanding the fact that it appears by the record that substantial justice has been done), is error for which a new trial will be granted (*Reynolds v. State*, 61 *Ind.* 392, and cases there cited).

An action by a receiver to set aside a judgment as fraudulent is for equitable relief and properly tried by the court. But if a trial by jury was the right of either party, it is waived by not being demanded at the proper time (*Whittlesey v. Delaney*, 73 *N. Y.* 571).

* *Wheelock v. Lee*, *N. Y. Ct. of App.*, decided October 4, 1878; 7 *N. Y. Weekly Dig.* 323; *S. C.*, 5 *Abb. New Cas.* 72.

† *New Code*, § 1008; *Old Code*, §§ 253, 254 and 266 ; the sentence in italics is new.

It is doubtful whether a jury trial can be waived in any other manner than by either entirely failing to object, or as prescribed by this and the next section (*Wheelock v. Lee*, 5 *Abb. New Cas.* 72).

The judge has the right to refuse to try an equity case without a jury (*Parker v. Laney*, 58 *N. Y.* 469; *rev'g* 1 *S. C. [T. & C.]*, 590).

trial by a jury, before the production of any evidence upon the trial.*

§ 863. The bringing of an action of a distinctly equitable character is a waiver, as far as the plaintiff is concerned, of the right of trial by jury, although upon the facts he may be entitled to either legal or equitable relief; and in determining the mode of trial, the court may, as to him, be governed by the nature of the action as stated in the complaint. But it seems that the rule as to the defendant is different; that he cannot be deprived of a jury trial, in a proper court, because the plaintiff has demanded equitable, instead of legal relief.†

§ 864. In cases where the trial of issues of fact is not provided for in section 968 of the Code (§ 857, *ante*), if either party shall desire a trial by jury, such party shall, within ten days after issue joined, give notice of a special motion to be made upon the pleadings, that the whole issue, or any specific question of fact involved therein, be tried by a jury. With the notice of motion shall be served a copy of the questions of fact proposed to be submitted to the jury for trial, and in proper form to be incorporated in the order; and the court or judge may settle the issues, or may refer it to a referee to settle the issues. Such issues must be settled in the form prescribed in sections 823 and 970 of the Code of Civil Procedure (§§ 858 and 859, *ante*).

* *New Code*, § 1009; *Old Code*, § 266; subdivision four is new.

Where a defendant fails to appear when the case is reached in its order, and the issue is one of fact only, such failure may be treated as a waiver of jury trial (*Giberton v. Fleischel*, 5 *Duer*, 652; *Kassing v. Griffith et al.*, 86 *Ill.* 265).

In what cases trial by jury has been considered as waived (see *Greason v. Kettletas*, 17 *N. Y.* 491; *Black v. White*, 37 *N. Y. S. C.* 320; *Dayharsh v. Enos*, 5 *N. Y.* 531; *People v. Albany & S. R. R. Co.*, 5 *Lans.* 25; *S. C.*, 7 *Abb. New Cas.* 265; 1 *Lans.* 308; 55 *Barb.* 344; 38 *How.* 228; *Moffat v. Moffat*, 10 *N. Y.* 468; *S. C.*, 17 *Abb.* 4; and see *Gage v. Comml. Nat. Bank of Chicago*, 86 *Ill.* 371, in which it was held error to refuse trial by jury where the issues were changed after a jury had been waived.

† *Davison v. Associates of the Jersey Company*, 71 *N. Y.* 333; see § 859, *ante*).

In all actions for divorce where issue is joined by the pleadings, upon the question of adultery, such issue shall not be tried by a jury until the issue to be tried shall be settled in like manner as in other actions where issues arising out of the pleadings are required to be settled.

When any specific questions of fact involved in an action, or any question of fact not put in issue, is ordered to be tried by a jury as a substitute for a feigned issue, and has been tried, or a reference other than of the whole issue has been ordered under the Code, and a trial had, if either party shall desire to apply for a new trial on the ground of any error of the judge or referee, or on the ground that the verdict or report is against evidence (except when the judge directs such motion to be made upon his minutes, at the same term or court at which the issues are tried), a case or exceptions shall be made, or a case containing exceptions, as the case may require; which case or exceptions shall be served and settled in the manner prescribed by the rules of court for the settlement of cases and exceptions in other cases. Such motions shall be made in the first instance at special term.*

* Rule 31 of 1878; Rule 33 of 1858; Rule 40 of 1871; Rule 40 of 1874, amended; see *ante*, §§ 857, 858 and 859.

An action by the people to annul a corporation is triable, of course, and of right, by a jury, as if it was an action specified in section 968 of this act, and without procuring an order, as prescribed in section 970 of this act (*New Code*, § 1800).

An action by the people against the usurper of an office or franchise is triable, of course, and of right by a jury in like manner, as if it was an action specified in section 968 of this act, and without procuring an order, as prescribed in section 970 of this act (*New Code*, § 1950).

An action to vacate letters patent is triable, of course, and of right, by a jury, as if it was an action specified in section 968 of this act, and without procuring an order, as prescribed in section 970 of this act (*New Code*, § 1958).

An issue of fact, joined upon an alternative writ of mandamus, must be tried by a jury as if it was an issue, joined in an action specified in section 968 of this act; unless a jury trial is waived, or a reference is directed by consent of parties. Where the writ was issued upon the relation of a private person, the relator or the

Coroner's Jury.

§ 865. Whenever any coroner shall receive notice that any person has been slain, or has suddenly died, or has been dangerously wounded, or has been found dead under such circumstances as to require an inquisition, it shall be the duty of such coroner to go to the place where such person shall be, and forthwith to summon not less than nine, nor more than fifteen persons, qualified by law to serve as

defendant is entitled to a verdict, report, or decision, where he would be entitled thereto if the issue was joined in an action, brought by the relator against the defendant, to recover damages for making a false return (*New Code*, § 2083).

In an action brought to annul a void or voidable marriage, a final judgment, annulling the marriage, shall not be rendered by default, for want of an appearance or pleading, or upon the trial of an issue, without proof of the facts upon which the allegation of nullity is founded, and the declaration or confession of either party to the marriage is not alone sufficient as proof; but other satisfactory evidence of the facts must be produced, in such an action, except where it is founded upon an allegation of the physical incapacity of one of the parties thereto; the court must, upon the application of either of the parties, make an order, directing the trial, by a jury, of all the issues of fact; or it may, of its own motion, make an order directing the trial, by a jury, of one or more issues of fact; for which purpose, the questions to be tried must be prepared and settled, as prescribed in section 970 of this act (*New Code*, § 1753).

The answer of the defendant may be made, without verifying it, notwithstanding the verification of the complaint. If the answer puts in issue the allegation of adultery, the court must, upon the application of either party, or it may of its own motion, make an order directing the trial, by a jury, of that issue; for which purpose the questions to be tried must be prepared and settled, as prescribed in section 970 of this act. If the answer does not put in issue the allegation of adultery, or if the defendant makes default in appearing or pleading, the plaintiff must nevertheless satisfactorily prove the material allegations of his complaint, before he is entitled to judgment (*New Code*, § 1757).

[The sections contained in this note have not yet been adopted.]

jurors, and not exempt from such service, to appear before such coroner forthwith, at such place as he shall appoint, to make inquisition concerning such death or wounding.*

§ 866. Any justice of the peace in each of the several towns and cities of this State is hereby authorized and empowered, in case the attendance of a coroner cannot be procured within twelve hours after the discovery of a dead body, upon which an inquest is now by law required to be held, to hold an inquest thereon, in the same manner and with the like force and effect as coroners.†

§ 867. Hereafter, when, in the city and county of New York, any person shall die from criminal violence, or by a casualty, or suddenly, when in apparent health, or when unattended by a physician, or in prison, or in any suspicious or unusual manner, the coroner shall subpoena a properly qualified physician, who shall view the body of such deceased person externally, or make an autopsy thereon, as may be required. Should the coroner deem it necessary, he may call a jury to assist him in his investigation, or should any citizen demand that a jury be called, he shall proceed as directed by part four, title seven, article one of the Revised Statutes (§ 865, *ante*). Any citizen of this State not over seventy years of age, and being at the time a resident of the county, may be summoned to serve as a juror upon a coroner's inquest; and any person who shall willfully neglect or refuse to serve as such juror, when duly summoned, shall, upon conviction, be adjudged guilty of a misdemeanor, and shall be punished by imprisonment in the county prison not exceeding one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.‡

§ 868. The coroner must summon the jurors in person. It must be done in the same manner as jurors are summoned by a sheriff or other officer, where the selection of the jurors is discretionary with such officer. He should exercise the same care in selecting the jurors as the officer

* 3 R. S. 6 ed. § 1, p. 1039.

† 3 R. S. 6 ed. § 2, p. 1040.

‡ 3 R. S. 6 ed. §§ 17, 18 and 21, pp. 1041, 1042.

is required to do in the case of jurors in a civil or criminal proceeding in courts of law. Care should be taken not to summon any person related to the deceased; and if the person who caused the death or wounding is known, or if any suspicion is entertained who he is, no person related to or connected with such person should be summoned; nor should any one who is known to be prejudiced for or against him be summoned to act as a juror upon the inquisition. The same care should be observed in such case to obtain a fair and impartial verdict as upon the trial of the party accused of the offence. But the jurors who are selected and appear are not challengeable by either party.*

§ 869. Whenever six or more of the jurors shall appear, they shall be sworn by the coroner, and charged by him to inquire how and in what manner, and when and where, such person came to his death or was wounded (as the case may be), and who such person was, and into all the circumstances attending such death or wounding; and to make a true inquisition according to the evidence offered to them, or arising from the inspection of the body.†

§ 870. After the jury have been thus sworn and charged by the coroner, they with the coroner go together to view and examine the body of the deceased or the wounded person. It will not be sufficient that they view the body separately and at different times. And they cannot proceed upon the inquest until they shall have so viewed the body; and if it be buried, it must be dug up. It is not necessary that the inquest be held where the body is found, but, after the body has been so viewed, the jury may return to some convenient place to hear the testimony of witnesses and deliberate upon their verdict.‡

§ 871. The coroner swears or affirms the witnesses produced before the jury, and examines them and reduces their testimony to writing.§

* 2 *Hale's Cr. L.* 59.

† 3 *R. S.* 6 ed. § 5, p. 1040; 2 *Hale's Cr. L.* 60. See *Forms*.

‡ *R. v. Ferrand*, 3 *B. & A.* 260; 2 *Hale's Cr. L.* 58; *Hawkins' P. C.* 78.

§ 3 *R. S.* 6 ed. § 11, p. 1040.

§ 872. Counsel may be present and assist the coroner in the examination of the witnesses, and the jurors may, if they see fit, put any proper questions to the witnesses. But the party suspected or charged with the crime has no right to produce witnesses on the inquest or to cross-examine those produced on behalf of the people by himself or counsel. The jury must hear all the evidence offered before them, whether it be in favor or against any party suspected of the killing or wounding, for the jury is to find all the circumstances attending the killing or wounding.*

§ 873. Upon the investigation, the coroner's jury is not limited in their inquiry like the jury upon the trial of one charged with the crime. Their duty is to determine if a crime has or has not been committed, and who perpetrated or who caused the same to be perpetrated and all the circumstances attending it; and any proper testimony tending in any degree to throw light upon the subject may be properly given. Still, nothing but legal testimony should be taken, and mere matter as to who the offender is should not be permitted nor should hearsay evidence be indulged in.

§ 874. The jury upon the inspection of the body of the person dead or wounded, and after hearing all the testimony offered before them shall retire, as jurors in other cases, and deliberate upon their verdict. They must not suffer any one, not even the coroner, to mingle with them in their deliberations. But they may, as in the case of jurors in courts of law, take the opinion of the coroner upon any question of law that may arise upon the investigation.

§ 875. When the jury shall have agreed upon a verdict, they shall reduce their inquisition to writing, which shall show before what coroner the same was taken, and that the same was taken upon the oath of good and lawful men of the county, who were first duly sworn, and it must also show when and where the same was executed. They shall also therein find and certify how and in what manner and

* *People v. Collins*, 20 *How.* 111; *Hale's Cr. L.* 60-62.

when and where the person so dead or wounded came to his death or was wounded (as the case may be), and who such person was, and all the circumstances attending such death or wounding, and who were guilty thereof, either as principal or accessory, and in what manner. The jury, however, are not required to find who were accessories after the fact, but they need only inquire of those before the fact. If the person who is found dead or wounded is unknown, or the person who caused the death or wounding is unknown, the jury shall so find. And they shall find, if the fact so appears before them, whether the killing was accidental or suicide, murder or manslaughter, or excusable or justifiable homicide, and if the manner of the death is unknown, they shall so state; such inquisition shall then be signed by such jurors and the coroner. If the names of the jurors are not set out at length in the caption, they must sign their names, and not merely the initials of their christian name. If some of the jurors sign with their mark, such signature should properly be attested, but it will be taken *prima facie*, that the signing was in the presence of each other. Where there are two or more on the inquisition of the same name, it is not necessary to designate them by their abode or addition.*

§ 876. It is not necessary that the jury should be kept together until they shall have agreed upon a verdict, for if there appear to be irreconcilable differences of opinion as to any material fact amongst the jurors, concerning which they are to make inquest, the jurors agreeing in opinion may find accordingly, and may present two or more inquisitions.

§ 877. There is no law which provides for the compensation of a coroner's jury.†

* 2 *Hawkins P. C.* 77, 78; 2 *Hale's Cr. L.* 63; *People v. Collins*, 20 *How. Pr.* 113; *Rex v. Bowen*, 3 *C. & P.* 602; *Rex v. Bennett*, 6 *Id.* 179; *Lewin's Case*, 2 *Lewens C. C.* 125; *Rex v. Nicholas*, 7 *C. & P.* 538; 3 *R. S.* 6 ed. § 8, p. 1040.

† *Kennedy et al. v. Seamans et al.*, 60 *Ga.* 612.

Struck Jury.

§ 878 Where it appears to the court that a fair and impartial trial of an issue of fact, triable by a jury, joined in an action pending in the supreme court, or in a superior city court, cannot be had without a struck jury, or that the importance or intricacy of the case requires such a jury, the court must make an order upon notice, directing a special jury to be struck for the trial of the issue. The order must specify the term, and it may specify a particular day in the term, when the jurors must attend.*

§ 879. Unless the order specifies or directs the officer who is to strike the jury, to fix a time for the parties to attend, the party obtaining it must give at least eight days' notice of the time when he will attend, before the clerk of the county in which the action is triable, or, if it is triable in the city and county of New York, or the county of Kings, before the commissioner of jurors, or, if it is triable in the superior court of Buffalo, before the clerk of that court, for the purpose of having the jury struck.†

§ 880. At the time appointed, the clerk, or, in his absence, the deputy clerk, or the commissioner, as the case requires, must attend at his office, with the original lists or books, filed or kept in his office, as required by law, containing the names of the persons who are then liable to serve as trial jurors; and, in the presence of the parties, or their attorneys or counsel, must strike a trial jury, as follows:

1. The clerk, deputy-clerk or commissioner must select from the lists or books the names of forty-eight persons, whom he deems most indifferent between the parties, and best qualified to try the issue, and must make and certify a list of those names.

2. The party, on whose application the special jury was

* *New Code*, § 1063; 2 *R. S.* 418, § 46 (2 *Edm.* 435), amended and extended; see notes to § 884, *post*.

† *New Code*, § 1064; 2 *R. S.* 418, § 47, amended.

directed to be struck, or his attorney or counsel, may then first strike from the list one name; the adverse party, or his attorney or counsel, may then strike therefrom one name; and so alternately, until each party has stricken out twelve names.

3. If either party fails to attend, at the time and place of striking the jury, or neglects to strike out a name, the clerk, deputy-clerk or commissioner must strike for him.

4. The clerk, deputy-clerk, or commissioner must thereupon make out a list of the names of the twenty-four persons not stricken out, and must certify that it is a correct list of the persons drawn to serve as jurors, pursuant to the order of the court. He must immediately deliver the list so certified, and a certified copy of the order, to the sheriff of the county. If the list from any ward or town cannot be found, the clerk must make a new list from the ballots then in use for jurors for that ward or town, and must use that list upon striking the jury, in place of the original list.*

§ 881. The sheriff must notify the persons whose names are contained in the list, and must return the names of those notified to the term at which they are required to attend, as prescribed by law for notifying and returning ordinary trial jurors.†

§ 882. From the persons so notified and attending, a jury must be formed for the trial, and the issue must be tried as prescribed in this chapter with respect to an ordinary jury trial. The court has the same power to excuse or discharge a juror, and to cause additional jurors to be drawn, or talesmen to attend, as upon an ordinary jury trial. But the court may, in its discretion, set aside an additional juror so drawn, or a talesman, upon the objection of either party, without a formal challenge.‡

§ 883. If it appears to the court, to which an applica-

* *New Code*, § 1065; 2 *R. S.* 418, § 48, as amended by *Laws of* 1876, c. 69, p. 54; *People v. Tweed*, 50 *How.* 273.

† *New Code*, § 1066; 2 *R. S.* 418, § 49; see *Laws of* 1873, c. 166, § 1, modifying *Laws of* 1858, c. 322, § 36.

‡ *New Code*, § 1067; 2 *R. S.* 418, § 50, amended.

tion for a special jury is made, that the clerk, or the commissioner of jurors, as the case may be, is interested in the action, or is related to either of the parties, or is not indifferent between them, the court must appoint two disinterested persons to strike the jury.

The persons so appointed possess, for the purpose of the action, all the powers conferred by this article upon the clerk or the commissioner of jurors.*

§ 884. The expense of striking a special jury must be paid by the party applying for it, and shall not be taxed in the costs of the action.†

* *New Code*, § 1068; 2 *R. S.* 418, § 51.

† *New Code*, § 1069; 2 *R. S.* 418, § 52.

A struck jury will only be granted in extreme cases (*Patchin v. Sands*, 10 *Wend.* 570).

To entitle the party to a struck jury, the court must be satisfied, by affidavit, of the importance or intricacy of the cause (*Livingston v. Columbia Ins. Co.*, *Col. & Caines*, 339).

And the affidavit must state wherein the importance or intricacy consists (*Manhattan Co. v. Lydig*, *Col. & Caines*, 423).

If the case involves a question affecting the public, and important in its consequences, a struck jury will be allowed (*New Windsor Turnpike Co. v. Ellison*, 1 *Johns.* 141).

But the litigant parties do not make the case important within the meaning of the statute (*Hartshorne v. Gelston*, *Col. & Caines*, 434).

A struck jury will not be ordered to try a question of title to the office of justice of a district court in New York (*People v. McGuire*, 43 *How. Pr.* 67).

Neither will a struck jury be granted in an action for a libel on a public officer, unless it relate to his official conduct (*Thomas v. Crosswell*, 4 *Johns.* 491).

The amount in controversy is not alone sufficient for the allowance of a struck jury (*Wright v. Columbia Ins. Co.*, 2 *Johns.* 211).

In an action for death by negligence, the defendant is not entitled to a struck jury (*Murphy v. Kipp*, 1 *Duer*, 659).

A foreign and struck jury will be granted, where it appears that a town has contributed to the expenses of a suit (*Stryker v. Turnbull*, *Col. & Caines*, 457).

In general, a struck jury will not be ordered in the city of New York (*Nesmith v. Atlantic Insurance Co.*, 8 *Abb. Pr.* 423).

About summoning talesmen to fill up a struck jury see *People v. Tweed* (11 *Hun.* 195, and 50 *How. Pr.* 286).

§ 885. Where an order for a trial by a foreign jury is made, a certified copy thereof must be delivered to the sheriff of the county from which it is to be drawn; who must give notice thereof to the clerk of that county; and also, in the city and county of New York, or the county of Kings, to the commissioner of jurors, at least twenty days before the first day of the term at which the foreign jury is required to attend.*

§ 886. The clerk, or, in the county of Kings, the commissioner, to whom the notice is given, must draw the names of twenty-four persons in the same manner, and in presence of the same officers, as prescribed by law with respect to ordinary trial jurors; except that notice of the drawing need not be published. A certified list of the names drawn must be delivered to the sheriff, who must notify each person drawn, and make a return, as in an ordinary case.†

Juries in Surrogates' Courts.

§ 887. The only cases in which the supreme court is authorized by statute to direct that an issue be made up and tried by a jury at a circuit court on appeals from the decisions of surrogates, are those by which wills have been admitted to probate, or refused to be admitted to record or probate.‡

A stay of proceedings to enable a party to move for a struck jury should only be granted at the trial term or by the justice assigned to hold that part of it, upon whose calendar the cause is placed (*Walsh v. Sun Mutual Ins. Co.*, 2 *Rob.* 646; *S. C.*, 17 *Abb. Pr.* 356).

Where there appears to have been some irregularity in the proceedings to obtain a struck jury, the court has power to set aside a jury already struck, and order a new jury (*People ex rel. Kirtland v. Dillon*, 8 *N. Y. Weekly Dig.* 89; *S. C.*, 17 *Hun.* 1).

* *New Code*, § 1070; 2 *R. S.* 410, § 10 (2 *Edm.* 427).

† *New Code*, § 1071; 2 *R. S.* 410, § 11.

‡ 2 *R. S.* p. 66, § 57; *Ib.* p. 609, § 98; 3 *R. S.* 5 ed. p. 906, § 21; *Laws of 1848*, p. 295; *Devin v. Patchen*, 26 *N. Y.* 445.

No statute confers authority on the supreme court to direct the

The validity of any actual or alleged devise or will of real estate may be determined by the supreme court in a proper action for that purpose, in which all persons interested, or who claim an interest in the question, may be made parties, and such action may be brought by any heir at law of the actual, or alleged testator or testatrix, or by any devisee under any actual or alleged will, and thereupon, after final judgment in such action, any party may be enjoined from setting up or from impeaching such devise or will, as justice may require. The court may also, in its discretion, during the pendency of any such action, restrain the commencement or prosecution of any other action involving the trial of the same question. Such adjudication, however, shall not determine nor affect the validity of any such will as to any personal property, nor shall this act, or any proceeding taken by virtue thereof, affect or interfere with any suit or proceeding in any court of this State relating to the probate of any will. Issues of fact in such actions may be tried by a jury or the court, as the nature of the case may require and the court shall direct.*

§ 888. Issues of fact, which shall be joined in any surrogate's court to be tried by a jury, shall be tried in the county court of the county in which said surrogate's court is held.†

§ 889. The supreme court possesses only the same powers and jurisdiction on appeals from the decisions of surrogates that the court of chancery had, and the justices of the supreme court possess only the powers and jurisdiction that the chancellor, vice-chancellor and circuit judges had under the State Constitution of 1821 and the laws prior to the judiciary act of 1847.‡

issue whether a woman was the lawful wife and is the widow of the deceased, to be tried by a jury (*Ib.*).

* *Laws of 1853*, c. 238, § 1, as amended by *Laws of 1879*, c. 316.

† 3 *R. S.* 6 ed. p. 323, § 12; *Laws of 1847*, c. 280, § 45.

‡ *Laws of 1847*, vol. 1, p. 323, § 16; *Ib.* p. 324, § 17; 3 *R. S.* 5 ed. p. 277, § 1; *Ib.* p. 906, § 22, &c.

And except in probate cases (2 *R. S.* §§ 55, 56 and 57), the appel-

§ 890. Prior to the adoption of the Revised Statutes of 1830, it was held that the court of chancery had power to award feigned issues in cases affecting the decrees of a surrogate, on the ground that the practice on appeals from such decrees was according to the course of the civil law, by which new allegations and new proofs were allowed to be introduced, in the discretion of the court, in any stage of the proceedings; and it might call to its aid the verdict of a jury upon disputed questions of fact.*

§ 891. The same course was pursued under the Revised Statutes.†

§ 892. And the correctness of that practice has been to some extent recognized since the reorganization of the courts under the constitution of 1846, and since the adoption of the Code of Procedure.‡

§ 893. In the case of *Caujolle v. Ferrie* (9 *Abb. Pr.* 393), the court of appeals rejected the additional testimony taken after the appeal to the supreme court, holding that the decree of the surrogate could only be reviewed on the evidence produced before him.

§ 894. The circuit judge had the power to reverse the decree where his conclusion either on the law or facts differed from that of the surrogate.§ If he reversed the decree upon a question of fact, he was required by the statute to direct feigned issues to be made up to try the question in controversy.|| The same rule now prevails in the supreme court, and *it is a matter of right*, not dis-

late court cannot on reversal award an issue of fact to be tried by a jury (*Devin v. Patchen*, 26 *N. Y.* 447).

In Maine, upon an appeal from a decree of a probate judge, neither party can claim a trial by jury as a matter of right (*Bradstreet v. Bradstreet*, 64 *Me.* 204).

* *Vanderhuyden v. Reid*, 1 *Hopk.* 408; *Van Wyck v. Alley*, *Id.* 552; *Devin v. Patchen*, 26 *N. Y.* 441.

† *Scribner v. Williams*, 1 *Paige*, 550; *S. C.*, 26 *N. Y.* 441.

‡ *Clayton v. Wardell*, 2 *Bradf.* 6; *Caujolle v. Ferrie*, 9 *Abb. Pr.* 893; *S. C.*, 23 *N. Y.* 90.

§ *Marvin v. Marvin*, 3 *Abb. Ct. of App. Dec.* 192; *Robinson v. Raynor*, 28 *N. Y.* 494.

|| 2 *R. S.* p. 66, § 57.

cretion, that such an issue be tried by a jury, and the court has no authority in reversing a decree on the facts to direct the surrogate to enter a *final decree* in accordance with its order.* And the appellate court has no authority to direct this trial of such a feigned issue, unless it arrives at a conclusion on the question of fact adverse to that of the original tribunal.† An appeal, as hereinbefore mentioned, is not heard by a justice of the supreme court sitting at special term, but is heard at a *general term* of the supreme court, which alone possesses the appellate jurisdiction in such cases.‡

§ 895. The supreme court will not usually disturb the surrogate's decision on a question of fact where the evidence is evenly balanced, and directly controverted, and where the question is one simply of the credibility of witnesses.§ In a doubtful case on the facts, the case may be remitted to the surrogate for further testimony.||

§ 896. The court of appeals will review questions of fact, in probate cases, and where it is not convinced as to the validity of the will propounded, it will reverse the decree admitting it to probate, and will send the case to a jury for investigation.¶

* *Tyler v. Gardiner*, 35 *N. Y.* 596; *Johnson v. Hicks*, 1 *Lans.* 150;—*contra*, *Pilling v. Pilling*, 45 *Barb.* 86.

† *Tyler v. Gardiner*, 35 *N. Y.* 596.

‡ *Devin v. Patchen*, 26 *N. Y.* 447.

§ *Robinson v. Smith*, 13 *Abb. Pr.* 359; *Lake v. Ranney*, 33 *Barb.* 49.

| *Matter of Forman*, 1 *Tuck.* 205.

¶ *Howland v. Taylor*, 53 *N. Y.* 627.

The surrogate may, in his discretion, make an order, directing the trial by a jury, at a circuit court to be held within the county, or in the county court of the county, or, in the city and county of New York, in the court of common pleas, of any controverted question of fact, arising in a special proceeding for the disposition of the real property of a decedent, as prescribed in title fifth of this chapter. The order must state, distinctly and plainly, each question of fact to be tried; and it is the only authority necessary for the trial (*New Code*, § 2547).

A trial by a jury, pursuant to an order made as prescribed in the last section, can be reviewed, in the first instance, only upon a motion

Sheriff's (or Constable's) Jury to Try Title to Personal Property, Taken under Execution or Attachment.

§ 897. Where it is specially prescribed by law that a sheriff must, or may, in his discretion, impanel a jury to try the validity of a claim or title to, or of the right of possession of goods or effects, seized by him by virtue of a mandate in an action, interposed by a person not a party to the action, the trial must be conducted in the following manner, except as otherwise specially prescribed by law:

1. The sheriff must from time to time notify as many persons to attend as it is necessary, in order to form a jury of twelve persons, qualified to serve as trial jurors in the county court of the county, or, in the city and county of New York, in the court of common pleas for that city and county, to try the validity of the claim.

2. Upon the trial, witnesses may be examined in behalf of the claimant and of the party at whose instance the property claimed was taken by the sheriff.

for a new trial. A new trial may be granted by the surrogate, or the court in which the trial took place, or, if it took place at the circuit court, by the supreme court, in a case where a new trial of specific questions of fact, tried by a jury, pursuant to an order for such a trial, made in an action, would be granted. The verdict of the jury must be certified to the surrogate's court, by the clerk of the court in which the trial took place (*New Code*, § 2548).

Where the reversal or modification of a decree by the appellate court is founded upon a question of fact, the appellate court must, if the appeal was taken from a decree, made upon a petition to admit a will to probate, or to revoke the probate of a will, make an order, directing the trial by a jury of the material questions of fact arising upon the issues between the parties. Such an order must state distinctly and plainly the questions of fact to be tried; and must direct the trial to take place either in a circuit court, specified in the order, or in the county court of the county of the surrogate, or, in the city and county of New York, in the court of common pleas. After the trial a new trial may be granted, as prescribed in section 2548 of this act (*New Code*, § 2588).

[The sections contained in this note have not yet been adopted.]

3. The sheriff or under-sheriff must preside upon the trial. A witness produced by either party must be sworn by the presiding officer, and examined orally in the presence of the jury.*

§ 898. Such inquiry or investigation may be taken by the sheriff whenever he has reason to doubt whether the property belongs to the defendant in an execution or not. And if he would protect himself against an action for a false return, it would be safer for him to summon a jury to try the title to the property before he releases it. If a jury summoned for that purpose find that the title is not in the defendant, the sheriff may then require the plaintiff in the execution to give him adequate indemnity, else he may return the execution unsatisfied.†

§ 899. The constable may, like the sheriff, call a jury to try the title of any claimant to the property levied on by him and with the like effect. Six jurymen would seem to be sufficient in such case. And he may also, like the sheriff, take a receiptor for the property seized. And he has the same rights in respect thereto as the sheriff in similar cases, except that he must demand the property of the receiptor within the life of the execution, otherwise his lien is gone, and he cannot maintain an action upon such receipt.‡

§ 900. If any goods or effects, seized by virtue of a warrant of attachment as the property of the debtor, other than vessels, shall be claimed by or in behalf of any other person as his property, the sheriff shall summon and swear a jury to try the validity of such claim in the same manner and with the like effect as in case of seizure under execution.§

* See note to next section.

† *New Code*, §§ 108 (as amended in 1879), 109, 1418, 1419, and 1420, for fees of jurors in these proceedings, see § 240, *ante*. *Hofheimer v. Campbell*, 59 *N. Y.* 269; *Samuels v. Bryant*, 14 *Abb. Pr. N. S.* 442; *Bayley v. Bates*, 8 *Johns.* 143; *Van Cleef v. Fleet*, 15 *Id.* 147; *Townsend v. Philips*, 10 *Id.* 98; *Platt v. Sherry*, 7 *Wend.* 236.

‡ *Brown v. Cook*, 9 *Johns.* 361; *Burrell v. Acker*, 23 *Wend.* 606.

§ 3 *R. S.* 6 ed. p. 3, § 10; *People v. Schuyler*, 4 *N. Y.* 183;

§ 901. When the selection of jurors is left to the discretion of the sheriff, he should be careful that the person or persons selected by him have the necessary legal qualifications, and that they are not exempt from serving upon juries. He should select those only who are in nowise of kin to the parties, however remote; and no one who is interested in the proceedings, or who, he has reason to believe, is biased or prejudiced for or against either of the parties, or who has given an opinion upon the subject in controversy. And he should not permit either of the parties, or any other person, to name any juror. But after summoning one to serve as a juror in any case, whether he is exempt from service or has a valid excuse for not serving, the sheriff cannot, on hearing that fact, release him and summon another in his place, for the court or officer before whom such person is summoned to appear can alone discharge him.

Inquiry as to Sanity of Person in Confinement under Criminal and Civil Process.

§ 902. If any person under indictment, or under sentence of imprisonment, or under a criminal charge, or for want of bail for good behavior, or for keeping the peace, or for appearing as a witness, or in consequence of any summary conviction, or by order of any justice, or under any other than civil process, shall appear to be insane, the county judge of the county where he is confined shall institute a careful investigation, call two respectable physicians, and other credible witnesses, invite the district attorney to aid in the examination (and, if he deems it necessary, call a jury, and for that purpose is fully empowered to compel the attendance of witnesses and jurors), and if it be satisfactorily proved that he is insane, said judge may discharge him from imprisonment, and order his safe custody and

Batchellor v. Schuyler, 3 *Hill*, 387; Hall v. Stryker, 27 *N. Y.* 603; Lummis v. Kassen, 43 *Barb.* 375; Ball v. Pratt, 36 *Id.* 407.

removal to a State asylum, where he shall remain until restored to his right mind.*

§ 903. If a person imprisoned on attachment, or any civil process, or for the non-payment of a militia fine, become insane, one of the judges mentioned in the last preceding section of this act shall institute like proceedings in his case as are required in the case provided for in said section.†

Inquiry as to Insanity of Convict after Sentence of Death.

§ 904. If, after any convict shall have been sentenced to the punishment of death, he shall become insane, the sheriff of the county, with the concurrence of a justice of the supreme court, or, if he be absent from the county, with the concurrence of the county judge of the county in which the conviction was had, may summon a jury of twelve electors to inquire into such insanity, and shall give immediate notice thereof to the district attorney of the county, who shall attend such inquiry, and may produce witnesses before the jury; for which purpose he shall have the same power to issue subpoenas as for witnesses to attend a grand jury. And disobedience thereto may be punished by the court of oyer and terminer which shall next sit in such county, in the same manner as disobedience to any process issued by such court. The inquisition of the jury shall be signed by them and the sheriff.‡

Inquiry into Pregnancy of Female Convict.

§ 905. If a female convict, sentenced to the punishment of death, be pregnant, the sheriff shall in like man-

* 2 R. S. 6 ed. § 26, p. 846; see § 906, *post*.

† 2 R. S. 6 ed. § 27, p. 84; see § 906, *post*; for fees of jurors in these proceedings, see § 240, *ante*.

‡ 3 R. S. 6 ed. §§ 16, 17, 18, p. 929; see § 906, *post*; for fees of jurors in these proceedings, see § 240, *ante*.

ner summon a jury of six physicians, and shall give the like notice thereof to the district attorney, who shall attend and have power to issue subpoenas as in the case of an insane convict, and with the like effect, and an inquisition shall in like manner be made and signed by the jurors and the sheriff.*

§ 906. The jurors upon such inquest should be summoned by the sheriff, in the same manner as in other cases where the selection of jurors is left discretionary with him. Though the statute prescribes no other qualification for the jurors in the case of an insane person than that they should be electors, and, in the case of a pregnant female, that they should be physicians, yet it is clearly the duty of the sheriff to select those only against whom no legal exception as jurors exist, and he should be careful not to select any who entertain ill-will against the prisoner, or who have conscientious scruples against capital punishment, or who have declared an opinion upon the question. But the mere expression of a hypothetical opinion, that if the facts stated are true, the prisoner is, or is not insane, is, or is not *enceinte*, will not necessarily disqualify a juror, but it will be for the sheriff to say whether such expression of opinion has left any undue bias upon the mind of the juror or not, and he should allow him to be sworn, or set him aside, accordingly. The sheriff presides upon the hearing, and swears the jurors and witnesses. The prisoner must be present, and may be attended by counsel. Either party may object to a juror for cause, and it is the sheriff's duty to hear the ground of such objection, and, if it is well taken, to set the juror aside and summon another in his place. The truth of the objection may be determined upon the testimony of others, or the juror may himself be examined touching the objection, provided it do not tend to his dishonor or discredit.† Every one is presumed to be of sound mind until the contrary be made to appear,

* 3 R. S. 6 ed. § 20, p. 930; see last section; for fees of jurors in these proceedings see § 240, *ante*.

† 1 Gr. Prac. 308.

and the burden of proof is therefore thrown upon the prisoner. And so with the female prisoner claiming to be *enceinte*. She is not to be presumed so until the fact be made to appear. The prisoner, therefore, holds the affirmative of the issue, and will be entitled to the closing reply. In the latter case the issue is obvious, and no difficulty can arise in determining the form of the inquiry to the witness or the verdict to be rendered by the jury. In the case of one supposed to be insane, the inquiry should be whether the prisoner, at the time, has sufficient mind rightly to comprehend his own condition, or whether he is laboring under such a diseased state of mind as to be really unconscious of his situation and the nature and purpose of the punishment about to be inflicted upon him.*

Inquiry into Value of Property held under Homestead Exemption Law.

§ 907. To entitle property, consisting of a lot and buildings thereon, of the value of one thousand dollars, owned by the debtor, being a householder, and having a family, and occupied by him as a residence, to exemption from sale on execution, the conveyance of the same shall show that it is designed to be held as a homestead under the exemption act, or if already purchased, or the conveyance does not show such design, a notice that the same is designed to be so held shall be executed and acknowledged by the person owning the said property, which shall contain a full description thereof, and shall be recorded in the office of the clerk of the county in which the said property is situated, in a book to be provided for that purpose, and known as the "Homestead Exemption Book." But no property shall be so exempt for a debt contracted for the purchase thereof, or prior to the recording of the aforesaid deed or notice.†

* See *Guernsey's Juries and Physicians on Questions of Insanity*, pamphlet.

† *Allen v. Cook*, 26 Barb. 374; *Cook v. Newman*, 8 How. 523; *Schonton v. Kilmer*, 8 How. 527.

§ 908. If, in the opinion of the sheriff holding an execution against such householder, the premises claimed by him or her as exempt are worth more than one thousand dollars, he shall summon six qualified jurors of his county, who shall, upon oath to be administered to them by such sheriff, appraise said premises, and if, in the opinion of the jury, the property may be divided without injury to the interests of the parties, they shall set off so much of said premises, including the dwelling-house, as in their opinion shall be worth one thousand dollars, and the residue of said premises may be advertised and sold by such sheriff. In case the value of the premises shall, in the opinion of the jury, be more than one thousand dollars, and cannot be divided as above provided, they shall make and sign an appraisal of the value thereof, and deliver the same to the sheriff, who shall deliver a copy thereof to the execution debtor, or to some of his family of suitable age to understand the nature thereof, with a notice thereof attached, that unless the execution debtor shall pay to the sheriff the surplus over and above one thousand dollars, within sixty days thereafter, that such premises will be sold.*

De Lunatico Inquirendo Proceedings.

§ 909. The sheriff to whom a precept of the commissioners appointed to execute a writ *De Lunatico Inquirendo*, or writ in the nature of a writ *De Lunatico Inquirendo*, shall execute the same by summoning not less than twelve nor more than twenty-four legally qualified jurors of his county to appear at the time and place of hearing designated in such precept. The sheriff himself selects the jurors, and neither the commissioners nor any one else have any right to make out a list of jurors to be served. The mode of service is the same as in all other cases where the sheriff selects the jurors; it must be personal, and the

* For fees of jurors in these proceedings see § 240, *ante*.

3 R. S. 6 ed. §§ 33, 34, 35, p. 627, 628; see *New Code*, §§ 1397 to 1404, *incl*.

officer should state to each one served, the time and place at which he is required to attend, and the purpose for which he is so required to attend, and they should be summoned a reasonable time before the day of hearing. The sheriff must insert the names of the jurors summoned by him, in a panel, and annex it to the precept, and make return upon the precept of the manner in which he executed the same. The sheriff may at the time of the hearing be required by the commissioners to attend upon the jury, and to guard the room in which they deliberate from intrusion, but it will be irregular if he is present with them when they deliberate.*

In conducting the proceedings before the jury of inquiry, one of the commissioners (usually the one first named in the commission), must administer an oath to the jurors, and must also swear the witnesses previous to their being examined. He must also read to the jury the commission, and explain the object of their meeting and their duties. And to aid the jury in their inquiries upon the execution of the commission, they have the right to inspect and examine the lunatic, and they should do so in every case of doubt, when such examination can be had. In such cases the commissioners should direct the person in whose custody the lunatic is to produce him or to permit him to attend before them.†

And the commissioners may also determine upon the validity of challenges to jurors.‡

§ 910. The jury having deliberated upon the matter of inquiry, and agreed upon a verdict, are to return the same to the commissioners. The blanks in the inquisition (which is a response to the commission, in relation to the fact of lunacy, drunkenness, &c.), are then filled up, and the inquisition is signed and sealed by the commissioners and by the jury.§

* 2 *Hoff. Ch. Pr.* 255; see § 215, *ante*.

† *Matter of Russell*, 1 *Barb.* 8; *Ch. R.* 38.

‡ *Matter of Wager*, 6 *Paige*, 11.

§ *Com. v. Moore*, 1 *Gratt.* 296; *Baggett v. Meux*, 1 *Coll.* 140; *Merrian v. Harsen*, 2 *Barb. Ch. Pr.* 233.

§ 911. The inquisition is then delivered to the commissioners, and is annexed by them to the commission.

§ 912. With respect to the *form* of the inquisition, the jury should adhere substantially to the technical form of finding in the language of the statute itself; as, that the party is an "idiot" or "lunatic," or of "unsound mind and incapable of the government of himself or the management of his estate," or that the party is "incapable of conducting his own affairs in consequence of habitual drunkenness."*

* *Matter of Mason, Barb. S. C. R. 437; Matter of Mason, 3 Edw. Ch. 380; Matter of Morgan, 7 Paige, 236; Shelf. on Lun. 108, 109; Hill Eq. Jur. 675 to 680; see Forms, Appendix, post; for fees of jurors in these proceedings, see § 240, ante.*

Unless an order is made, as prescribed in the last section, if it presumptively appears, to the satisfaction of the court, from the petition and the proofs accompanying it, that the case is one of those specified in this title, and that a committee ought, in the exercise of a sound discretion, to be appointed, the court must make an order, directing, either:

1. That a commission issue, as prescribed in the next section, to one or more fit persons, designated in the order; or,

2. That the questions of fact, arising upon the competency of the person, with respect to whom the petition prays for the appointment of a committee, be tried by a jury, at a trial term of the court; or, if the petition was presented to the supreme court, at a term of the circuit court for a county specified in the order (*New Code, § 2327*).

The commission must direct the commissioners to cause the sheriff of a county, specified therein, to procure a jury; and that they inquire, by the jury, into the matters set forth in the petition; and also into the value of the real and personal property of the person alleged to be incompetent, and the amount of his income. It may contain such other directions, with respect to the subjects of inquiry, or the manner of executing the commission, as the court directs to be inserted therein (*New Code, § 2328*).

The commissioners, or a majority of them, must immediately issue a precept to the sheriff designated in the commission, requiring him to notify not less than twelve, nor more than twenty-four indifferent persons, qualified to serve, and not exempt from serving, as trial jurors in the same court, to appear before the commissioners, at a specified time and place within the county, to make inquiry, as commanded by the commission. The sheriff must notify the jurors accordingly; and must return the precept, and the names of

Forcible Entries and Detainers.

§ 913. On complaint to any justice, of the supreme court, county judge, mayor, recorder, alderman of any city and special justice, any justice of the marine court and any justice of the justices' court of the city of New York, in their respective cities and counties, that any one has forcibly entered upon or holds the possession of any lands by force contrary to the statute, he shall thereupon issue a

the persons notified, to the commissioners, at the time and place specified in the precept. The commissioners, or a majority of them, must determine a challenge made to a juror. Upon the failure to attend of a person who has been duly notified, his attendance may be compelled, and he may be punished by the court for a contempt, as where a juror duly notified fails to attend at a circuit court, or a trial term of the court. The commissioners may require the sheriff to cause a talesman to attend in place of a juror notified, and not attending, or who is excused or discharged; or they may adjourn the proceedings, for the purpose of punishing the defaulting juror, or compelling his attendance. But it is not necessary to cause any talesman to attend, if at least twelve of the persons notified by the sheriff appear and are sworn (*New Code*, § 2330).

All the commissioners must attend, and preside at the hearing; and they, or a majority of them, have, with respect to the proceedings upon the hearing, all the power and authority of a judge of the court, holding a trial term, subject to the directions contained in the commission. Either of the commissioners may administer the usual oath to the jurors. At least twelve jurors must concur in a finding. If twelve do not concur, the jurors must report their disagreement to the commissioners, who must thereupon discharge them, and issue a new precept to the sheriff to procure another jury (*New Code*, § 2331).

The inquisition must be signed by the jurors concurring therein, and by the commissioners, or a majority of them, and annexed to the commission. The commission and inquisition must be returned by the commissioners, and filed with the clerk (*New Code*, § 2332).

The commissioners and the sheriff are entitled to such compensation for their services as the court directs. The jurors are entitled to the same compensation as jurors upon the trial of an issue in an action in the same court. The petitioner must pay the compensation of the commissioners, sheriff, and jurors (*New Code*, § 2333).

[The sections contained in this note have not yet been adopted.]

precept to the sheriff, or any constable of the county, commanding him to cause twenty-four inhabitants of the same county, duly qualified to serve as jurors, to come before such judge, at some time not less than two days thereafter, to inquire of such forcible entry or such forcibly holding.*

§ 914. The jurors must be notified personally, at least twenty-four hours before the time required for the hearing, and they shall be summoned, returned, and impaneled in the same manner as provided by law in civil actions before justices of the peace, and shall be sworn by such judge well and truly to hear, try and determine the traverse; they shall be kept together by such judge, and shall hear and examine any competent witnesses who may be offered, on oath, to be administered by such judge, and after hearing the allegations and proofs of the parties the jury shall be kept together until they agree on a verdict, by an officer, who shall be sworn as is usual on trials in courts of record.†

§ 915. If the jury cannot agree after being kept together for such time as such judge shall deem reasonable, he may discharge them and issue a precept for a new jury, and the same proceedings shall be had in respect to such new jury.‡

Summary Proceedings to Obtain Possession of Lands.

§ 916. Any person in possession of demised premises, or any person claiming possession thereof, may at the time appointed in a summons for showing cause, in accordance with the Revised Statutes, file an affidavit with the magistrate who issued the same, denying the facts upon which the said summons was issued, or any of those facts, and the matters thus controverted shall be tried by a jury, provided

* 3 R. S. 6 ed. §§ 3, 18, pp. 820, 822.

† 3 R. S. 6 ed. § 16, p. 822.

‡ 3 R. S. 6 ed. §§ 9, 10, p. 821; *People ex rel. Davids v. Wilson*, 13 How. 446; *Porter et al. v. Cass*, 7 Id. 441; *Vulte v. Martin*, 44 Id. 24; for fees of jurors in these proceedings, see § 240, *ante*.

either party to such proceeding shall at the time appointed in such summons for showing cause (and before adjournment) demand such jury, and shall, at the time of such demand, pay the necessary costs and expenses of obtaining such jury.*

§ 917. In order to form such jury, the magistrate with whom such affidavit shall be filed shall nominate twelve reputable persons, qualified to serve as jurors in courts of record, and shall issue his precept, directed to the sheriff or one of the constables for the county, or any constable or marshal of the city or town, commanding him to summon the persons so nominated to appear before such magistrate, at such time and place as he shall therein appoint, not more than three days from the date thereof, for the purpose of trying the said matter in difference.†

§ 918. If more than the prescribed number of jurors are summoned, the proceeding will be reversed.‡

§ 919. Six of the persons so summoned shall be drawn in like manner as jurors in justices' courts, and shall be sworn by such magistrate, well and truly to hear, try and determine the matters in difference between the parties. Whenever a sufficient number of jurors duly drawn and summoned do not appear, or cannot be obtained to form a jury, the magistrate may order any sheriff, constable or marshal to summon from the bystanders or from the county at large so many persons, qualified to serve as jurors, as shall be sufficient, and return their names to the magistrate.

Every person so summoned, or summoned under the provisions of this article, as hereby amended, shall attend forthwith, and serve as a juror, unless excused by the magistrate; and for every neglect or refusal so to attend

* 3 R. S. 6 ed. §§ 30, 31, 32, 34, pp. 825, 826; *Lewis v. Lewis*, 11 N. Y. 227; *Lohman v. People*, 1 *Id.* 383; *Rowan v. Lytle*, 11 *Wend.* 616; *People v. Simpson*, 28 N. Y. 60; *Starkweather v. Seeley*, 45 *Barb.* 166.

† 3 R. S. 6 ed. § 35, p. 826; *Miner v. Burling*, 32 *Barb.* 541; *People ex rel. Livermore v. Hamilton*, 15 *Abb. Pr.* 334.

‡ *Farrington v. Morgan*, 20 *Wend.* 208.

shall be subject to fine by said magistrate, in the same manner as is now provided by law in the case of jurors in courts of record.*

§ 920. After hearing the proofs and allegations of the parties, the said jury shall be kept together until they agree on their verdict, by the sheriff, or one of his deputies, or a constable, or by some proper person appointed by the magistrate for that purpose, who shall be sworn, to keep such jury, as is usual in like cases in courts of record.†

§ 921. If such jury cannot agree after being kept together for such time as such magistrate shall deem reasonable, he may discharge them, and nominate a new jury, and issue a new precept in manner aforesaid.‡

* 3 *R. S.* 6 ed. § 36, p. 826; see § 141, *ante*. *Miner v. Burling*, 32 *Barb.* 541; *People ex rel. Livermore v. Hamilton*, 15 *Abb. Pr.* 334.

† 3 *R. S.* 6 ed. § 37, p. 826.

‡ 3 *R. S.* 6 ed. § 38, p. 827; *Roach v. Cosine*, 9 *Wend.* 230; as to challenges in these proceedings, see § 457, *ante*; for fees of jurors in these proceedings, see § 849, *ante*.

In summary proceedings to recover possession of real property, the issues joined by the petition and answer must be tried by the judge or justice; unless a party, or one of two or more parties, answering as prescribed in the two last sections, files with the answer a written demand that the issues so joined be tried by a jury; and at the same time pays to the judge or justice, or to the clerk, the fees of the jurors, and of the officer for notifying them. In that case, the issues must be tried by a jury in like manner as an issue of fact joined in an action, in the court of which the judge or justice who issued the precept is the presiding officer; and all the provisions of this act, relating to procuring and impaneling a jury, the trial of an issue of fact by a jury, and the proceeding upon such a trial, including those relating to the mode of compelling the attendance of a witness, and to the punishment of a defaulting witness or juror, in that court, apply to the trial of an issue so joined, except as otherwise expressly prescribed in this title (*New Code*, § 2246).

[The section contained in this note has not yet been adopted.]

Proceedings on Laying out and Altering Roads and Highways.

§ 922. In all cases of the alteration of any road, or the laying out of any new road, except where the same is altered, opened or laid out with the consent in writing of the owner or owners of the lands to be taken for such alteration or opening, the person or persons applying for the same shall serve a notice on the town clerk of the town, and on a justice of the peace, and the commissioner or commissioners of highways thereof, asking for a jury to certify to the necessity of the same, and specifying a time not less than ten or more than twenty days for the time of serving such notice, when such jury shall be drawn at the clerk's office of the town, by the town clerk thereof, and shall notify in writing each of the owners or occupants, through which such alteration or new road is proposed to be laid, of the time and place of drawing such jury, by personally serving such notice on such owner or occupant, at least five days before the drawing of such jury, or by mailing a copy thereof, at least eight days before such drawing, to such owner or owners, in the manner prescribed by law for the service of legal notices. At the time and place mentioned, the town clerk of such town, having received such notice that such jury is to be drawn, shall, in the presence of a justice of the peace, or one of the commissioners of highways of the town, deposit in a box the names of all persons then residents of his town, whose names are in the lists filed in said town clerk's office, of those selected and returned as jurors, pursuant to article second, title four, chapter seven, part third of the Revised Statutes (now New Code), who are not interested in the lands through which such road is to pass or be located, nor of kin to the owner thereof, and shall publicly, in the presence of such justice of the peace or commissioner, draw therefrom the names of twelve persons, and shall make a certificate of such names, and the purposes for which they were drawn, and shall deliver the same to the person asking for the jury, and the applicant for

such jury shall pay to the said town clerk one dollar for drawing such jury. The applicant for such road or alteration of a road, on receiving such certificate, shall deliver the same to a justice of the peace of the town wherein the road is to be laid. And it shall be the duty of such justice, forthwith to issue a summons to one of the constables of said town, directing him to summon the persons named in said certificate, specifying a time and place in said summons, at which the persons to be summoned shall meet, which shall not be less than ten nor more than twenty days from the issuing thereof ; and in case the owner or owners of any of the lands through which said road or alteration is proposed to be located shall be a non-resident, it shall be the duty of such justice to notify such owner or owners by mail, at least eight days before the meeting of such jury, of the time and place of such meeting ; and if any person so summoned to attend as a juror shall neglect or refuse to attend at the time and place designated in such summons, the person or persons so neglecting or refusing to attend shall be liable, unless a sufficient excuse be established, to pay a fine of five dollars, which shall be sued for and recovered by the overseers of the poor of said town, and such fine shall be applied by them to the support of the poor thereof. If nine or more of the persons shall have been so drawn, not interested in the lands through which the road is to be laid, nor of kin to the owners thereof, shall appear at the time and place specified in the summons, they shall then be sworn by the justice of the peace who issued such summons, well and truly to certify as to the necessity of the highway applied for ; and if such justice of the peace shall refuse or neglect to attend at the time and place mentioned in said summons, such oath may be administered to such jurors by any other justice of the peace of said county, and the justice of the peace swearing such jury shall receive therefor from such applicant the sum of two dollars. Such jury shall then personally examine the route of such highways, and shall hear any reasons that may be offered for or against such proposed route or alteration. If nine or more of the number thereof shall

be of opinion that such highway or alteration of a highway is necessary and proper, they shall make and subscribe a certificate in writing to that effect, which shall be delivered to the commissioners of the highway of the town. But if such number thereof shall not certify that such road or alteration is necessary, then no application for such road or alteration shall be made again in three months. Every juror shall be entitled to receive for his services as such juror the sum of fifty cents, to be paid by such applicant, and the constable who may summon such jury shall receive therefor from such applicant therefor ten cents for summoning each juror summoned, and ten cents a mile for each mile actually and necessarily traveled in summoning such jury in going from and returning to his place of residence therefor. If nine or more of such jurors shall make a certificate that such highway or alteration is necessary and proper, then the cost of such proceeding, as hereinbefore provided, shall be a charge against such town in favor of such applicant. The commissioners of highways shall decide upon such application for such road or alteration within thirty days after the decision of the jury or the service upon them of the consent, in writing, of the owner or owners of the land to be taken for such alteration or opening, by an order in writing, which shall be filed in the office of the town clerk of such town.*

§ 923. They shall then personally examine the route of such highway, and shall hear any reasons that may be offered for or against laying out the same. If they shall be of opinion that such highway is necessary and proper, they shall make and subscribe a certificate in writing to that effect, which shall be delivered to the commissioners of highway of the town.†

* 2 R. S. 6 ed. § 98, p. 153; Albany Northern R. R. Co. v. Bonnell, 24 N. Y. 345-351; Commissioners of Highways, &c. v. Judges of the County Court, 7 Wend. 264; People ex rel. Flint v. Cline et al. 23 Barb. 197; People ex rel. Tudlum v. Wallace, 4 N. Y. S. C. (T. & C.) 439.

† 2 R. S. 6 ed. § 99, p. 154; People ex rel. Flint v. Cline et al. 23 Barb. 197; Albany Northern R. R. Co. v. Bonnell, 24 N. Y. 345, 351; Carris v. Commissioners, &c. of Waterloo, 2 Hill, 444.

Assessing damages when Highways laid out through uninclosed Lands, &c.

§ 924. Any person conceiving himself aggrieved, or the commissioner or commissioners on the part of the town feeling dissatisfied by any assessment for the laying out of any highway through uninclosed, unimproved and uncultivated lands, may within twenty days after the filing thereof signify the same by notice in writing, and serving the same on the town clerk, and on the opposite party; that is, the persons for whom the assessments were made, or the commissioner or commissioners of highways, as the case may be, asking for a jury to reassess the damages, and specifying a time not less than ten nor more than twenty days from the time of filing said assessment, when such jury will be drawn at the clerk's office of an adjoining town of the same county by the town clerk thereof, which notice shall be served upon said opposite party within three days after service upon the town clerk as aforesaid, and may be served personally, or by being left at the dwelling-house of the party with some person in charge thereof, or, if there be no such person, or the house be closed, then by fixing the same upon the outer door of said dwelling-house.*

§ 925. At the time and place mentioned in the preceding section, the town clerk of such adjoining town, having received three days' previous notice that such jury is to be drawn, from the person or party asking a reassessment, shall deposit in a box the names of all such persons then residents of his town whose names are on the last list filed in said town clerk's office, of those selected and returned as jurors pursuant to article second, title four, chapter seventh, part third of the Revised Statutes (now New Code), who are not interested in the lands through which such road shall be located, nor of kin to either or any of the parties,

* 2 R. S. 6 ed. § 108, p. 156; *People ex rel. Lefever v. Board of Supervisors*, 34 N. Y. 268, 271.

and shall draw therefrom the names of twelve persons, and shall make a certificate of such names, and the purposes for which they were drawn, and shall deliver the same to the party first asking for the reassessment.*

§ 926. The party receiving such certificate shall within twenty-fours thereafter deliver the same to a justice of the peace of the town wherein the damages are to be assessed, and it shall be the duty of such justice forthwith to issue a summons to one of the constables of his town, directing him to summon the persons named in said certificate, and shall specify a time and place in said summons at which the persons to be summoned shall meet, but no meeting of such persons shall be had within twenty days from the time of filing the assessment of damages in the town clerk's office, by the commissioner or commissioners of highways.†

§ 927. Upon such persons appearing at the time and place mentioned in the summons, the justice who issued the summons shall draw by lot six of the persons attending to serve as a jury, and the first six persons drawn who shall be free from all legal exceptions shall be the jury to reassess all the damages required to be reassessed upon the same highway; and the said jury shall be sworn by the said justice, well and truly to determine and reassess such damages as shall be submitted to their consideration, and shall take a view of the premises, hear the parties and such witnesses as may be offered by the parties and sworn by said justice before them, and shall render their verdict in writing under their hands, which shall be certified by said justice, and be delivered to the commissioners of highways of the town, and the same shall be final.‡

* 2 *R. S.* 6 ed. § 109, p. 156; *People ex rel. Van Sickle v. Eldridge*, 3 *Hun.* 541-544; *S. C.*, 6 *N. Y. S. C. (T. & C.)* 20 and 21.

† 2 *R. S.* 6 ed. § 110, p. 156; *People ex rel. Van Sickle v. Eldridge*, 3 *Hun.* 541-544; *S. C.*, 6 *N. Y. (T. & C.)* 20, 21.

‡ 2 *R. S.* 6 ed. § 111, p. 156; *Board ex rel. Fountain v. Board of Supervisors*, 4 *Barb.* 64; *Board ex rel. Van Sickle v. Eldridge*, 3 *Hun.* 541-544; *S. C.*, 6 *N. Y. S. C. (T. & C.)* 20, 21.

§ 928. The service of the summons on such jurors should be personal, if they can be found, but if not, then the same may be made by leaving a notice of the selection of such person, and the time and place and the purpose for which he is required to attend, at his place of residence, with some member of his family of suitable age and discretion.

§ 929. Jurors who shall be summoned from an adjoining town, and shall attend but not serve, shall be entitled each to fifty cents; if they shall serve, then one dollar; if from the same town, and shall attend and not serve, twenty-five cents; if they shall serve, then fifty cents each.*

Right of Way.

§ 930. The provision of the sixth section of the Bill of Rights of the Constitution of 1836, which was in force when the act of January 22, 1855, under which the proceedings in this case (*Cairo & Fulton R. R. Co. v. Trout*) was had, was passed, in which it is declared that "The right of trial by jury shall remain inviolate," relates to the trials of issues of fact in civil and criminal causes in courts of justice, and has no relation to a statutory proceeding for the assessment of damages for the appropriation of a right of way.†

* 2 *R. S.* 6 ed. § 113, p. 157.

† 32 *Ark.* 17; *Beekman v. Saratoga & S. R. R. Co.* 3 *Paige*, 75; *People v. Michigan Southern R. R. Co.*, 3 *Mich.* 496; *Pierce Am. R. R. L.* 166; *Bonaparte v. Camden & Amboy R. R. Co.*, 1 *Baldwin C. C.* 205; *Hickox v. Cleveland*, 8 *Ohio*, 543.

In Illinois, on an appeal in the circuit court, in a case for the assessment of damages for the appropriation of land for railroad purposes, the statute (*Sess. Laws* 1852, p. 146, § 14), gives a trial by jury, unless the parties shall otherwise agree (*Toledo, P. & W. R. R. Co. v. Darst*, 12 *Am. Railway Rep.* 448; *S. C.*, 61 *Ill.* 231).

In proceedings to take lands for the use of a railroad, the oath of the jurors is not to be construed by itself, but as a part of the proceeding in which it was taken; and if it contains in substance,

Jurors in Plank-road and Turnpike Cases.

§ 931. If any owner of land through which a plank or turnpike road shall be laid, shall from any cause be incapable of selling the same, or if such company cannot agree with him for the purchase thereof, or if, after diligent inquiry, the name or residence of any such owner cannot be ascertained, the company may present to the first judge or county judge of the county in which the lands of such owner lie, a petition setting forth the grounds of the application, a description of the lands in question, and the name of the owner, if known, and the means that have been taken to ascertain the name and residence of such owner, if his name and residence have not been ascertained, and praying that the compensation and damages of the owner of the lands described in the petition may be ascertained by a jury. Such petition shall be verified by the oaths of at least two of the directors of the company, and if it shall allege that the name or residence of any owner is unknown, it shall be accompanied by affidavits,

though not in form, everything the statute requires, it is sufficient (*East Saginaw & St. C. R. R. Co. v. Benham*, 12 *Am. Railway Rep.* 356; S. C., 28 *Mich.* 459).

Where two persons, interested in lands sought to be taken by a railway company, are joined in one petition, appear jointly, and jointly demand a jury, the jury have the right to award an undivided sum to the two (*Ib.*).

It is a sufficient finding by a jury, that the land sought to be taken is required for public use, when they state in their finding the following: that they "did ascertain and determine that it is necessary for said company to take said real estate for public use, to wit, for the purpose of said company's incorporation, as and for a right of way" (*Ib.*).

In impaneling a sheriff's jury to assess damages taken for railroad purposes, the parties have no right to any peremptory challenges, neither are they entitled to have the names of all the jurors placed separately in a box, and the jury drawn, in accordance with the provisions of *R. S.* 1871, c. 82, § 66 (*Davis v. Bangor & P. R. R. Co.*, 60 *Me.* 303).

proving to the satisfaction of the said judge that all reasonable efforts have been made by the company to ascertain the name and residence of any owner whose name or residence is unknown.*

§ 932. On receiving such petition, the said judge shall appoint a time for drawing such jury, which shall be drawn from the grand-jury box of the county, by the clerk thereof, at his office. At least fourteen days' notice of the time and place of such drawing shall be served personally upon each owner of the lands described in the petition, who shall be known and reside in the county where the lands lie, or by leaving the same at his residence; and such notice shall be served on all other owners in the manner aforesaid, or by putting the same into the post-office, directed to them at their respective places of residence, and paying the postage thereon, or by publishing the same once in each week for two successive weeks in a newspaper printed in such county; the first of such publications shall be at least fourteen days before such drawing.†

§ 933. The said judge shall attend such drawing, and shall decide upon any challenge made to any juror drawn by any person interested. Twenty-four competent and disinterested jurors, and as many more as the said judge shall direct, shall be drawn; the clerk shall make, certify and deliver to the judge and to any party requiring the same, a list of them, and the balance drawn shall be returned to the box. The said judge, if he shall deem it necessary, may at any subsequent time direct the drawing of an additional number of jurors, and they shall be drawn, and all proceedings in relation to such drawing shall be had in the manner hereinbefore provided. Before proceeding to draw any such jury, the company shall furnish to the said judge proof, by affidavit satisfactory to him, of the time and manner of serving and publishing notice of such drawings, which affidavit shall be filed in such clerk's office, and no such jury shall be drawn, unless it shall appear to

* 2 *R. S.* 6 ed. § 82, p. 273; *King v. Mayor*, 36 *N. Y.* 186.

† 2 *R. S.* 6 ed. § 83, p. 273.

the satisfaction of the said judge, that the provisions of this act in respect to giving notice of such drawing have been complied with.*

§ 934. From the jurors so drawn, said judge shall draw as many as he shall deem necessary to secure the attendance of twelve, and he shall issue his precept, directed to the sheriff of such county, either of his deputies or any constable of such county, to summon the jurors so drawn by the said judge, to attend at the time and place therein specified, to ascertain such compensation and damages. And he may from time to time, in case of the absence or inability to serve of any juror directed to be summoned, draw and direct to be summoned as aforesaid, as many as may be necessary in his opinion to secure the attendance of twelve.†

§ 935. Every juror named in any such precept, shall, at least four days before the day therein specified for his attendance, be summoned personally or by leaving at his residence a notice containing the substance of such precept. The officer serving such precept shall return it to the said judge with an affidavit of the manner of serving the same, and of the distance necessarily traveled by him for that purpose, and such officer shall receive for making such service six cents a mile for the distance so traveled.‡

§ 936. Every juror so summoned, who shall neglect or refuse to attend or serve in pursuance of such summons, shall be liable to the same penalties as in case of such neglect or refusal of a person duly summoned as a juror in a court of record, and may be excused by the said judge from attending or serving for reasons for which such juror might be so excused if summoned as a juror in such court. Every juror attending shall be entitled therefor to one dollar a day, and his reasonable and necessary expenses to be paid by the company.§

§ 937. The jurors so summoned shall meet at the time and place fixed by the said judge for that purpose,

* 2 R. S. 6 ed. § 85, p. 274.

† 2 R. S. 6 ed. § 86, p. 274.

‡ 2 R. S. 6 ed. § 87, p. 274.

§ 2 R. S. 6 ed. § 88, p. 274.

(the said justice having the right to fix said time and place of meeting), and shall be sworn by him to diligently inquire and ascertain the compensation and damages which ought justly to be paid for the land described in the petition, or for those of them in respect to which they shall be called upon to inquire, to the owners thereof, and for taking the same for such road, and faithfully to perform their duty as such jurors according to law.*

§ 938. The said judge shall attend such jurors, shall administer oaths to witnesses called before them, shall take the minutes of the testimony given, and admissions of the parties made before them, shall advise such jury as to the law applicable to any case that may arise, shall receive, certify and return to the county clerk's office the verdicts agreed upon by them, and while so attending, shall have all the powers possessed by a court of record, when trying issues of fact joined in civil cases.†

§ 939. The jury, after hearing the parties, and viewing the lands in question in each case, shall by a verdict ascertain and determine the compensation and damages that ought to be paid to the owner for the lands to be taken by the company, and for taking the same for such road, and also the amount that ought to be paid to him for the time spent, and necessary expenses incurred by him in respect to the proceedings to ascertain and determine such compensation and damages, of which time and expenses a bill of items shall be presented to the jury, verified by the oath of the owner or his agent, and such compensation and damages shall be ascertained and determined without any deduction on account of any real or supposed benefit which the owners of such lands may derive from the construction of such road.‡

§ 940. Such jury finding any such verdict, shall, after agreeing upon the same, make a certificate thereof, and sign and deliver the same to the said judge, and shall

* 2 R. S. 6 ed. §§ 90, 91, p. 275.

† 2 R. S. 6 ed. § 92, p. 275.

‡ 2 R. S. 6 ed. § 93, p. 275.

embrace therein a particular description of the land in respect to which it is found; such certificate may include one or more verdicts in the discretion of the jury. Every such certificate shall be certified by the judge to have been made by such jury, and shall be recorded in the records of deeds in the clerk's office of the county where the lands therein described, shall lie, at the expense of the company.*

Jurors in Ad Quod Damnum Proceedings.

941. Whenever the governor of this State shall be authorized by law to take possession of any lands or tenements within this State, for the use of the people of this State, and he cannot agree with the owner or owners of such lands or tenements for the purchase thereof, he shall cause application to be made to the supreme court for a writ of inquiry of damages, which shall thereupon be issued to the sheriff of the county within which such lands or tenements shall be situated, unless the supreme court shall direct such damages to be assessed by a foreign jury.†

§ 942. Such writ shall describe the said lands and tenements with the like certainty as required in a declaration in ejectment, and shall command the sheriff, that, by the oaths of twelve good and lawful men of his county, he shall inquire whether the person or persons owning the said lands or tenements, or any of such persons, will sustain any, and what, injury by reason of the taking of such premises for the use of the people of this State, and that he return the said writ with the finding of the jury thereupon to the supreme court without delay.‡

§ 943. Upon such writ being delivered to the sheriff, he shall give at least three weeks' notice of the time and place of executing the same, by publishing a notice thereof in a newspaper printed in his county.§

* 2 R. S. 6 ed. § 95, p. 275.

† 3 R. S. 6 ed. § 29, p. 890; see § 885, *ante*; United States v. Dumplin Island, 1 Barb. 24.

‡ 3 R. S. 6 ed. § 30, p. 891.

§ 3 R. S. 6 ed. § 31, p. 891.

§ 944. The sheriff shall summon twelve qualified jurors of his county to attend at such time and place, and shall then and there administer to each of the said jurors an oath that he will diligently inquire concerning the matters specified in the said writ, and will give a true verdict, according to the best of his judgment, without favor or partiality.*

§ 945. After the jury shall have been duly sworn, they shall proceed to view all the lands and tenements specified in the writ, and having duly considered the value thereof, they shall proceed to assess the damages which the owner, or, if there be several, which the respective owners of such lands and tenements will sustain by being deprived thereof. They shall make an inquisition to be signed by themselves and by the sheriff, in which they shall set forth the names of the several owners of the lands and tenements in question, and the rights of each owner respectively, so far as the same can be ascertained by them, together with the amount to be paid therefor by the people of this State, and to whom particularly, which inquisition the sheriff shall forthwith return together with the writ to the supreme court.†

§ 946. Whenever any lands or tenements shall be taken for the use of the people of the United States, by the consent of the legislature of this State, and it shall become necessary to issue a writ of inquiry of damages, the like proceedings shall be had as provided in this article.‡

* 3 R. S. 6 ed. § 32, p. 891.

† 3 R. S. 6 ed. § 33, p. 891; *United States v. Dumplin Island*, 1 Barb. 24.

‡ 3 R. S. 6 ed. § 39, p. 892; 1 R. L. 198; for fees of jurors in these proceedings see § 240, *ante*.

The writ, heretofore known as the writ of *ad quod damnum*, shall hereafter be styled the writ of assessment of damages (*New Code*, § 2103).

Whenever the governor of the State is authorized by law to take possession of any real property within the State, for the use of the people of the State, and he cannot agree with the owner or owners thereof, for its purchase, he may cause application to be made to the supreme court, at a special term thereof, for a writ of assessment of damages, which must be granted accordingly (*New Code*, § 2104).

The attorney-general, or the district attorney of the county in

Highway Encroachment Proceedings.

§ 947. If the occupant of land to whom notice is given, that his fences encroach upon the highway, shall within five days deny such encroachment, the commissioners, or some one of them, shall apply to any justice of the peace of the county for a precept, directed to any constable

which the real property is situated, must, when the governor so directs, make the application, in the name of the governor; and must conduct the subsequent proceedings, under the governor's direction (*New Code*, § 2105).

The writ must be directed to the sheriff of the county in which the real property to be taken is situated, unless the court directs the damages for the taking to be assessed by a jury of another county; in which case, the writ must be issued to the sheriff of the county from which the jury is directed to be taken (*New Code*, § 2106).

The writ must describe the real property to be taken, with the like certainty as is required in a complaint in an action of ejectment. It must command the sheriff, to whom it is directed, to inquire, by the oaths of twelve men of his county, qualified to act as trial jurors in a court of record, whether the owner or owners of the real property, or any of them, will sustain any damages by the taking thereof, for the use of the people of the State; and, if so, the amount thereof; and that he return the writ to the supreme court, without delay, with the finding of the jury thereupon (*New Code*, § 2107).

The sheriff, immediately after the delivery of the writ to him, must give notice of the time when, and the place where, the writ will be executed, by publishing the notice, once in each week, for at least three successive weeks, in a newspaper printed in his county (*New Code*, § 2108).

The sheriff must notify twelve men of his county, qualified to act as trial jurors in a court of record, to attend at the time and place, and for the purpose specified in the notice. Each juror must be notified, as a juror is notified to attend a term of the circuit court. Upon his failure to attend, when duly notified, his attendance may be compelled by attachment, and proceedings may be taken against him, and he may be punished thereupon, by the supreme court, as where a juror, duly notified, fails to attend at a circuit court. The sheriff may require the attendance of a talesman, in place of a juror notified and not appearing; or he may adjourn the

of the town, to summon twelve freeholders thereof, to meet at a certain day and place, to be specified in such precept, and not less than four days after the issuing thereof, to inquire into the premises. The constable to whom such precept shall be directed shall give at least three days' notice to the commissioners of highways of the town, and

proceedings, for the purpose of punishing the defaulting juror, or compelling his attendance (*New Code*, § 2109).

When a jury has been procured, the sheriff must, before the jurors proceed to the inquiry commanded by the writ, administer to each of them an oath, that he will diligently inquire concerning the matter specified in the writ, and will give a true verdict, according to the best of his judgment, without favor or partiality (*New Code*, § 2110).

After being sworn as prescribed in the last section, the jury must view all the real property described in the writ, and consider the value thereof. They may, in the discretion of a majority of them, hear such testimony as may be offered by any person appearing, respecting the value. They must thereupon assess the damages which the owner or owners of the real property will sustain by being deprived thereof. When the real property consists of two or more distinct parcels, owned, or claimed to be owned, by different persons, the jury must assess separately the value of each distinct parcel, if the writ requires them so to do, or if a majority of them think proper so to do. If they cannot agree, after a reasonable time, the sheriff may discharge them, and publish a new notice, and procure a new jury. When the jurors have agreed, they must make an inquisition, stating the sum to be paid, by the people of the State, for taking each distinct parcel, or the whole, as the case requires. The inquisition must be signed by each juror, and by the sheriff; and the sheriff must immediately thereafter file the inquisition and the writ, with his return to the writ, in the office of the clerk of the county in which the real property is situated (*New Code*, § 2111).

When the legislature of the State consents to the taking of any real property within the State, for the use of the people of the United States, a writ of assessment of damages may be issued; and the proceedings thereupon must be in accordance with the provisions of this article; except that the application for the writ must be made, and the subsequent proceedings must be conducted, by the attorney of the United States, for the district embracing the county wherein the real property is situated (*New Code*, § 2119).

[The sections contained in this note have not yet been adopted.]

to the occupant of the land, of the time and place at which such freeholders are to meet.*

§ 948. On the day specified in the precept, the jury so summoned shall be sworn by such justice well and truly to inquire whether any such encroachment has been made, and by whom. Such witnesses as may be produced by either party shall also be sworn by such justice, and the jury shall hear the proofs and allegations which may be produced and submitted.†

§ 949. If the jury find that any encroachment has been made, they shall make and subscribe a certificate in writing, stating the particulars of such encroachment and by whom made, which shall be filed in the office of the town clerk. The occupant of the land, whether such an encroachment shall have been made by him or by any former occupant, shall remove his fences within sixty days after the filing of such certificate, under the penalty provided in section 170 of this title. He shall also pay the costs of such inquiry; and if the same shall not be paid within ten days, the justice shall issue a warrant for the collection thereof in the manner provided in section 62 of this title.‡

§ 950. Upon the hearing before the jury, the justice who has issued the precept shall preside at the trial. Six of the jurors summoned shall be drawn and impaneled in the same manner as upon trial by jury in a civil action before him, and he shall have the power, and it shall be his duty to decide as to the competency of jurors, the competency and admissibility of evidence, and all other questions which may arise before him in the same manner and with the like effect as upon a jury trial in civil actions before him. If the jury find that no encroachment has

* 2 R. S. 6 ed. § 171, p. 165; *Bronson v. Mann*, 13 J. R. 460; *Pugsley v. Anderson*, 3 Wend. 468; *Lane v. Crary et al.*, 19 Barb. 537.

† 2 R. S. 6 ed. § 172, p. 166; *People ex rel. Ottman v. Hyndes et al.*, 30 N. Y. 470; *Pugsley v. Anderson*, 3 Wend. 471.

‡ 2 R. S. 6 ed. § 173, p. 166; *Fitch v. Commissioners of Highways, &c.*, 22 Wend. 132; *Fleet v. Youngs*, 7 Id. 300; *Voorhees v. Martin*, 12 Barb. 508; *Doughty v. Brill*, 36 Id. 493; *Robbins v. Gosham*, 26 Id. 592; *Lane v. Crary et al.*, 19 Id. 537.

been made, they shall so certify, and shall also ascertain and certify the damages which the then occupant shall have sustained by such proceeding, and in case the jury shall find an encroachment, the justice shall render and docket a judgment to that effect.*

Proceedings of Insolvents to obtain Discharge from Debts.

§ 951. Every creditor opposing the discharge of an insolvent under this article may, at the time appointed for the first hearing, demand of the officer or court before whom such hearing shall be had, that the case of such insolvent be heard and determined by a jury, and shall be entitled to an order to that effect, upon filing with such officer or court a specification in writing of the grounds of his objections to such discharge.†

§ 952. Upon such demand being made to any court before which a hearing shall be had, a jury shall be drawn in the same manner as for a trial of civil causes, from the jurors summoned and attending such court, who shall be sworn as prescribed in the succeeding twenty-first section (§ 954, *post*).‡

§ 953. If such demand be made to any single officer, he shall nominate eighteen reputable freeholders of the county, and shall issue a summons to the sheriff or any constable of the county, commanding him to cause the persons so nominated to appear before such officer, at a time and place to be specified in the summons, not less than six or more than twelve days from the time of issuing the same.§

§ 954. At the time and place so appointed, twelve of the persons so summoned and appearing shall be balloted

* 2 *R. S.* 6 ed. §§ 174 to 178, incl. pp. 166, 167; for fees of jurors in these proceedings, see § 240, *ante*.

† 3 *R. S.* 6 ed. § 18, p. 16; *Avery's Case*, 6 *Abb. Pr.* 146.

‡ 3 *R. S.* 6 ed. § 19, p. 16.

§ 3 *R. S.* 6 ed. § 20, p. 16.

for and drawn in like manner as jurors in a court of record, and shall be sworn by such officer well and truly to hear, try and determine the validity of the objections so specified.*

§ 955. Such jury so drawn and sworn either by a court or any officer, having heard the proofs and allegations of the parties, shall determine the matters submitted to them, and for that purpose shall be kept together by some proper officer, to be sworn as is usual in like cases in courts of record, until they agree upon their verdict, and such verdict shall be conclusive in the premises.†

§ 956. The verdict so rendered shall be recorded by the court or officer in the minutes of the proceedings.‡

§ 957. There shall be but one hearing before a jury in any case under this article. If such jury cannot agree, after being kept together for such time as the officer or court shall think reasonable, then they shall be discharged, and the court or officer shall decide upon the merits of the application as if no jury had been called.§

* 3 R. S. 6 ed. § 21, p. 16; for penalty for failing to attend, see § 959, *post*.

† 3 R. S. 6 ed. § 22, p. 16; for fees of jurors in these proceedings, see § 960, *post*.

‡ 3 R. S. 6 ed. § 23, p. 16.

§ 3 R. S. 6 ed. § 24, p. 16.

In order to entitle a creditor to oppose the discharge of the insolvent, he must, on the day fixed to show cause, or at such other time as the court directs, file with the clerk a specification of his objections; and he may then, but not afterwards, demand a trial, by a jury, of the questions of fact arising thereupon. If a trial by a jury is not then demanded, the questions of fact must be tried by the court, without a jury. Where one of two or more opposing creditors demands a trial by a jury, all the material questions of fact, arising upon the objections of all the creditors, must be tried in like manner, and at the same time. The court may, in its discretion, direct the questions to be settled, and plainly stated in an order, as where an order is made by the supreme court, in an action pending therein, for the trial of questions of fact by a jury (*New Code*, § 2168).

There shall be but one trial by jury. If the jurors cannot agree, after being kept together for such a time as the court deems reasonable, the court must discharge them, and determine the questions of

Proceedings by Creditors to Compel Assignments by Debtors Imprisoned on Execution in Civil Cases.

§ 958. Any creditor of a person actually imprisoned upon execution in any civil action may, at the time of such debtor's rendering his account and inventory, demand that the case of such debtor be submitted to a jury, and shall be entitled thereto, on filing with the officer before whom the proceedings shall be had a specification of the grounds of his objection to such debtor's discharge, and the same proceedings shall be had in all respects for the summoning of such jury, and for their determination of the matters, and with the like effect as prescribed in the preceding third article (§§ 951-957, *ante*).*

§ 959. Every person who shall be summoned as a juror under the provisions of this title, and shall refuse or neglect to attend, without reasonable cause, to be determined by the officer issuing such summons, shall forfeit ten dollars, to be recovered by any creditor at whose instance such summons was issued, and in case of his neglect to prosecute for the same, then it shall be competent for the insolvent to sue for and recover the said penalty.†

§ 960. The sheriff or constable summoning a jury under the provisions of this title shall be entitled to receive one dollar and twelve and a half cents; and each juror attending and sworn, twenty-five cents. The said fees, together with all other expenses of the hearing of any case by a jury, shall be paid by the creditors requiring the same.‡

fact, or those questions as to which the jurors have not agreed, upon the evidence taken before the jury, as if a jury had not been demanded (*New Code*, § 2170).

[The sections contained in this note have not yet been adopted.]

* 3 *R. S.* 6 ed. § 14, p. 21; *People ex rel. La Torre v. O'Brien*, 54 *Barb.* 38.

† 3 *R. S.* 6 ed. § 17, p. 30.

‡ 3 *R. S.* 6 ed. § 18, p. 30.

The provisions of sections 2166, 2167, 2168, 2169, 2170, 2172, and

*Habitual Drunkard Proceedings—Inquiry by Overseers
of the Poor.*

§ 961. Any person designated by the overseers of the poor of any town, in the manner provided by statute, as an habitual drunkard, may apply to any justice of the peace of the city or town in which the person so designated resides, for process to summon a jury to try and determine such fact of drunkenness.*

§ 962. On such application the justice shall immediately give notice thereof, in writing, to the overseers of the poor, specifying the time and place where the parties shall meet for the trial of such fact, and shall issue a *venire* to any constable to summon a jury of twelve persons, competent to serve on juries, to appear at the said time and place for the purpose of trying the said fact.†

§ 963. Such jury shall be summoned, returned, and six of them shall be balloted for, by such justice, and shall be sworn well and truly to try the fact of the alleged drunkenness, in the same manner as for the trial of issues in suits brought before a justice of the peace, and witnesses shall be summoned, and their attendance and testimony enforced, and they shall be sworn and examined before the said jury in the like manner.‡

§ 964. The said jury shall hear the allegations and proof offered on both sides, and shall proceed in all respects as in trials at law to render their verdict.§

2173, of this act, apply to a special proceeding, taken as prescribed in this article, for the purpose of obtaining the discharge from imprisonment of an insolvent debtor (*New Code*, § 2193; see note to § 957, *ante*).

[The section contained in this note has not yet been adopted.]

* 2 *R. S.* 6 ed. § 3, p. 877.

† 2 *R. S.* 6 ed. § 4, p. 877.

‡ 2 *R. S.* 6 ed. § 5, p. 877.

§ 2 *R. S.* 6 ed. § 6, p. 877; for fees of jurors in these proceedings, see § 849, *ante*.

Of the Investigation of the Origin of Fires.

§ 965. Whenever it shall be made to appear, by the affidavit of a credible witness, that there is ground to believe that any building has been maliciously set on fire, or attempted to be, any coroner, sheriff, or deputy-sheriff of the county in which such crime is supposed to have been committed, to whom such affidavit shall be delivered, and who shall be requested, in writing, by the president, secretary, or agent of any insurance company, or by two or more reputable freeholders, to investigate the truth of such belief, shall do so without delay.*

§ 966. For this purpose he shall possess all the powers conferred upon coroners for the purpose of holding inquests (see §§ 865-867, *ante*).†

§ 967. The jury, after inspecting the place where the fire was, or was attempted, and after hearing the testimony, shall deliver to the officer holding such inquest their inquisition in writing, to be signed by them, in which they shall find and certify how and in what manner such fire happened or was attempted, and all the circumstances attending the same, and who were guilty thereof, either as principal or accessory, and in what manner. But if such jury shall be unable to ascertain the origin and circumstances of such fire, they shall find and certify accordingly.‡

§ 968. This act does not extend to the cities of New York, Brooklyn and Buffalo.§

Jury of Inquiry to Assess Damages for Injury to Person, &c., on Defaults.

§ 969. Where the summons was personally served upon the defendant within this State, and he has made

* 2 R. S. 6 ed. § 1, p. 1014.

† 2 R. S. 6 ed. § 2, p. 1015.

‡ 2 R. S. 6 ed. § 3, p. 1015.

§ 2 R. S. 6 ed. § 8, p. 1015.

default in appearing, or where the defendant has appeared, but has made default in pleading, and the case is not one where the clerk can enter final judgment, as prescribed in the last two sections, the plaintiff must apply to the court for judgment. Upon the application he must file, if the default was in appearing, proof of service of the summons; or if the default was in pleading, proof of appearance, and also, if a copy of the complaint was demanded, proof of service thereof upon the defendant's attorney; and in either case proof, by affidavit, of the default which entitles him to judgment.*

§ 970. The court must thereupon render the judgment to which the plaintiff is entitled. It may, without a jury, or with a jury, if one is present in court, make a computation or assessment, or take an account or proof of a fact for the purpose of enabling it to render the judgment or to carry it into effect, or it may, in its discretion, direct a reference, or a writ of inquiry for either purpose, except that where the action is brought to recover damages for a personal injury or an injury to property, the damages must be ascertained by means of a writ of inquiry.†

§ 971. Where a reference, or a writ of inquiry is directed, the court may direct that the report or inquisition be returned to the court for its further action, or it may in its discretion, except where special provision is otherwise made by law, omit that direction, in which case final judgment may be entered by the clerk, in accordance with the report of the referee, or for the damages ascertained by the inquisition, without any further application.‡

§ 972. Where a reference, or a writ of inquiry, directed as prescribed in section one thousand and fifteen, or section one thousand two hundred and fifteen of this act (§ 970, *ante*), has been executed, either party may apply for an order directing a new hearing, or a new writ of inquiry upon proof by affidavit that error was committed, to his

* *New Code*, § 1214; *Old Code*, § 246.

† *New Code*, § 1215; *Old Code*, § 246.

‡ See note to last section.

300 INQUIRY TO ASSESS DAMAGES ON DEFAULTS.

prejudice upon the hearing, or in the report, or upon the execution of the writ, or in the inquisition. In a proper case the application may be granted after judgment has been entered. In that case the judgment may be set aside, either then or after the new hearing, or the execution of the new writ, as justice requires.*

* *New Code*, § 1232; and see *New Code*, § 1015. As to mode of obtaining jury, &c., see §§ 897-901, *ante*.

APPENDIX.

FORMS.

Form No. 1. Ordinary oath of jurors in a civil action.

You and each of you solemnly swear (or affirm) that you will well and truly try the issues joined in this action, in which A. B. is plaintiff, and C. D. defendant, and a true verdict render according to the evidence. So help you God.*

2. Ordinary oath of jurors in a criminal action.

You and each of you solemnly swear (or affirm) that you will well and truly try and true deliverance make in this issue of traverse joined between the People of the State of New York (Commonwealth or State) and A. B., the prisoner at the bar (or the defendant at the bar), and a true verdict render according to the evidence. So help you God.†

3. Oath of jurors where the whole panel is sworn collectively.

You and each of you solemnly swear (or affirm) that you will well and truly try the several issues which may be given you in charge at this term of the ——— court, and true verdicts render according to evidence. So help you God.‡

* See note to next form.

† See §§ 523 to 532, *ante*.

‡ See § 523, *ante*.

4. Oath to triers.

You shall well and truly try whether A. B., one of the jurors, stands indifferently, to try the prisoner at the bar, and a true verdict give according to the evidence. So help you God.*

5. Oath to witness before triers.

The evidence which you shall give to the court and triers upon this inquest shall be the truth, the whole truth, and nothing but the truth. So help you God.†

6. Oath to juror on voir dire.

You shall true answers make to all such questions as shall be put to you touching your competency to serve as juror in the case of the people (Commonwealth or State) against the prisoner (or in the case of A. B., plaintiff, against C. D., defendant). So help you God.‡

7. Oath to jurors as to insanity of prisoner or pregnancy of female.

You do each for yourself swear that you will well and truly inquire whether A. B., the prisoner now here, be of sane mind or no (or be pregnant and quick with child, or no), and that you will true inquest make thereof according to the evidence. So help you God.§

8. Oath of juror on challenge.

You shall true answers make to such questions as shall be put to you touching the objection or challenge to you as a juror. So help you God.||

9. To a witness in such case.

You shall true answers make to such questions as shall be put to you touching the challenge of —, a juror. So help you God.¶

* See § 300, *ante*.

† See § 402, *ante*.

‡ See § 402, *ante*.

§ See § 303, *ante*.

§ See §§ 904-906, *ante*.

¶ See § 320, *ante*.

10. Oath of witness as to insanity of prisoner.

The evidence you shall give touching the insanity of A. B., the prisoner now here, shall be the truth, the whole truth, and nothing but the truth. So help you God.*

11. Inquisition as to the sanity of prisoner.

State of New York, }
County of —, } *ss. :*

Inquisition taken before the undersigned, sheriff of the county of —, with the concurrence of A. B., the justice of the supreme court, before whom C. D., now confined in the jail of the said county under sentence of death, was convicted at the said jail, on, &c., upon the oaths and affirmations of E. F., &c., twelve electors of the said county, summoned by me to inquire as to the sanity of the said C. D. The said jurors being each duly sworn and charged to inquire touching the sanity of the said prisoner, do, upon their oaths and affirmations, say that the said C. D. is not in a sound state of mind, but is of insane mind (or is of sane mind). In witness whereof, we, the said sheriff, as well as the said jurors, have to this inquisition set our hands and seals, at the time and place aforesaid.*

Jurors.

A. B.,

C. D., &c.

Jurors.

E. F.

G. H., *Sheriff.*

12. Oath of witness in case of pregnant female.

The evidence you shall give upon this inquest, whether A. B., the prisoner now here, be pregnant and quick with child or not, shall be the truth, the whole truth, and nothing but the truth. So help you God.†

13. Inquisition in case of pregnant female.

State of New York, }
County of —, } *ss. :*

Inquisition taken before the undersigned, sheriff of

* See § 904, *ante*.

† See §§ 905, 906, *ante*.

—— county, at the jail in —— in said county, on the —— day of ——, upon the oaths and affirmations of E. F., &c., six physicians of said county, summoned by me to inquire whether A. B., a prisoner now confined in said jail under sentence of death, be pregnant and quick with child or no. And the said jurors each being sworn and charged to inquire whether the said A. B. be pregnant and quick with child, and upon their oaths and affirmations say that the said A. B. is now pregnant and quick with child (or is not pregnant and quick with child).

In witness whereof, &c.*

14. Oath of jurors on claim of property.

You and each of you do swear, that you will well and truly try the claim of A. B. to the property levied on (or attached) by the sheriff of —— county, under the execution (or attachment) in favor of C. D., at the suit of E. F., and true inquisition make according to the evidence. So help you God.†

15. Oath of witness on claim of property.

You do swear, that the evidence you shall give to the jury, touching the claim of A. B. to the property levied on (or attached) by the sheriff of —— county, under the execution (or attachment) in favor of C. D., against E. F., shall be the truth, the whole truth and nothing but the truth. So help you God.†

16. Inquisition of jury upon claim to property.

[*Title of Action.*]

We, whose names are hereto signed, being a jury summoned and sworn by the sheriff of —— county, to try the claim of A. B. to the property levied on (or attached)

* See §§ 905, 906, *ante*.

† See §§ 897-901, *ante*.

by the said sheriff of ——— county, under the execution (or attachment) in favor of C. D., against E. F., to wit, one horse, &c.,—do upon our oaths say that the title to the said property is (or is not) in the said A. B.

Witness our hands and seals, at &c., &c., &c., &c.*

Jurors.

[L. S.]

[L. S.]

[L. S.]

Jurors.

[L. S.]

[L. S.]

[L. S.]

G. H., *Sheriff of* ——— *County.*

17. Oath of Jurors to appraise homestead.

You, and each of you, do swear, that you will well and truly appraise the homestead of ———, situate in the town of ———, in the county of ———, and that if in your opinion the same is worth more than one thousand dollars, then that you will say whether the same can be conveniently divided or no, and if yea, that you will fairly and honestly set off to the said ——— so much thereof, with the dwelling, as shall in your opinion be worth one thousand dollars and no more. So help you God.†

18. Appraisal.

[*Title of Action.*]

We, whose names are hereto subscribed, having been summoned and sworn by the sheriff of the county of ———, to appraise the homestead of ——— in said county, and if in our opinion the same is worth more than one thousand dollars, then that we say whether the same can be conveniently divided or no, and if yea, that we set off to the said ——— so much thereof as shall be worth (\$1,000), one thousand dollars and no more; do upon our oaths say that the said premises are worth not to exceed the sum of one thousand dollars (or exceed the sum of

* See §§ 897-901, *ante*.

† See §§ 907, 908. *ante*.

one thousand dollars, to wit, the sum of eighteen hundred dollars, and that in our opinion, the same cannot be conveniently divided), or can be conveniently divided, and that we have set off to the said ——— the following described part thereof, including the dwelling, which in our opinion is worth the sum of one thousand dollars, to wit:— (here describe property). In witness whereof we have set our hands and seals this ——— day of ———, 18—.*

Jurors.

[L. s.]

[L. s.]

A. B., *Sheriff*.

19. Oath of jurors on writ of inquiry for damages.

You and each of you do swear that you will well and truly hear and determine the matter in difference between ———, plaintiff, and ———, defendant, and true inquisition make according to the evidence. So help you God.†

20. Oath to witness on writ of inquiry for damages.

You do swear that the evidence you shall give in the matter and difference between ———, plaintiff, and ———, defendant, shall be the truth, the whole truth, and nothing but the truth. So help you God.†

21. Inquisition on writ of inquiry for damages.

County of ———, ss.: Inquisition taken this ——— day of ———, before me, A. B., sheriff of ——— county, at ———, by virtue of a writ of inquiry to me directed, and to this inquisition annexed, to inquire of and concerning matters in said writ contained, and specified by the oaths of ———, twelve good and lawful men of said county, who, being summoned and sworn upon their oaths that the plaintiff in the said writ named hath sustained damages by reason of the premises in the writ mentioned

* See §§ 907, 908, *ante*.

† See §§ 962–972, *ante*.

over and above his costs and charges to — dollars. In witness whereof, we, as well as the said sheriff as the said jurors, have set our hands and seals to this inquisition the day and year above written.*

A. B., *Sheriff*. [L. s.]

Jurors.

[L. s.]

[L. s.]

Jurors.

[L. s.]

[L. s.]

22. Oath to jurors on writ of ad quod damnum.

You do swear that you will diligently inquire whether the person (or persons) owning the lands or tenements to be viewed by you, and which are mentioned and described in the writ of *ad quod damnum* issued by the supreme court of this State to the sheriff of — county, will sustain any and what injury by reason of the taking of such premises for the use of the people of this State (or of the United States), and will give a true verdict, according to the best of your judgment, without favor or partiality. So help you God.†

23. Inquisition upon a writ of ad quod damnum.

State of New York, }
County of — } ss.:

Inquisition taken this — day of —, 18—, at, &c., before —, sheriff of — county, under and by virtue of the writ of *ad quod damnum*, to said sheriff directed and delivered, and to this inquisition annexed, by the oaths of —, qualified jurors of said county, who, being duly summoned and sworn by the said sheriff, say, upon their oaths, that A. B. is the owner in fee of the lands and tenements firstly described in said writ, as follows; C. D. is the owner in fee of the premises secondly described in said writ, as follows; and E. F. holds the said last-mentioned premises by lease granted by —, on, &c., for the term of — years, at an annual rent of — dollars. That said A. B. will sustain

* See §§ 962-972, *ante*.

† See §§ 941-946, *ante*.

injury and damages to the amount of — dollars by being deprived of the said premises so owned by him. That said C. D. will sustain damages to the amount of — dollars by being deprived of the said premises so owned by him; and that E. F. will sustain injury and damages to the amount of — dollars by being deprived of the said premises so held by him, as aforesaid.

And the said jurors, upon their oaths aforesaid, do further say that the people of the State of New York should pay for the said several parcels of lands and tenements the said several sums so assessed as aforesaid, to the said persons to whom the same are assessed as aforesaid respectively. In witness whereof we, the said sheriff, as well as the said jurors, have hereto set their hands and seals, the day and year first above written.*

A. B., *Sheriff*. [L. s.]

Jurors.

[L. s.]

24. Oath to foreman of coroner's jury on inquest.

You do swear that you will well and truly inquire how and in what manner, and when and where, the person lying here (or whose body you have just viewed, as the case may be) came to his death (or was wounded), and who such person was, and into all the circumstances attending such death (or wounding), and by whom the same was produced, and that you will make a true inquisition thereof according to the evidence offered to you, or arising from the investigation of the body. So help you God.†

25. Oath to jurors on coroner's inquest.

The same oath which A. B., the foreman of this inquest, hath on his part taken, you and each of you do now take, and shall well and truly observe and keep on your part. So help you God.†

* See §§ 941-946, *ante*.

† See §§ 865-877, *ante*.

‡ See note to last form.

26. Oath to witness on coroner's inquest.

The evidence you shall give upon the inquest touching the death (or wounding) of —— (or of the person whose body has been viewed) shall be the truth, the whole truth, and nothing but the truth. So help you God.*

27. Oath to interpreter on coroner's inquest.

You shall truly interpret to the witness the oath that shall be administered to him upon this inquest, and shall truly interpret between the coroner, the jury (and the counsel) and the witness. So help you God.*

28. Coroner's inquisition.

State of New York, }
County of ——, } ss.:

Inquisition taken at, &c., before ——, one of the coroners of said county, upon view of the body of —— (or person unknown), then and there lying dead (or wounded), upon the oath of E. F., G. H., J. K., &c., good and lawful men of the said county, who being duly summoned and sworn to inquire into all the circumstances attending the death (or wounding) of the said —— (or person unknown), and by whom the same was produced, and in what manner, and when and where the said —— came to his death (or was wounded), do say upon their oaths aforesaid, that (1) The deceased came to his death ——; (2) And so the said jurors say that the said killing of the deceased by the said —— was murder (or manslaughter) in the —— degree. (3) In witness whereof, as well the said coroner, as the jurors aforesaid, have to this inquisition set their hands and seals on the day of the date thereof.*

C. D., *Coroner*. [L. s.]

E. F., *Foreman*. [L. s.]

Jurors.

G. H., [L. s.]

&c., &c.

* See note to Form No. 24.

29. Inquisition where the killing is murder in the first degree.

After (2) insert—

From a wound in the left lung inflicted by one —— with a knife (pistol-shot, blow of a club, slung-shot, &c., &c.), at &c., on &c., which wound was given by the said —— with the premeditated design of effecting the death of the deceased.

Or, from taking arsenic given to the deceased by one —— in a cup of coffee, with the premeditated design of poisoning or effecting the death of the deceased.

Or, from a pistol-shot recklessly fired without cause or provocation by one —— into a crowd in which the deceased was quietly standing, at, &c., on, &c., the ball from which entered the brain of deceased, from which wound he instantly (or, on the —— day of ——) died.

Or, from a blow on the head from a club (slung-shot, &c.), inflicted by one —— while attempting to escape from the deceased, who had seized him, while he, the said ——, was firing the dwelling of the deceased.*

30. Inquisition where the killing was murder in the second degree.

After (2) insert—

From a blow on the head inflicted by one —— (or some persons unknown to the jury), while endeavoring to escape from the deceased, who seized him in the act of robbing his dwelling.*

31. Inquisition where the killing is manslaughter in the first degree.

Insert in place of part between (1) and (3)—

The said —— came to his death from a stone thrown by E. F., at the house of said ——, with the design of frightening the occupants, but without design to kill any one.*

* See note to Form No. 24.

32. Inquisition where the killing is manslaughter in the second degree.

Insert in place of part between (1) and (3)—

The said ——— came to her death by means of medicine administered to her by E. F., while she was pregnant, with the intention of procuring the miscarriage of the said ———.*

33. Inquisition where the killing is manslaughter in the third degree.

Insert in place of part between (1) and (3)—

The said ——— came to his death from a blow given by E. F. with a club, in the heat of passion, without any design to effect death.*

34. Inquisition upon the body of an infant.

Insert in place of part between (1) and (2)—

That the body is the child of ———, an unmarried woman, of which she was secretly delivered, and was born alive, and the said ———, with the intent to destroy the same, wrapped and folded it in a cloth, by means of which it was suffocated and died.

Or, threw the same into a privy, by means of which the same was suffocated and died.

Or, threw the same into the river, by means of which it was drowned.

Or, the said C. D., in a fit of temporary insanity, caused by the pains of childbirth, choked and suffocated the said new-born child, so that it instantly died, and the jury say that the same was not done feloniously, or with malice aforethought, but in the agonies of pain, and not otherwise.*

35. Inquisition where a person is found dead with marks of violence.

Insert in place of the part between (1) and (3)—

* See note to Form No. 24.

That the body of the said — was found lying in the highway, near —, on the, &c., and that the said — came to his death from a wound in the left side, which appeared to have been made with a knife, dirk, or other sharp instrument (or by a gun or pistol bullet, or from a bruise upon the head given with a club, stone, or slung-shot), by some person to the jury unknown.*

86. Inquisition where one accidentally takes poison.

Insert in place of part between (1) and (2)—

The said C. D., being unwell, swallowed a quantity of white arsenic through mistake, supposing the same to be ———.*

87. Inquisition where the killing is justifiable homicide.

Insert in place of part between (1) and (3)—

A. B., being sheriff of ——— county (or constable, marshal, or police officer, &c.), and having lawful process for the arrest of C. D. upon a charge of felony (or an execution against the person or property of the said C. D., or a writ of ejectment against the said C. D., or a warrant for the removal of the said C. D. from demised premises, &c.), did, on the, &c., at, &c., attempt in a legal way to execute the said process, as he was commanded; but the said C. D., and E. D. and G. D., the sons of the said C. D., violently resisted and opposed the execution of the same, and assaulted and attempted to drive off the said A. B., who thereupon fired a pistol at the said C. D., by which he inflicted a mortal wound upon the neck of the said C. D., of which he instantly died; and the jurors aforesaid, upon their oaths aforesaid, say that the said C. D. came to his death in the manner aforesaid, by the hand of the said A. B., in the legal and necessary attempt of the said A. B. to prevent resistance to the execution of the said process, and that the said wound was not given feloniously or with malice aforethought, but for the cause aforesaid.

(a) Or, A. B., being sheriff of ——— county (or consta-

* See note to Form 24.

ble, marshal, or police officer, &c.), and having lawful process for the arrest of the said C. D. upon a charge of felony (or the said C. D. having murdered one E. F.), and the said A. B. having arrested him upon said warrant (or for the said offence or having him in jail), the said C. D. broke away and escaped from the custody of the said A. B., and said A. B., in order to prevent the escape of the said felon, fired, &c. (conclude as the last).

(b) Or, the said C. D., with E. F. and G. H., and divers other persons to the jury unknown, on —, at —, being riotously and unlawfully assembled, for the purpose of preventing the laborers and workmen on the — canal, — or — railroad (or the operatives in the — factory) from working, and with stones, clubs, guns, and other weapons, did threaten the destruction of the property of the contractors on said work (or of the said — factory), and the lives of such laborers and operatives, and —, sheriff of said county (or —, mayor of the said city), in the exercise of the duties and powers conferred upon him, did call out the military to aid in suppressing such riot, and prevent the destruction of property and loss of life; and having warned and admonished said rioters then and there so unlawfully assembled to desist from the acts, but the said persons disregarding such warning and orders of the said —, sheriff (or mayor), and continuing their assaults as aforesaid, and also having attacked said military by the discharge of stones, bricks, and guns at them, the said sheriff (or mayor) did thereupon, as he lawfully might, command the said military to fire upon the said rioters, and thereupon the said military did fire and discharge their guns at the said rioters under and pursuant to such command; that the charge of one of said guns took effect upon the head of the said C. D., then and there so riotously engaged as aforesaid, inflicting a mortal wound upon the said C. D., of which wound he, the said C. D., then and there died; and the jurors aforesaid, upon their oaths aforesaid, say that the said death was not committed feloniously or with malice aforethought, but necessarily and in the discharge of a lawful duty, in manner aforesaid.

(c) Or, the said C. D., at, &c., on, &c., being then and there engaged in an attempt to commit a burglary by feloniously entering the dwelling of, &c., on, &c., in the night time, one A. B., being then a police officer (constable, marshal or watchman), and then and there present, did attempt to prevent such burglary and felony by seizing and arresting the said C. D.; but he, the said C. D., being about to escape, and the said A. B., being unable to hold and detain him, did strike the said C. D. a blow upon the head with his club, for the purpose of disabling the said C. D. and preventing such escape, and thereby inflicted a wound upon the head of said C. D. of which he instantly (or thereafter, to wit, on, &c.,) died. Conclude as last.

(d) Or, the said C. D., on, &c., at, &c., violently and feloniously made an assault upon one A. B., with the intent to rob the said A. B. of a sum of money, in the possession of said A. B., by which assault the said C. D. put the said A. B. in great bodily fear, and the said A. B. was in danger of losing said money in the manner aforesaid, and being so in danger, he, the said A. B., for the purpose of protecting his property, did draw a pocket-knife and strike or stab the said C. D. in the abdomen, and thereby inflicted a wound upon the said C. D. of which he, the said C. D., instantly (or on, &c.) did die; and the jurors aforesaid do, on their oaths aforesaid, say that the said A. B. did kill the said C. D. in manner aforesaid, not feloniously, or with malice aforethought, but in defence of his property as aforesaid.

(e) Or, the said C. D. made a violent assault upon one A. B., with intent to kill, maim or dangerously wound said A. B., and thereby put him, the said A. B., in imminent danger and bodily fear of his life, and the said A. B. then and there in self-defence seized a loaded pistol (struck or stabbed) the said C. D. in the left breast (or inflicted a wound upon the head of said C. D.), whereof he, the said C. D., instantly (or thereafter on, &c., at, &c.), died; and the jurors, upon their oaths aforesaid, say that the said shooting (stabbing or blow) was not done feloniously or with malice aforethought, but in self-defence.

(f) Or, the said C. D. and other persons to the jury

unknown, on, &c., at, &c., being riotous and unlawfully assembled, and having violently and unlawfully assaulted the dwelling-house of one A. B. with stones, bricks, clubs and other instruments, with the intent to demolish and pull down said house (or break into the said house), and thereby put the said A. B., and the other persons in said house, in great peril and danger of their lives, and the said A. B., in defence of himself, and for the preservation of the lives of the other persons in said house, and also of preventing the destruction of his house and lot, and injury of his goods, did discharge a rifle at the several persons so riotously and unlawfully assembled, and the bullet mortally wounded the said C. D. in the head, of which the said C. D. then and there instantly died; and so the jurors aforesaid, on their oaths aforesaid, do say, that the said A. B. did kill the said C. D. in manner aforesaid, in defence of himself and property, and not feloniously or with malice aforethought.

(g) Or, the said C. D., on, &c., at, &c., violently and willfully and feloniously made an assault upon one A. B., the wife (or daughter) of C. B., with the intent to murder (ravish, rob, or commit some bodily harm to the said A. B.), and the said C. B., being unable to cause the said C. D. to desist from his assault upon the said A. B., discharged a pistol at the said C. D. (and conclude as the last).*

38. Inquisition in case of suicide.

Insert in place of part between (1) and (3)—

The deceased came to his death by hanging himself at, &c., on, &c. (or by stabbing himself with a knife, or by cutting his throat with a razor, or by blowing out his brains with a gun or pistol, or by taking a dose of arsenic), with the intent and for the purpose of destroying himself, or by voluntarily drowning himself in the waters of the Erie canal, or by hanging himself by the neck in his barn.

If the person is a lunatic, add—

* See note to Form No. 24.

The said C. D. being a lunatic or person of unsound mind.

Or, if the suicide was committed in a fit of temporary insanity, add —

The said C. D., being in feeble health and depressed spirits, was seized with a fit of delirium.

If any one was present and aided in the self-murder add—

And the said jurors further say that E. F., of ———, was feloniously present and deliberately aided the said C. D. in the commission of the self-murder aforesaid.*

39. Inquisition where one had died a natural death.

Insert in place of part between (1) and (3)—

The said C. D., on, &c., at, &c., was found lying dead in the highway, near the house of ———, and that he had no marks of violence appearing upon his body; and so the said jurors upon their oaths aforesaid say that the said C. D. died by the visitation of God.*

40. Inquisition where one is accidentally drowned.

Insert in place of part between (1) and (3)—

The said C. D. on, &c., at, &c., while bathing in the ——— river (or fell from a boat or bridge, or while sailing in a boat on ——— river, the same was upset, or while skating on ——— river, the ice broke), was accidentally drowned, and so the jurors aforesaid say that the said C. D., in manner and form, and by the means aforesaid, accidentally and by misfortune, came to his death and not otherwise.*

41. Inquisition where one is accidentally choked in swallowing.

Insert in place of part between (1) and (3)—

The said C. D., while eating his dinner, on, &c., at, &c., attempted to swallow a piece of meat, which became lodged in his throat, and could not be removed, but suffocated him.*

* See note to Form No. 24.

42. Inquisition where the death was from old age and want of care and diet.

Insert in place of part between (1) and (3)—

The said C. D. died from old age and infirmity, and for want of proper care and diet.*

43. Inquisition where the death was from intemperance and want of food.

Insert in place of part between (1) and (3)—

The said C. D. came to his death through want of food and care while in a state of drunkenness.*

44. Inquisition where the death was from delirium tremens.

Insert in place of part between (1) and (3)—

The said C. D. being a person of intemperate habits, and addicted to intoxication, was on, &c., at, &c., attacked with *delirium tremens*, of which he then and there died.*

45. Inquisition where the death was from jumping or falling from the cars.

Insert in place of part between (1) and (3)—

The said C. D., being a passenger (or employed) upon the railroad cars, upon the ——— railroad, on the, &c., he leaped (or fell) from the cars while they were in rapid motion, by means of which he was so bruised and injured that he instantly (or thereafter, to wit, on, &c.) died.

Or, was so mutilated that it became necessary to amputate his right leg above the knee, but the said C. D. died under the operation, though the same was performed in a careful and skillful manner.*

46. Inquisition of a child who had died by falling in fire, &c.

Insert in place of part between (1) and (3)—

The said C. D., being a child of — years, came to its death by falling into the fire (or into the cistern), on, &c., at, &c., when left alone by its mother (or nurse).*

* See note to Form No. 24.

47. Oath to foreman of jury on the investigation of the origin of fires.

You do swear that you will well and truly inquire whether the dwelling-house of E. F., situate on — street, in —, which was lately injured (or destroyed) by fire, was maliciously set on fire (or attempted to be set on fire), and how and in what manner such fire happened (or was attempted), and all the circumstances attending the same, and who are guilty thereof, either as principal or accessory, and in what manner, and that you will make a true inquisition thereof according to the evidence offered you or arising from an investigation of the place where the fire was (or was attempted). So help you God.*

48. Oath to the jurors on the same.

The same oath which K. L., the foreman of this inquest, hath on his part taken, you and each of you do now take, and shall well and truly observe and keep on your part. So help you God.*

49. Oath to the witnesses on the same.

The evidence you shall give upon the inquest concerning the burning (or attempted burning) of the dwelling-house of E. F., situate on — street, in —, lately destroyed (or injured) by fire, shall be the truth, the whole truth, and nothing but the truth. So help you God.*

50. Inquisition on the same.

State of New York, }
County of —, } ss.:

Inquisition taken at —, in said county, on the — day of —, 187—, before A. B., sheriff (or C. D., one of the coroners) of said county, upon inspecting the place where the fire was (or attempted), upon the oath of —, good and lawful men of the said county, duly summoned and sworn to inquire whether the dwelling-house of

* See §§ 965-968, *ante*.

E. F., situate on — street, —, was maliciously set on fire (or attempted to be), and how and in what manner such fire happened (or was attempted), and all the circumstances attending the same, and who were guilty thereof, either as principal or accessory, and in what manner, do say, upon their oaths aforesaid, that the said dwelling was willfully and maliciously set on fire (or attempted to be) by E. F., for the purpose of defrauding — insurance company of the amount of the policy issued to him by said company on the premises, and that there were no accessories.

In witness whereof, as well the said sheriff (or coroner) as the jurors aforesaid, have to this inquisition set their hands and seals, on the day of the date hereof.

A. B., *Sheriff*. [L. s.]

E. H., *Foreman*. [L. s.]

H. I., *Juror*. [L. s.]

K. L., “ [L. s.]

&c. &c.

Or, that the same was fired by one —, an evil disposed person, in consequence of ill-feeling towards the owner, and that M. N. was present, and aided the said — in setting fire to the building.

Or, that they were unable to ascertain the origin and circumstances of the fire.

Or, that the same was willfully set on fire by some person or persons to the jury unknown.

Or, that the same caught fire in consequence of a defect in the chimney.

Or, accidentally in consequence of a stove standing too near a wooden partition.*

51. Oath to constable on taking charge of jury in justice's court.

You swear in the presence of Almighty God, that you will to the utmost of your ability keep the persons sworn as jurors in this trial, together in some private and conven-

* See note to Form 47.

ient place, without any meat or drink, except such as shall be ordered by me, that you will not suffer any communication orally or otherwise to be made to them, that you will not communicate with them yourself, orally or otherwise unless by my order, or to ask them whether they have agreed on their verdict, until they shall be discharged, and that you will not, before they render their verdict, communicate to any person the state of their deliberations, or the verdict they have agreed on.*

52. Oath to foreman of grand jury.

You ———, as foreman of this inquest for the body of the county of ———, do swear (or affirm) that you will diligently inquire and true presentment make of such articles, matters, and things as shall be given you in charge; the counsel of the people (or commonwealth or State), your fellows, and your own, you shall keep secret; you shall present no one from envy, hatred or malice, neither shall you leave any one unpresented through fear, favor, affection, reward, hope of reward, or gain, but shall present all things truly, as they come to your knowledge, according to the best of your understanding. So help you God.†

53. Oath to grand jurors.

The same oath (or affirmation) which your foreman hath taken on his part, you and each of you shall well and truly observe and keep on your part. So help you God.†

54. Oath to juror in justice's court.

You and each of you solemnly swear (or affirm) well and truly to try the matter in difference between ———, plaintiff, and ———, defendant, and, unless discharged by me (the justice), a true verdict to give, according to evidence. So help you God.‡

* 3 R. S. 6 ed. § 101, p. 415; see § 838, *ante*.

† See §§ 709, 719–723, *ante*.

‡ 3 R. S. 6 ed. p. 414, § 94; see § 836, *ante*.

55. Oath to juror on trial in court of special sessions.

You (and each of you) do swear, in the presence of Almighty God (or, you do solemnly affirm, as the case may be), that you will well and truly try this traverse between the People of the State of New York and ———, the defendant, and a true verdict give according to evidence, unless discharged by the court.*

56. Oath to jurors in lunacy, idiocy, or habitual drunkenness proceedings.

You do swear (or affirm) well and truly to inquire, touching the lunacy or idiocy or habitual drunkenness of A. B. C., and of all such matters and things as shall be given you in charge by virtue of a commission issued out of and under the seal of the supreme court (or other court), and now here to be executed, and a true inquisition make according to evidence. So help you God.†

57. Oath of witnesses in like proceedings.

You do swear (or affirm) that the evidence you shall give touching the lunacy (idiocy, or habitual drunkenness) of A. B. C., and as to who are his next of kin, and the nature, extent, and value of his real and personal estate, and all such other matters and things as shall be required of you by virtue of a commission issued out of the supreme court (or other court), to inquire into the said lunacy or idiocy, &c., and now here to be executed, shall be the truth, the whole truth, and nothing but the truth. So help you God.†

58. Inquisition as to lunacy, idiocy, habitual drunkenness.

An inquisition taken at the hotel kept by ———, in the village of ———, in the county of ——— (or at the school-house in school-district No. —, in the town of ———), on the ——— of ———, in the year one thousand eight hundred and ———,

* 3 R. S. 6 ed. p. 1007, § 15; see § 853, *ante*.

† See §§ 909-912, 961-964, *ante*.

before D. E., F. G., and H. I., commissioners appointed by virtue of a commission in the nature of a writ de lunatico (or idiota) inquirendo, issued out of and under the seal of the supreme court of the State of New York (or other court), dated on the — day of —, 18—, directed to the said commissioners to inquire, among other things, of the lunacy of A. B. C., upon the oath of J. S. M., &c. (insert the names of the jurors), good and lawful men of the said county, who, being summoned, sworn, and charged upon their oaths, say that the said A. B. C., at the time of taking this inquisition, is a lunatic and of unsound mind, and does not enjoy lucid intervals, so that he is incapable of the government of himself or of the management of his lands, tenements, goods and chattels, and that he has been in the same state of lunacy for the space of two years last past. That the said A. B. C. has occasionally, for many years past, been afflicted with mental alienation; but what occasioned such mental alienation, or his present lunacy, the jurors aforesaid have no information, and know not.

And the jurors aforesaid, upon their oaths aforesaid, further say that, whether the said A. B. C., being in that state, has alienated any lands or tenements or not, the jurors aforesaid know not (or, that the said A. B. C., being in the condition aforesaid, did, on or about the — day of —, 18—, at the village of —, in said county, convey, by warrantee deed, to one X. Y. C., of, &c., a certain lot owned by him in the village of —, in said county, for the nominal consideration of — dollars, and the money actually received by said A. B. C., upon the sale of said lot, was only the sum of — dollars, being not one-fifth of the actual value of said lot). And the jurors aforesaid, upon their oaths aforesaid, do further say that the following lands and tenements situated in the town of — aforesaid, yet remain to him, the said A. B. C., to wit, (describe real estate).

That the said lands and tenements above described are worth about — dollars, and the issues and profits thereof by the year are worth about the sum of — dollars. And the jurors aforesaid, upon their oaths aforesaid, do fur-

ther say that the following goods and chattels yet remain to the said A. B. C., to wit (give general description of the personal property), that the value of the said goods and chattels of the said A. B. C. is about the sum of ——— dollars.

And the jurors aforesaid, upon their oaths aforesaid, do further say that J. C. is the wife of the said A. B. C., and resides with him in ——— aforesaid.

That K. C., L. C., M. C. and N. C. are the children of said A. B. C., all of whom except the said K. C. reside with said lunatic in ——— aforesaid. That the said K. C. resides in the State of ———, and is aged about thirty years. That the said L. C. is aged about twenty-six years, that the said M. C. is aged about twenty-four years, and the said N. C. is aged about twenty-one years, and that the said children will be entitled to the estate of the said A. B. C. in equal proportions, in case of his death.

In witness whereof, as well the said commissioners as the jurors aforesaid, have to this inquisition set their hands and seals, the day and year first above written.

(Signatures and Seals of Commissioners.)

(Signatures and Seals of Jurors.)*

59. Venire in U. S. courts for grand and petit jurors.

The President of the United States of America, to the marshal of the United States, for the ——— district of ———, greeting:

You are hereby commanded, that you cause to come before a circuit (or district) court of the United States, for the ——— district of ———, to be held at the (*place of holding court*), in the city of ———, in the said ——— district of ———, on the ——— day of ———, 18——, at ——— o'clock in the ——— noon, ——— good and lawful men of your district to inquire for the United States, and the body of said district, and to do and receive all those things which, in behalf of the United States, shall then and there be enjoined them, and also all the prisoners then and there being in any or either of the jails of said district, with

* See note to Form No. 56.

their attachments, and all other muniments in anywise concerning those persons, and likewise —— free and lawful men resident within the —— district of ——, of the age of twenty-one years and upwards, and under sixty years old, who are at the time assessed for personal property belonging to them in their own right to the amount of two hundred and fifty dollars, or shall have a freehold estate in real property in the said district, belonging to them in their own right, or in the right of their wives, to the value of one hundred and fifty dollars, by whom the truth of the matter shall be better known and inquired into, and who are in no wise of kin to the plaintiffs or defendants, between whom the several issues joined are to be tried, nor to those prisoners.

And you, the said marshal, and your deputies, in your and their proper persons, shall then and there attend to do all those things which to your and their offices appertain to be done in that behalf, and have you then there the —— names of those jurors and those prisoners, and this writ.

[SEAL.]

Witness the honorable (*naming the chief justice of the supreme court of the United States*), chief justice of the supreme court of the United States, at (*state place of holding circuit court*) in the said district, this —— day of ——, in the year of our Lord one thousand eight hundred and ——.*

A. B.

Attorney for ——

C. D.

Clerk.

60. Challenge to the array. [Relationship.]

The following form of challenge to the array is taken from Coke's entries (title Tormedon), and may be adapted to a criminal case.

"And now at this day come the aforesaid (the plaintiff) and (the defendant) by their attorneys, and the jurors thereupon impealed, being called in like

* See §§ 775, &c., *ante*.

manner, come, and thereupon the aforesaid (defendant) challengeth the array of the panel aforesaid, because he says that the panel was arrayed by one J. S., now and at the time of making the array aforesaid sheriff of the said county of ———, which said sheriff is a kinsman of the aforesaid (plaintiff), to wit, the son of E. Z., son of J. Z., son of J. Z., son of W. Z., son of A. Z., son of W. Z., son of E., daughter of W. R., father of W. R., father of R., father of E., mother of G. M., father of T. R., father of the aforesaid (plaintiff); and this he is ready to verify; whereupon he prayeth judgment, and that the said panel may be quashed; which said challenge by John Doe, and by Richard Roe (triers), to this chosen and sworn, is found true. And therefore let the panel aforesaid be quashed and removed, &c.”*

61. Challenge to array for favor.

<p>THE KING <i>against</i> FRANCIS ADAMS and THOMAS LANGTON.</p>	<p>Court of Oyer and Terminer and Jail Delivery, in and for the Queens County.</p>
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And upon this, the said F. A. and T. L., the prisoners at the bar, challenge the array of the said panel, because they say the panel was arrayed by one A. M. M., and not by the high sheriff or sub-sheriff of the Queens County; and because the panel, by whomsoever arrayed, has been arrayed in a manner more favorable to the prosecutors than the prisoners. And because T. K., Esq., sheriff of said county, did permit said A. M. M. to array said panel, and did return thereon certain persons, and omit to return certain other persons, at the instance of the said A. M. M., and among the rest did return thereon the said A. M. M. himself. And because the said A. M. M., or the said sheriff or sub-sheriff, at the instance of the said A. M. M., did, in

* See § 257, *ante*.

arraying said panel, omit the names of certain persons, because he, the said A. M. M., deemed them more likely to acquit than to convict the prisoners, and inserted thereon the names of certain other persons, because he, the said A. M. M., deemed them more likely to convict than to acquit the said prisoners. And because the said A. M. M., or the said sheriff or sub-sheriff, at the instance of the said A. M. M., did, in arraying said panel, dispose the names of certain persons whom he, the said A. M. M., deemed more likely to convict the prisoners, above the names of other persons whom he, the said A. M. M., deemed more likely to acquit the prisoners, to the manifest wrong and injury of the prisoners; and this he, the said F. A. and T. L., are ready to verify. Wherefore they pray judgment, and that the said panel may be quashed, and so forth, &c.*

62. Challenge to array. [Interested in the event.]

And hereupon the said mayor, aldermen, and assistants of the said town of S., in the said county of S., do challenge the array of the panel aforesaid, because they say that the said panel was arrayed and returned by J. B., Esq., who now is, and at the time of the arraying the said panel, and of the return thereof, was sheriff of the said county of S., which J. B. then was, and now is, one of the aldermen of the said town of S., in the said county of S., and concerned in interest in the event of the trial of the said several issues above joined to be tried; and this they are ready to verify; wherefore they pray judgment of the panel aforesaid, and that the said panel so as aforesaid, arrayed by the said sheriff for the trial of the said several issues in this cause, may be quashed, &c.†

63. Challenge to array. [Interested in the event.—Another Form.]

And now here at this day come, as well the said coroner and attorney of our said Sovereign Lord the King, who

* See note to last Form.

† See note to Form No. 60; *Crown Circuit Companion*, p. 105.

for our said Lord the King prosecutes in this behalf, as the said G. J., &c. (the names of all the defendants), by their attorney aforesaid; and the jury thereupon impaneled likewise comes, and thereupon they, the said G. J., &c. (as before), challenge the array of the said panel, because they say that the said panel was arrayed and returned by one H. B., Esq., who now is, and at the time of arraying the said panel, and of the return thereof, was sheriff of the said county palatine of C., which H. B. then was and now is a citizen and freeman of the said city of C., and county of the same city, where the supposed offence mentioned in the said information was committed; and also for that the said H. B. hath contributed and paid a certain sum of money, to wit, the sum of fifty pounds, towards defraying the expenses of prosecuting and carrying on this cause, and he is concerned in interest in the event of the trial of the said several issues above joined to be tried, and this the said G. J., &c. (as before), are ready to verify, as the court here shall award: whereupon they pray judgment, and that the panel aforesaid may be quashed, &c. (To this challenge the coroner and attorney pleaded that the panel ought not to be quashed, alleging that the special jury was struck by a rule of the court of King's Bench; but it seems he did not bring the rule into court, for which cause, and likewise his having traversed matter not alleged in the plea, or traversable, &c., the defendants demurred specially as follows:)

And the said G. J., &c. (all the defendants), by protestation say, that there is no such rule as the said coroner and attorney, in his said plea to the said challenge, hath above alleged; nevertheless, for answer in this behalf, they say, that the said plea of the said coroner and attorney to the aforesaid challenge, and the matter therein contained, are not sufficient in law to prevent the quashing the said array of the said panel; and that they to the said plea, in manner and form above pleaded, are under no necessity, nor bound by the law of the land to answer; and this they are ready to verify; wherefore they pray judgment, and that the panel aforesaid may be quashed. And for causes of this demurrer in law, the said G. J., &c. (as before), by

leave of the court here to them, for this purpose granted, according to the form of the statute in such case made and provided, show to the court here these causes following, to wit, for that the said coroner and attorney hath neither denied, nor sufficiently confessed, and avoided by his said plea, several material facts in the said challenge alleged; and for that the said coroner and attorney hath traversed matters not traversable, and also other matters not alleged in the said challenge; and also for that the said coroner and attorney, by his said plea, hath not sufficiently induced the traverse therein mentioned; and for that the said coroner and attorney hath not produced the said supposed rule here in court, nor verified his said plea by the record thereof; and for that the said challenge is in various other respects defective, insufficient, and informal, &c.

And the said coroner and attorney of our said Lord the King, who prosecutes as aforesaid, for that he sufficient matter in law to prevent the quashing the said array of the said panel hath above alleged, which he is ready to verify, which matter the said G. J., &c. (as before) hath not gained, nor to the same in anywise answered, but the said verification do admit, have altogether refused, as before, prays judgment, and that the said jury may be taken, &c.*

64. Sealed verdict.

DOE	}	Verdict of jury.
v.		
ROE.		

We, the jurors impaneled in the above-entitled action, find a verdict (for \$1,000) in favor of the plaintiff (or, *in favor of the defendant*, or, if the action is one where the value of property should be assessed, *and assess the value*

* See note to Form No. 61; *Crown Circuit Companion*, p. 105.

of the property (taken) at the sum of \$ —— (and find the sum of \$ —— damages for the detention thereof), or, where the defendant has proven a counter-claim against the plaintiff, in favor of the defendant against the plaintiff for the sum of \$ ——), and so say we all.

*Attach signatures of all the jurors.**

* See §§ 546, 561, *ante*.

INDEX TO FORMS.

	PAGE
Challenge to Array for favor, No. 61.....	325
interest in event, No. 62, 63.....	326
relationship, No. 60	324
Coroner's Inquisition , Nos. 28-46	309-317
Inquisition on writ of ad quod damnum, No. 23.....	307
of coroner, Nos. 28-46.....	309-317
one accidentally choked, No. 41.....	316
drowned, No. 40.....	316
poisoned, No. 36....	312
jumping or falling from cars, No. 45..	317
death from delirium tremens, No. 44....	317
on body of infant, Nos. 34, 46.....	311, 317
death from intemperance and want,	
Nos. 43, 44.....	317
justifiable homicide, No. 37.....	312
manslaughter in first degree, No. 31...	310
second degree, No. 32.	311
third degree, No. 33..	311
murder in first degree, No. 29.....	310
second degree, No. 30.....	310
death from natural causes, No. 39.....	316
old age and want, No. 42...	317
by suicide, No. 38.....	315
with marks of violence, No. 35..	311
on inquiry for damages on defaults, No. 21.....	306
in de lunatico inquirendo proceedings, No. 58.	321
in habitual drunkard proceedings, No. 58.....	321
on homestead exemption appraisal, No. 18.....	305
in idiocy proceedings, No. 58.....	321
on origin of fires, No. 50.....	318
in case of pregnant female, No. 13.....	303
as to sanity of prisoner, No. 11.....	303
on claim of title to property, No. 16.....	304
Oath to constable on taking charge of justice's jury, No. 51..	319
coroner's jury, Nos. 24, 25.....	308
foreman of coroner's jury, No. 24.....	308
grand jury, No. 52.....	320
jury on origin of fires, No. 47.....	318
grand jurors, Nos. 52, 53.....	320
interpreter on coroner's inquest, No. 27.....	309

	PAGE
Oath to jurors on writ of ad quod damnum, No. 22.....	307
challenge, No. 8.....	302
in civil action, No. 1.....	301
criminal action, No. 2.....	301
inquiry for damages on defaults, No. 19....	306
de lunatico inquirendo proceedings, No. 56...	321
habitual drunkard proceedings, No. 56....	321
on homestead exemption appraisal, No. 17....	305
in idiocy proceedings, No. 56.....	321
on insanity of prisoner, No. 7.....	302
in justice's court, No. 54.....	320
on origin of fires, Nos. 47, 48.....	318
sworn in panel collectively, No. 3.....	301
on pregnancy of female, No. 7.....	302
in special sessions, No. 55.....	321
on claim of title to property, No. 14.....	304
voir dire, No. 6.....	302
triers, No. 4.....	302
witness on challenge to juror, No. 9.....	302
coroner's inquest, No. 26.....	309
inquiry for damages on defaults, No. 20..	306
in de lunatico inquirendo proceedings, No. 57.	321
habitual drunkard proceedings, No. 57....	321
idiocy proceedings, No. 57.....	321
on insanity of prisoner, No. 10.....	303
origin of fires, No. 49.....	318
in case of pregnant female, No. 12.....	303
on claim of title to property, No. 15.....	304
before triers, No. 5.....	302
Sealed Verdict, No. 64.....	328
Venire in U. S. Courts, No. 59.....	323

TABLE OF CASES CITED.

	SECTION	
Adams v. Olive.....	48 Ala. 551.....	442
— v. People.....	47 Ill. 376.....	587, 653
Albany Northern R.R.Co. v. Bonnell, 24 N. Y. 345.....		922, 923
Albrecht v. Walker.....	73 Ill. 69.....	368
Alexander v. Jamieson	5 Binney, 238.....	663
Alfred v. State.....	2 Swan, 581.....	360
Allen v. Cook.....	26 Barb. 374.....	907
Amherst v. Hadley.....	1 Pick. 38-42.....	613, 702
Amory v. McGregor.....	15 Johns. 24, 38.....	573
Anderson v. George.....	1 Burr. 332.....	618
— v. State.....	14 Ga. 709.....	384, 385, 694
Anthony v. Smith.....	4 Bosw. 503.....	635
Armsby v. People.....	2 S. C. 157.....	450
Armstead v. Com.....	11 Leigh, 657.....	353, 365, 374
Artwein v. Com.....	76 Pa. St. 414.....	345
Atkins v. State.....	16 Ark. 568.....	422, 661
Austin v. Ahearne.....	61 N. Y. 6.....	572
— v. Wilson.....	4 Cush. (Mass.) 273.....	556
Avery's Case.....	6 Abb. Pr. 146.....	951
Aylett v. Jewell.....	3 W. & Bl. 1299.....	624
Babcock v. People.....	15 Hun, 347.....	598
Baggett v. Meux.....	1 Coll. 140.....	910
Baker v. Rand.....	13 Barb. 153.....	575
— v. State.....	15 Ga. 498.....	385
Ball v. Pratt.....	36 Barb. 407.....	900
Bank of United States v. Davis.....	2 Hill, 461.....	821
Barclay v. People.....	5 Leg. Gaz. 278; 8 Alb. L. J. 104.....	411
Barney v. State.....	12 S. & M. 68.....	509
Batchellor v. Schuyler.....	3 Hill, 387.....	900
Baum v. Tarpenny.....	3 Hill, 76.....	847
Baxter v. People.....	3 Gilman, 386.....	381, 493, 666
— v. Putney.....	37 How. Pr. 140..	821, 830, 831
Bayley v. Bates.....	8 Johns. 143.....	898
Beal v. Finch.....	11 N. Y. 128.....	573
Beebe v. People.....	5 Hill, 32.....	634
Beekman v. Saratoga & S. R. R. Co.....	3 Paige, 75.....	930
Bell v. Morrison.....	27 Miss. 68.....	556
Bennett v. Howard.....	3 Day, 223.....	582, 613

		SECTION
Benson v. Fish.....	6 Greenl. 141.....	661
Birchard v. Booth.....	4 Wis. 67.....	679
Birkhead v. Brown.....	5 Hill. 635.....	572
Birdsong v. State.....	47 Ala. 68.....	493
Black v. State.....	42 Tex. 377... ..	369
— v. White.....	37 N. Y. S. C. 320.....	862
Blaine v. Chambers.....	1 Serg. & R. 169.....	613
Blake v. Millsbaugh.....	1 Johns. 316.....	347, 833
Blakeley v. Sheldon.....	7 Johns. 32.....	563, 632, 845
Board <i>ex rel.</i> Fountain v. Board of Supervisors.....	4 Barb. 64.....	927
Board of Excise of Marion v. Tuck..	2 N. Y. S. C. (T. & C.) 368..	847
Boddington v. Harris.....	1 Bing. 187.....	618
Boles v. State.....	13 S. & M. 398.....	649
Bonaparte v. Camden & A. R. R. Co.	1 Baldwin C. C. 205..	930
Boon v. State.....	1 Kelley, 631.....	385
Borst v. Beecker.....	6 Johns. 332.....	448
Bowler v. Washington.....	62 Me. 312.....	584
Boyer v. Philadelphia & R. R. Co.	6 N. Y. Week. Dig. 295..	705
Bradstreet v. Bradstreet.....	64 Me. 204.....	889
Brakefield v. State.....	1 Sneed (Tenn.), 215..	361, 690
Brant v. Fowler.....	7 Cow. 562... ..	669
Breeding v. State.....	11 Tex. 257.....	404, 515
Brinkley v. Brinkley.....	56 N. Y. 192.....	858
Brisbane v. Macomber.....	56 Barb. 376..	826, 830, 831 834, 835, 836
Bristow v. Com.....	15 Grat. 634.....	375
Bronson v. Mann.....	13 J. R. 460.....	947
— v. People.....	32 Mich. 34.....	271
Brotherton v. People.....	7 N. Y. Week. Dig. 445..	725
Brown v. Com.....	2 Virg. Cas. 516.....	694
— v. Cook.....	9 Johns. 361.....	899
— v. Cowdele.....	12 Johns. 384.....	843
— v. Crashaw.....	1 Bulstr. 154.....	416
— v. La Crosse.....	21 Wis. 51.....	700
— v. State.....	52 Ala. 345.....	436
Browning v. State.....	33 Miss. 47.....	587, 649
Brunson v. Graham.....	2 Yeates, 166.....	583
Buchanan v. State.....	24 Ga. 282.....	326
Buckner v. Jewell.....	14 Nat. Bank. Reg. 286..	819
Bulkley v. Marks.....	15 Abb. Pr. 404.....	569
Bullard v. Spoor.....	2 Cow. 430.....	832
Bunn v. Crowl.....	10 Johns. 239.....	841
Burdine v. Grand.....	37 Ala. N. S. 478 ..	431
Burnham v. Hatfield.....	5 Blackf. (Ind.) 21.....	758
Burns v. Hoyt.....	3 Johns. 255 ..	633
Burrell v. Acker.....	23 Wend. 606.....	899
Burroughs v. State.....	33 Ga. 403.....	701
Burr's Trial.....	Vol. 1, pp. 367-416..	373, 409
Burtine v. State.....	18 Ga. 534.....	654
Bush v. Prosser.....	11 N. Y. 356.....	556
Busick v. State.....	19 Ohio, 198.....	690
Cancemi v. People.....	16 N. Y. 501.....	331
Canjolle v. Ferrie.....	9 Abb. Pr. 393; 23 N. Y. 494	892
Cannan v. Newell.....	1 Den. 26.....	821

		SECTION
Carnal v. People.....	1 Park. Cr. 272.....	251, 327
Carpenter v. People.....	64 N. Y. 483.....	94, 282, 495
Carr v. Carr.....	52 N. Y. 251-256.....	372, 573
Carris v. Comm'rs., &c., of Waterloo.	2 Hill, 444.....	923
Chase v. People.....	40 Ill. 352.....	700
Cheek v. State.....	35 Ind. 492.....	452, 668
Cherry v. State.....	6 Fla. 679.....	725
— v. —.....	5 Neb. 412.....	354
Chicago, &c. R. R. Co. v. Buttolf..	66 Ill. 347.....	409
Clare's Case.....	8 Gratt. 606.....	419
Clarks v. Bates.....	15 Ark. 452.....	556
Clayton v. Wardell.....	2 Bradf. 6.....	892
Clum v. Smith.....	5 Hill, 560.....	623
Cochran v. State.....	7 Humph. 544.....	687
Cody v. State.....	3 How. (Miss.) 27.....	690
Cogan v. Elden.....	1 Burr. 383.....	566
Cohron v. State.....	20 Ga. 752.....	655
Coit v. Robinson.....	9 B. R. 289.....	819
Coker v. State.....	20 Ark. 53.....	607
Cole v. Berry.....	6 Cow. 584.....	194
Coleman v. Moody.....	4 H. & M. 1.....	671
Collins v. Hasbrouck.....	56 N. Y. 157.....	575
Commissioners of Highways, &c. v.		
Judges, &c.....	7 Wend. 264.....	922
Commonwealth v. Abbott.....	13 Metc. 120.....	430
— v. Austin.....	7 Gray, 51.....	343, 430
— v. Beale.....	Phila. 1854.....	674, 689
— v. Buzzell.....	16 Pick. 153.....	341, 409, 427
— v. Clurey.....	2 Virg. Cas. 20.....	507
— v. Drew.....	4 Mass. 391.....	683
— v. Eagan.....	4 Gray (Mass.) 18.....	429, 432
— v. Edgerly.....	10 Allen, 263.....	661
— v. Flanagan.....	7 Watts & Serg. 415..	372, 694
		695, 696
— v. Frazier.....	2 Brewst. 490.....	465
— v. Gallagher.....	4 Penn. L. J. 512-520.	690, 702
— v. Gee.....	6 Cush. 177.....	341, 406, 407
— v. Gross.....	1 Ashm. 281.....	372
— v. Hayden.....	4 Gray, 18.....	404
— v. Heath.....	1 Rob. 735.....	327
— v. Hill.....	4 Allen, 591.....	344
— v. —.....	11 Cush. 137.....	758
— v. Hughes.....	5 Rand. 655.....	694
— v. Jolliffe.....	7 Watts, 585.....	477
— v. Jones.....	1 Leigh, 598; 12 East, 231..	441
		690
— v. Knapp.....	9 Pick. 496.....	340, 482
— v. —.....	10 Pick. 477.....	438
— v. Lennox.....	3 Brewst. 249.....	372
— v. Leshner.....	17 Serg. & R. 155.....	417
— v. Lippan.....	6 Serg. & R. 395.....	287
— v. McFadden.....	11 Harris, 12.....	416, 428, 437
— v. Mead.....	12 Gray, 167.....	758
— v. Moore.....	1 Gratt. 296.....	910
— v. O'Neill.....	6 Gray (Mass.) 343.....	433
— v. Porter.....	1 Gray (Mass.) 423.....	342

		SECTION
Commonwealth v. Roby.....	12 Pick. 496, 588, 629, 634, 671	
— v. Rogers.....	7 Metc. 500.....	466, 482
— v. Sargent.....	Thatch. Crim. Cas. 116....	725
— v. Sherry.....	(Penn. MSS.).....	409
— v. Thrasher.....	11 Gray, 55.....	334, 433
— v. Twombly.....	10 Pick. 480.....	439
— v. Walters.....	6 Dana, 290.....	725
— v. Work.....	4 Crumrine, 493.....	372
Conway v. Clinton.....	1 Utah T. 215.....	489
Cook v. Green.....	11 Price, 736.....	610
— v. Newman.....	8 How. 523.....	907
Cook's Case.....	4 Harg. St. Tr. 740; 13 How. St. Tr. 311.....	476
Cooley v. State.....	38 Tex. 636.....	246, 451
Cooper v. Bissell.....	16 Johns. 146.....	203
— v. State.....	16 Ohio, 328.....	377
Cornelius v. State.....	7 Eng. (Ark.) 789.....	652
Coster v. Mersset.....	3 Brod. & Bing. 272..	616, 623
Costly v. State.....	19 Ga. 614.....	326
Cottle v. Cottle.....	6 Greenl. 140.....	613
Cowperthwaite v. Jones.....	2 Dallas, 55.....	681
Crabtree v. State.....	3 Sneed (Tenn.), 302.....	679
Craig v. Elliott.....	4 Bibb, 272.....	701
Cramer v. City of Burlington.....	42 Iowa, 315.....	413
Crane v. Deygert.....	4 Wend. 675.....	279, 280
Crawford v. State.....	2 Yerg. 60.....	624, 685, 687
Creek v. State.....	24 Ind. 151.....	647, 674
Crippin v. State.....	8 Mich. 117.....	426
Crocker v. State.....	1 Meigs, 127.....	758
Dalrymple v. Williams.....	63 N. Y. 361.....	565, 566, 575
Dana v. Fielder.....	12 N. Y. 40.....	573
— v. Tucker.....	4 Johns. 487.....	681
Davis v. Bangor & P. R. R. Co.....	60 Me. 303.....	930
— v. People.....	19 Ill. 74.....	515, 674
— v. State.....	35 Ind. 496.....	669
— v. —.....	15 Ohio, 72.....	650
— v. Walker.....	60 Ill. 452.....	395
Davison v. Associates of Jersey Co.....	71 N. Y. 333.....	863
Dawson v. People.....	25 N. Y. 405.....	494, 763, 764
Dayharsh v. Enos.....	5 N. Y. 531.....	267
Deacon v. Shreve.....	2 Zab. N. J. 176.....	624
Dempsey v. People.....	47 Ill. 323.....	591
Dennison v. Collins.....	1 Cow. 111.....	669
— v. Hyde.....	6 Conn. 508.....	556
Dent v. Hundred, &c.....	2 Salk. 645.....	690, 692
— v. People.....	1 N. Y. S. C. (T. & C.) 656..	451
Devin v. Patchen.....	26 N. Y. 445.....	887, 889, 890, 894
Dew v. McDewitt.....	17 Am. L. Reg. N. S. 621..	309
Dickerson v. Watson.....	48 Barb. 412.....	571
Diveny v. Elmira.....	51 N. Y. 506.....	86, 251, 414
Dobbins v. State.....	14 Ohio St. 493.....	650
Dolan v. People.....	6 Hun. 493.....	284
— v. —.....	64 N. Y. 485.. 94, 282, 499, 500 501, 502	
Donahue v. Henry.....	4 E. D. Smith, 162.....	845

TABLE OF CASES CITED.

337

		SECTION
Donnell <i>v.</i> Jones <i>et al.</i>	13 Ala. N. S. 490.....	556
Donston <i>v.</i> State.....	6 Humph. 275.....	596
Dooley <i>v.</i> State.....	28 Ind. 239.....	681, 682
Doughty <i>v.</i> Brill.....	36 Barb. 493.....	949
Dorlon <i>v.</i> Lewis.....	9 How. 1.....	626
Douglass <i>v.</i> Blackman.....	14 Barb. 381.....	888, 840, 847
— <i>v.</i> Tousey.....	2 Wend. 352.....	633
Dox <i>v.</i> Dey.....	3 Wend. 356.....	573
Doyle <i>v.</i> State.....	17 Ohio, 222.....	508
Drake <i>v.</i> Barrymore.....	14 Johns. 166.....	559
— <i>v.</i> State.....	51 Ala. 30.....	451
Driskill <i>v.</i> State.....	7 Ind. 338.....	419
Drummond <i>v.</i> Lessie.....	5 Blackf. 453.....	611
Dubois <i>et al. v.</i> Weaver.....	25 N. Y. 123.....	570
Dull <i>v.</i> People.....	4 Den. 91.....	452, 464
Dunning <i>v.</i> Hurlbut.....	2 Chip. 45.....	701
Durfee <i>v.</i> Eveland.....	8 Barb. 46.....	888, 844
Durrell <i>v.</i> Mosher.....	8 Johns. 445.....	836
East Saginaw & S. C. R. R. Co. <i>v.</i>		
Benham.....	12 Am. Railway Rep. 356; 28 Mich. 459.....	930
Eastwood <i>v.</i> People.....	3 Park. Cr. 25.....	599, 646, 658
Edwards <i>v.</i> Beach.....	3 Day (Conn.) 457.....	556
Eiseman <i>v.</i> Swan.....	6 Bosw. 669.....	572
Eppes <i>v.</i> State.....	19 Ga. 102.....	607, 612, 654
Epp's Case.....	5 Gratt. 681.....	365
Evans <i>v.</i> State.....	7 Ind. 271.....	651
Farrington <i>v.</i> Morgan.....	20 Wend. 208.....	918
Fenwick <i>v.</i> Parker.....	3 Code R. 254.....	447
Ferris <i>v.</i> People.....	35 N. Y. 125.....	260
Fink <i>v.</i> Hall.....	8 Johns. 437.....	840
Fisher <i>v.</i> Hepburn.....	48 N. Y. 41.....	206
Fitch <i>v.</i> Commr's of Highways, &c.....	22 Wend. 132.....	949
Fleet <i>v.</i> Hollenkemp.....	13 B. Monr. (Ky.) 219.....	556
— <i>v.</i> Youngs.....	7 Wend. 300.....	949
Fletcher <i>v.</i> State.....	6 Humph. 249.....	899, 429
Foote <i>v.</i> Silsby.....	1 Blatchf. 445; 14 How. 281.....	812
Forman, Matter of.....	1 Tuck. 205.....	895
Fox <i>v.</i> Smith.....	3 Cow. 23.....	632
Franchieras <i>v.</i> Henriques.....	6 Abb. Pr. N. S. 251.....	575
Frazier <i>v.</i> State.....	28 Ohio St. 551.....	318
Freeman <i>v.</i> People.....	4 Den. 9, 31-35. 251, 801, 312 325, 327, 851, 866, 451, 463 470, 471	
French <i>v.</i> Smith.....	4 Vt. 363.....	624
Friery <i>v.</i> People.....	2 Abb. Ct. of App. Dec. 230.....	87
— <i>v.</i> —.....	2 Keyes, 424.....	352, 489
Fry <i>v.</i> Bennett.....	1 Abb. Pr. 289.....	260
Furo <i>v.</i> Reynolds.....	20 Barb. 275.....	556
Gage <i>v.</i> Com'l Nat. Bank of Chicago.....	86 Ill. 371.....	843
Gale <i>v.</i> N. Y. C. & H. R. R.....	8 N. Y. Week. Dig. 245; 13 Hun. 1... 581, 587, 660	862

		SECTION
Galvin v. State	6 Cold. (Tenn.) 283...	683, 688
Gardiner v. People.....	6 Park. Cr. 155, 192...	222, 225, 275
— v. —.....	3 Scam. 88.....	380
Gardner v. Turner.....	9 Johns. 262.....	285
Gates v. People.....	14 Ill. 433.....	379, 382
George v. State.....	39 Miss. 570.....	699
Giberton v. Fleischel.....	5 Duer, 652.....	862
Gilbert v. Beach.....	16 N. Y. 608.....	571
Glann v. Younglove.....	27 Barb. 480.....	573
Grable v. Margrave.....	4 Ill. 373.....	556
Granger v. State.....	5 Yerg. 459.....	464
Grant v. McDonough.....	7 La. Ann. 447.....	556
Graves v. Short.....	Cro. Eliz. 616.....	617
Gray v. People.....	26 Ill. 344.....	379
— v. R.....	1 Cla. Fin. 427.....	290
Greason v. Kettletas.....	17 N. Y. 491.....	862
Green v. Bliss.....	12 How. 428.....	561, 622, 630
— v. Telfair.....	11 How. 262.....	567
Greenfield v. People.....	7 N. Y. Week. Dig. 345; 6 Abb. New Cas. 1; 13 Hun, 242..	318, 322, 323, 328, 348
Greenley v. State.....	60 Ind. 141.....	419, 574
Grey's Case.....	3 Harg. St. Tr. 519; 9 How. St. Tr. 127.....	476
Griffin v. State.....	15 Ga. 476.....	385
Grinnell v. Phillips.....	1 Mass. 541.....	681
Grisson v. State.....	4 Tex. Ct. of App. 374....	642
Griswold v. Dexter.....	62 Barb. 648.....	573
Grivens v. State.....	6 Tex. 344.....	699
Gross v. State.....	2 Carter (Ind.) 329.....	419
Hackley v. Hastie.....	3 Johns. 252.....	663
Hair v. Little.....	28 Ala. N. S. 236.....	556
Hale v. Cove.....	1 Strange, 642.....	679
Hall v. State.....	51 Ala. 9.....	323
— v. Stryker.....	27 N. Y. 603.....	900
Hall's Case.....	6 Leigh, 615.....	604
Hancock v. Salmon.....	8 Barb. 564.....	838
Hanks v. State.....	21 Tex. 526.....	690
Hard v. Shipman.....	6 Barb. 630.....	848
Hardenburg v. Crary.....	15 How. 307.....	267
Hare v. State.....	4 How. 194.....	649
Hartshorne v. Gelston.....	Col. & Caines, 434.....	884
Hartwright v. Badham.....	11 Price, 383.....	610
Harvey v. Rickett.....	15 Johns. 87.....	680
Hathaway v. Helmer.....	25 Barb. 29.....	315, 443
Hawkins v. Riley.....	17 B. Monr. (Ky.) 101....	556
Hay v. Cohoes Co.....	3 Barb. 42.....	556
Hearn v. City of Greensburgh.....	51 Ind. 119.....	413
Heath v. Com.....	1 Rob. 735..	326, 353, 367, 401, 690
Heffron v. Gallupe.....	55 Me. 563.....	584
Hegeman v. Cantrell.....	40 N. Y. S. C. 381.....	576
Hendrick v. Com.....	5 Leigh, 708.....	442, 467, 486

TABLE OF CASES CITED.

339

		SECTION
Henlon v. Leonard.....	7 Johns. 200.....	845
Henries v. People.....	1 Park. Cr. 579.....	475
Herdgins v. State.....	2 Kelley, 173.....	385
Herndon v. Bradshaw.....	4 Bibb, 45.....	701
Hewlett v. Wood.....	62 N. Y. 75.....	857
Hickox v. Cleveland.....	8 Ohio, 543.....	930
Hill, <i>ex parte</i>	3 Cow. 355.....	656
— v. N. O. R. R. Co.....	11 La. Ann. 292.....	556
— v. People.....	16 Mich. 351.....	700
Hilliard v. Nichols.....	2 Root, 176.....	614, 618
Hines v. State.....	8 Humph. 597.....	640
Hix v. Drury.....	5 Pick. 296.....	663
Hofheimer v. Campbell.....	59 N. Y. 269.....	898
Hogshead v. State.....	6 Humph. 59.....	676
Holt v. People.....	13 Mich. 224.....	389, 390
Hoobach v. State.....	43 Tex. 242.....	451
Hooker v. State.....	4 Ohio, 350.....	481
Hoppock, Matter of.....	2 Benedict, 478.....	819
Horton v. Horton.....	2 Cow. 589.....	645
How v. Brundage.....	1 N. Y. S. C. (T. & C.) 429.....	283
Howerton v. State.....	1 Meigs, 262.....	360, 694
Howland v. Gifford.....	1 Pick. 43.....	702
— v. Taylor.....	53 N. Y. 627.....	896
— v. Willetts.....	9 N. Y. 170.....	625
Howzer v. Com.....	1 P. F. Smith, 333.....	401
Hudson v. State.....	1 Blackf. (Ind.) 319.....	399
— v. —.....	9 Yerg. 408.....	582, 585
Huntley v. Bacon.....	15 Conn. 267.....	556
Hurley v. State.....	6 Ohio, 399.....	650
Huydekoper v. Cotton.....	3 Watts, 56.....	758
Imlay v. Rogers.....	2 Halst. 347.....	758
Irick v. Black.....	2 Green N. J. 105.....	307
Irvine v. Kearn.....	14 Serg. & R. 292.....	372
Jackson v. Dickinson.....	15 J. R. 309.....	566
— v. State.....	11 Tex. 261.....	509
— v. Warford.....	7 Wend. 62.....	618
Jainagin v. State.....	10 Yerg. 529.....	640
James v. State.....	45 Miss. 572.....	506
— v. —.....	55 Miss. 57.....	631, 641
Jeffries v. Randall.....	14 Mass. 205.....	618
Jesse v. State.....	20 Ga. 156.....	404, 515
Jessup v. Eldridge.....	Coxe, 401.....	661
Jewett v. Com.....	10 Harris, 94.....	477
Jim v. State.....	15 Ga. 535.....	694
— v. —.....	4 Humph. 289.....	686
John v. State.....	16 Ga. 200.....	336, 385
— v. —.....	8 Ired. 330.....	627
Johnson v. Hicks.....	1 Lans. 150.....	894
— v. State.....	32 Ark. 309.....	658
Jones v. Brooklyn Life Ins. Co.....	61 N. Y. 79.....	572
— v. People.....	2 Col. T. 351.....	349, 436
— v. State.....	2 Blackf. 475.....	419
— v. —.....	13 Tex. 168.....	675
Jordan v. Meredith.....	3 Yeates, 318.....	702

		SECTION
Joseph v. Bodwell.....	28 La. Ann. 382; 26 Am. Rep 102.....	859
Josephine v. State.....	39 Miss. 613.....	410
Jumpertz v. People.....	21 Ill. 375.....	587, 652, 658
Kassing v. Griffith <i>et al.</i>	86 Ill. 265.....	862
Keegan v. Kavanagh.....	62 Mo. 230.....	409
Keener v. State.....	18 Ga. 194.....	690, 701
Kelley v. People.....	55 N. Y. 565.....	449
Kennedy v. Com.....	2 Virg. Cas. 510.....	694
— v. Seamans.....	60 Ga. 612.....	877
— v. Williams.....	2 Nott & McCord, 79.....	702
King v. Havens.....	25 Wend. 420.....	570
— v. Mayor.....	36 N. Y. 186.....	931
— v. Root.....	4 Wend. 13.....	556
— v. State.....	5 How. (Miss.) 730.....	441
Knight v. Freeport.....	13 Mass. 218.....	582, 613
Kroer v. People.....	78 Ill. 294.....	368
Krom v. Schoonmaker.....	3 Barb. 647.....	556
Labar v. Koplin.....	4 N. Y. 547.....	627
Lake v. Ranney.....	33 Barb. 49.....	895
Lamb v. State.....	36 Wis. 424.....	451
Lane v. Crary <i>et al.</i>	19 Barb. 537.....	947, 949
— v. Scoville.....	16 Kans. 402.....	436
Lansing v. Montgomery.....	2 Johns. 382.....	559
Lavin v. People.....	69 Ill. 303.....	409
Lawson, Matter of.....	2 Nat. Bank. Reg. 396.....	819
Leach v. People.....	53 Ill. 311.....	381
Lee v. State.....	45 Miss. 114.....	357, 395
— v. Schadsey.....	2 Keyes, 543; 3 Ib. 223.....	621
Levells v. State.....	32 Ark. 585.....	563
Lewin's Case.....	2 Lewens C. C. 125.....	875
Lewis v. Few.....	Anth. N. P. 102.....	350
— v. Lewis.....	11 N. Y. 227.....	916
— v. State.....	9 S. & M. 115.....	419
Lindsley v. Bushnell.....	15 Conn. 225.....	556
— v. People.....	6 Park. Cr. 233.....	451, 456
Lisle v. State.....	6 Mo. 426.....	701
Lithgow v. Com.....	2 Va. Cas. 297.....	493
Livingston v. Columbia Ins. Co.....	Col. & Caines, 339.....	884
— v. Platner.....	1 Cow. 175.....	570
Lockwood v. Bull.....	1 Cow. 322.....	559
Lohman v. People.....	1 N. Y. (Comst.) 379.....	409, 916
Lonsdale v. Brown.....	4 Wash. C. C. R. 148.....	663
Lord Grey's Case.....	3 Harg. St. Tr. 519.....	476
Lowenberg v. People.....	5 Park. Cr. 414; 27 N. Y. 336.....	292, 332, 397, 418
Lowe's Case.....	4 Greenl. 439.....	758
Loyd v. State.....	45 Ga. 57.....	396
— v. —.....	60 Ga. 145.....	758
Lummis v. Kassen.....	43 Barb. 375.....	900
Luster v. State.....	11 Humph. 169.....	600
Macfarland's Trial.....	8 Abb. Pr. (N. S.) 57.....	246
Mallory v. Wood.....	6 Duer, 657; 3 Abb. Pr. 369; 14 How. 67.....	571

TABLE OF CASES CITED.

341

		SECTION
Manhattan Co. v. Lydig.....	Col. & Caines, 423.....	884
Manley v. Shaw.....	1 Car. & M. 361.....	620
Manning v. Monaghan.....	23 N. Y. 539.....	573
Mansell v. R.....	8 E. & B. 54; Dears. & B. 375.....	290, 476
Maretzek v. Cauldwell.....	5 Rob. 660; 2 Abb. Pr. (N. S.) 407.....	310, 311
Marsh v. Coppuck.....	9 C. & P. 480.....	461
Martin v. Com.....	2 Leigh, 745.....	634, 655
— v. State.....	25 Ga. 494.....	595
— v. —.....	54 Ill. 225.....	608
— v. —.....	16 Ohio, 364.....	419
Marvin v. Marvin.....	3 Abb. Ct. of App. Dec. 192.....	894
Mason, Matter of.....	Barb. S. C. R. 437; 3 Edw. Ch. Pr. 380.....	912
Mayor v. Blache.....	3 La. 619.....	399
— v. State.....	4 Sneed, 597.....	360
— &c. of N. Y. v. Mason.....	1 Abb. Pr. 344-352; 4 E. D. Smith, 142.....	267
McAllister v. State.....	17 Ala. 434.....	699
McCann v. State.....	9 S. & M. 465.....	607, 649
McCarter v. Com.....	11 Leigh, 633.....	634
McCarty v. State.....	26 Miss. 299.....	403
McClosky v. People.....	6 Park. Cr. 155.....	273
McCorkle v. Binns.....	5 Binn. 340.....	701
McCreary v. Com.....	29 Penn. St. 323.....	657
McElrath v. State.....	2 Swan, 378.....	589
McFadden v. Com.....	23 Penn. St. (11 Harris) 12.....	442, 467, 655
McGehee v. Shafer.....	9 Tex. 20.....	698
McGowan v. State.....	9 Yerg. 184.....	360, 492
McGregg v. State.....	4 Blackf. 106.....	354
McGuffie v. State.....	17 Ga. 497.....	624, 725
McGuire v. State.....	37 Miss. 369.....	437
McKinley v. Smith.....	Hardin, 167.....	701
McLain v. State.....	10 Yerg. 241.....	640
McLean v. State.....	8 Mo. 153.....	658
McNall v. McClure.....	1 Lans. 32.....	430
McNamara v. King.....	7 Ill. 432.....	556
McNevins v. People.....	61 Barb. 308.....	494, 754
McQuillan v. State.....	8 S. & M. 587.....	509
Mechanics & Farmers Bank v. Smith.....	19 Johns. 115.....	320, 399
Mellish v. Arnold.....	Bunb. 51.....	679
Merrian v. Harsen.....	2 Barb. Ch. Pr. 233.....	910
Merrills v. Tariff M'fg Co.....	10 Conn. 384.....	556
Meyer v. State.....	19 Ark. 156.....	383
Middletown v. Ames.....	7 Vt. 166.....	412
Milburn v. Beach.....	14 Mo. 104.....	556
Miley v. Lebanon Nat. Bank.....	1 Penn. (Pearson) 541. 313,	701
Miller v. Wild Cat, &c. Co.....	52 Ind. 51.....	413
Milligan's Case.....	6 C. H. Rec. 69.....	366
Mills v. Pulver.....	3 Den. 84.....	828
Miner v. Burling.....	32 Barb. 541.....	917, 919
Mitchell v. Carter.....	14 Hun, 448.....	662
— v. Milbank.....	6 T. R. 199.....	573

		SECTION
Mitchum v. State.....	11 Ga. 616.....	694
Mobley v. State.....	46 Miss. 501.....	704
Moffat v. Moffat.....	10 N. Y. 468; 17 Abb. 4.....	862
Monroe v. State.....	5 Ga. 85.....	679
Montague v. Com.....	10 Gratt. 767.....	404, 407
Morgan, Matter of.....	7 Paige, 236.....	912
Moses v. State.....	11 Humph. 232.....	860
Moss v. Priest.....	19 Abb. 314; 1 Rob. 632.....	563, 572
Murphy v. Kipp.....	1 Duer, 659.....	884
— v. Lippe.....	35 N. Y. S. C. 542.....	572
— v. People.....	2 Cow. 815, 818 b.....	851
— v. State.....	37 Ala. 147.....	423
Murray v. State.....	48 Ala. 675.....	451
Musick v. People.....	40 Ill. 268.....	497
Ned v. State.....	33 Miss. 364.....	607
— v. —.....	7 Port. 187.....	378
Neeley v. People.....	13 Ill. 685.....	379
Neil v. Abel.....	24 Wend. 185.....	842
Nelms v. State.....	13 S. & M. 500.....	649
Nesmith v. Atlantic Ins. Co.....	8 Abb. Pr. 423.....	884
— v. Clinton Fire Ins. Co.....	8 Abb. Pr. 141.....	626
Newcomb v. Butterfield.....	8 Johns. 264.....	570
New Windsor Turnpike Co. v. Ellison.....	1 Johns. 141.....	884
New York v. Mason.....	4 E. D. Smith, 142; 1 Abb. Pr. 344.....	274, 829
Niles v. Brackett.....	15 Mass. 378.....	618
Noe v. State.....	4 How. (Miss.) 330.....	357
Nolen v. State.....	2 Head, 520.....	594
Norfleet v. State.....	4 Sneed (Tenn.), 340. 370, 492, 690.....	567
Norton v. Breitenbach.....	1 Penn. (Pearson) 467.....	567
Oakley v. Van Horn.....	21 Wend. 305.....	847
Oates' Case.....	10 How. St. Tr. 1079.....	471
O'Brien v. People.....	36 N. Y. 276; 48 Barb. 274.....	351, 354, 418
O'Connell v. R.....	11 Cla. & Fin. 155.....	290
O'Connor v. State.....	9 Fla. 215.....	364
Ogle v. State.....	33 Miss. 383.....	357, 361
Oliver v. Trustees.....	5 Cow. 284.....	645
O'Mara v. Com.....	75 Pa. St. 424.....	323
Onions v. Naish.....	7 Price, 203.....	610
Organ v. State.....	26 Miss. 78.....	624
O'Shea v. Kirker.....	8 Abb. Pr. 69.....	573
Osiander v. Com.....	3 Leigh, 780.....	367
Packard v. United States.....	1 Iowa, 225.....	624
Parker v. Laney.....	58 N. Y. 469.....	573, 857, 861
— v. Thornton.....	2 Ld. Raym. 1410.....	702
Parks v. State.....	4 Ohio (N. S.) 234.....	690, 701
Parr v. Seames.....	Barnes, 438.....	679
Partridge v. Norton.....	9 Hun, 582.....	571
Patchin v. Sands.....	10 Wend. 570.....	884

TABLE OF CASES CITED.

343

		SECTION
Peiffer v. Com.	3 Harris, 471	638, 658
Pelham v. Page	1 Eng. (Ark.) 535	676
People v. Acosta	10 Cal. 195	697
— v. Aichinson	7 How. Pr. 241	459, 475
— v. Albany C. P.	6 Wend. 548	197
— v. Albany & S. R. R. Co.	5 Lans. 25; 7 Abb. New Cas. 265; 1 Lans. 308; 55 Barb. 344; 38 How. 228	862
— v. Allen	43 N. Y. 28-34	329, 398, 510
— v. Backus	5 Cal. 275	624
— v. Baker	3 Abb. Pr. 47; 3 Park. Cr. 181	221
— v. —	10 How. Pr. 567	757
— v. Bebee	5 Hill, 82	645
— v. Bodine	1 Den. 281-309; 1 Edm. Sel. Cas. 36	319, 327, 347, 351, 401, 437, 451, 458, 474, 481, 493, 690
— v. Buckley	4 Cal. 241	251
— v. Cancemi	7 Abb. Pr. 299	225
— v. Carnal	1 Park. Cr. 256	592, 610, 622
— v. Christie	2 Park. Cr. 579; 2 Abb. Pr. 526	400, 403, 409
— v. Collins	20 How. 111	872, 875
— v. Colson	49 Cal. 679	271
— v. Colt	3 Hill, 435	223
— v. Corning	2 N. Y. 9	547
— v. Cotta	49 Cal. 167	251, 271
— v. Cummings	3 Park. Cr. 343	197
— v. Cunningham	3 Park. Cr. 531	757
— v. Cyphers	5 Park. Cr. 681	737
— v. Damon	13 Wend. 351	418, 437, 460, 468
— v. Dewick	2 Park. Cr. 230	308
— v. Dixon	3 Abb. Pr. 395	757
— v. Doe	1 Mann. Mich. 451	257, 304, 305
— v. Douglass	4 Cow. 26	634, 645
— v. Edwards	41 Cal. 640	392
— v. Fanner	2 Cal. 257	419
— v. Freeman	1 Den. 9	493
— v. Fuller	2 Park. Cr. 16	278, 316, 354, 366
— v. Griffin	38 How. Pr. 477	760
— v. Hamilton	39 N. Y. 107	461, 472
— v. Harriott	3 Park. Cr. 112	728
— v. Harris	4 Den. 152	221
— v. Hartung	4 Park. Cr. 256	609
— v. Hayes	1 Edm. Sel. Cas. 582	354
— v. Henries	1 Park. Cr. 579	451, 456, 459
— v. Hettrick	1 Wh. Cr. Cas. 399	320
— v. Honeyman	3 Den. 121	321, 354
— v. Horton	13 Wend. 8	329, 431
— v. Hughes	29 Cal. 257	624
— v. Hulbut	4 Den. 183	758

		SECTION
People v. Jewett.....	3 Wend. 314; 6 Ib. 386...	286
— v. Johnson.....	494, 496; 498, 510, 730, 754 2 Wh. Cr. Cas. 361-367...	366 409
— v. Johnston.....	46 Cal. 78.....	358
— v. Jones.....	1 Edm. Sel. Cas. (Circuit, 1845).....	407
— v. King.....	27 Cal. 507.....	695
— v. Knickerbocker.....	1 Park. Cr. 302..	320, 401, 492
— v. Larned.....	7 N. Y. 445-451.....	197
— v. Lee.....	17 Cal. 76.....	405
— v. Lohman.....	2 Barb. 216.....	321
— v. Macauley.....	1 Cal. 379.....	393
— v. Mahoney.....	18 Cal. 180.....	391
— v. Mallon.....	3 Lans. 224-229..	222, 366, 369
— v. Masters.....	3 Park. Cr. 517.....	459
— v. Mather.....	4 Wend. 229....	291, 304, 309 347, 348, 351, 431, 444
— v. McCarty.....	48 Cal. 557.....	451
— v. McCollister.....	1 Wh. Cr. Cas. 391.....	314
— v. McGuire.....	43 How. Pr. 67.....	884
— v. McGungill.....	41 Cal. 429.....	291, 492
— v. Melvin.....	2 Wh. Cr. Cas. 262.....	320
— v. Michigan Southern R. R. Co.....	3 Mich. 496.....	930
— v. Monahan.....	32 Cal. 68.....	498
— v. Murphy.....	45 Cal. 137.....	271
— v. Northern R. R. Co.....	42 N. Y. 217.....	857
— v. Page.....	1 Idaho, 114.....	661
— v. Quigg.....	59 N. Y. 86.....	710
— v. Ransom.....	18 Johns. 218.....	645
— v. Rathbun.....	21 Wend. 509....	304, 307, 353
— v. Renfrou.....	41 Cal. 37.....	291
— v. Riley.....	5 Park. Cr. 401.....	851
— v. Rogers.....	13 Abb. Pr. (N. S.) 370..	197
— v. Schuyler.....	4 N. Y. 183.....	900
— v. Shattuck.....	6 Abb. New Cas. 33.....	758
— v. Simpson.....	28 N. Y. 60.....	916
— v. Stewart.....	7 Cal. 140.....	421
— v. Stokes.....	53 N. Y. 178.....	371
— v. Stonecifer.....	6 Cal. 405.....	492
— v. Symonds.....	22 Cal. 348.....	653
— v. Thayer.....	1 Park. Cr. 595.....	453
— v. Thompson.....	41 N. Y. 1.....	313
— v. Tweed.....	11 Hun, 197; 13 Abb. Pr. (N. S.) 371; 50 How. Pr. 273-286....	283, 468 880, 884
— v. Van Horne.....	8 Barb. 158.....	459, 757, 763
— v. Vasquez.....	49 Cal. 560.....	271
— v. Vermilyea.....	7 Cow. 369.....	197, 690
— v. Walters.....	18 Abb. Pr. 148.....	454
— v. Webb.....	1 Hill, 182.....	221
— v. Webster.....	14 How. Pr. 245..	834, 835, 836
— v. Williams.....	6 Cal. 206.....	394
— v. Wilson.....	3 Park. Cr. 199.....	306, 425
— v. Wintermute.....	1 Dakota (Bennett), 63....	494

TABLE OF CASES CITED.

345

		SECTION
People v. Young.....	31 Cal. 564.....	758
— <i>ex rel.</i> Blake v. Holdridge....	4 Lans. 511.....	63
— <i>ex rel.</i> Davids v. Wilson.....	13 How. 446.....	915
— <i>ex rel.</i> Flint v. Cline.....	23 Barb. 197.....	922, 923
— <i>ex rel.</i> Kirtland v. Dillon.....	8 N. Y. Week. Dig. 89; 17 Hun, 1.....	884
— <i>ex rel.</i> La Torre v. O'Brien....	54 Barb. 38.....	958
— <i>ex rel.</i> Lefever v. Board of Supervisors.....	34 N. Y. 268-271.....	924
— <i>ex rel.</i> Livermore v. Hamilton, Jr.....	39 N. Y. 109; 15 Abb. Pr. 334.....	456, 830, 831, 917
— <i>ex rel.</i> Ludlum v. Wallace....	4 N. Y. S. C. (T. & C.) 439.	922
— <i>ex rel.</i> Murray v. Justices of Special Session.....	12 Hun, 538.....	855
— <i>ex rel.</i> Ottman v. Hyndes <i>et al.</i>	30 N. Y. 470.....	948
— <i>ex rel.</i> Perkins v. Judges, &c.	8 Cow. 127.....	567
— <i>ex rel.</i> Tweed v. Liscomb.....	3 Hun, 760; 60 N. Y. 559.	298
— <i>ex rel.</i> Van Sickle v. Eldridge..	3 Hun, 541; 6 N. Y. S. C. (T. & C.) 20.....	925, 926
— <i>ex rel.</i> Walker v. Special Sessions.....	4 Hun, 442.....	851
Perkins v. Knight.....	2 N. H. 474.....	582
— v. State.....	4 Ind. 222.....	758
Phelps v. People.....	6 Hun, 401; 72 N. Y. 335.	371
Philips v. Com.....	19 Gratt. 485.....	639
— v. Melville.....	10 Hun, 211.....	573
Pierce v. Bush.....	3 Bibb, 347.....	701
— v. State.....	13 N. H. 536.....	407
Pilling v. Pilling.....	45 Barb. 86.....	894
Platt v. Sherry.....	7 Wend. 236.....	898
Poage v. State.....	3 Ohio St. 229.....	650, 658
Pollard v. Com.....	5 Rand. 659.....	367
Poore v. Com.....	2 Virg. Cas. 474.....	694, 695
Pope v. State.....	36 Miss. 122.....	609, 674
Porter <i>et al.</i> v. Cass.....	7 How. Pr. 441.....	826, 915
— v. State.....	2 Carter, 435.....	647
Pound v. State.....	43 Ga. 88.....	592
Powell v. People.....	5 Hun, 169; 63 N. Y. 88..	281
Presbury v. Com.....	9 Dana, 203.....	436, 690
President of W. W. Turnpike v. People.....	9 Barb. 161.....	451, 456
Price v. Warren.....	1 Hen. & Munf. 385..	594, 661
Pringle v. Huse.....	1 Cow. 432-436.....	261, 285
Probst's Case.....	Official Report, 8.....	347, 399
Prussel v. Knowles.....	4 How. (Miss.) 90.....	366
Pugsley v. Anderson.....	3 Wend. 468.....	947, 948
Pupke, matter of.....	1 Benedict, 342.....	812
Purinton v. Humphreys.....	6 Greenl. 379.....	594, 661
Quesenbury v. State.....	3 Stew. & Port. 308.....	378
Quinn v. State.....	14 Ind. 589.....	658

		SECTION
Rawle v. State.....	8 S. & M. 599.....	509
Ray v. State.....	15 Ga. 222.....	624, 690
— v. —.....	4 Tex. Ct. of App. 450.....	667
Raymond v. Danbury & N. R. R. Co.	14 Blackf. 133.....	812
Read v. Cambridge.....	124 Mass. 567; 26 Am. Rep. 690.....	589
Reading's Case.....	7 How. St. Tr. 265.....	471
Rex v. Bennett.....	6 C. & P. 179.....	875
— v. Bowen.....	3 C. & P. 602.....	875
— v. Brandreth.....	32 How. St. Tr. 774.....	246
— v. Despard.....	2 Man. & R. 406.....	436
— v. Dolby.....	2 B. & C. 104.....	259
— v. Edmunds.....	4 B. & Ald. 471.....	326
— v. Ferrand.....	3 B. & A. 260.....	870
— v. Frost.....	9 C. & P. 136.....	475
— v. Hunt.....	4 B. & A. 430.....	702
— v. Marsh.....	6 Ad. & El. 236.....	753, 758
— v. Martin.....	Law Rep. 1 C. C. 378.....	582
— v. Nicholas.....	7 C. & P. 538.....	875
— v. Parry.....	7 C. & P. 836.....	473, 476, 485
— v. Savage.....	1 Mood. C. C. 51.....	261, 288
— v. Sullivan.....	1 P. & D. 96.....	702
— v. Sutton.....	8 B. & C. 417; 2 M. & R. 406.....	289, 436, 699
— v. —.....	4 Maule & Sel. 532.....	593, 661
— v. Tremaine.....	7 D. & R. 684.....	702
— v. Upon St. Leonards.....	10 Q. B. 827.....	758
— v. Woolf.....	1 Chitty, 401.....	634, 656
Reynolds, matter of.....	6 Park. Cr. 309.....	223
— v. Champlain Transp't'n Co.....	9 How. 7.....	626
— v. State.....	61 Ind. 392.....	859
— v. —.....	1 Kelley, 222.....	384, 479
Rice v. Buchanan.....	41 Barb. 148.....	821
— v. State.....	7 Ind. 332-336.....	354, 695
Richardson v. Jones.....	1 Nev. 403.....	674
Riley's Case.....	1 C. H. Rec. 23.....	366
Ritchie v. Holbrook.....	7 Serg. & R. 458.....	613
Roach v. Cosine.....	9 Wend. 230.....	921
Roberts v. Failis.....	1 Cow. 238.....	680
— v. Heim.....	27 Ala. N. S. 678.....	556
— v. Hughes.....	7 M. & W. 399.....	566
— v. State.....	14 Ga. 8.....	654
Robins v. Gorham.....	26 Barb. 588-592.....	821, 834 835, 836, 949
Robinson v. Raynor.....	28 N. Y. 494.....	894
— v. Smith.....	13 Abb. Pr. 359.....	895
Rogers v. Monthrop.....	13 Wend. 274.....	841
Romaine v. State.....	7 Ind. 63.....	701
Rose v. Smith.....	4 Cow. 17.....	669
Rowan v. Lytle.....	11 Wend. 616.....	916
Rowe v. State.....	11 Humph. 491.....	587, 607, 673
Roy v. State.....	2 Kans. 405.....	864
Ruloff v. People.....	18 N. Y. (4 E. D. S.) 179.....	599 659
Ruloff's Case.....	11 Abb. Pr. (N. S.) 287.....	225
Russell, matter of.....	1 Barb. 8; Ch. R. 38.....	909

TABLE OF CASES CITED.

347

		SECTION
Russell v. People.....	44 Ill. 508.....	652
Ryan v. Harrow.....	27 Iowa, 494.....	669
Sackett v. Spencer	29 Barb. 180.....	571
Sam v. State.....	13 Sm. & M. 189.....	362
— v. —.....	1 Swann (Tenn.), 61.....	590
Samuels v. Bryant.....	14 Abb. Pr. N. S. 442.....	898
Sanches v. People.....	22 N. Y. 147.....	328
Sargent v. Dunnison	5 Cow. 106.....	566
Schonton v. Kilmer.....	8 How. 527.....	907
Scranton v. Stewart.....	52 Ind. 68.....	335
Scribner v. Williams.....	1 Paige, 550; 26 N. Y. 441.....	891
Seacore v. Burling.....	1 How. Pr. 175.....	440
Sealey v. State.....	1 Kelley, 213.....	479
Sefridge's Trial.....	(Pamph.) 9.....	409
Sellers v. People.....	3 Scam. 414.....	380, 690
— v. State.....	52 Ala. 368.....	289
Shappener v. Second Ave. R. R. Co.....	55 Barb. 497.....	625
Sheaff v. Gray	2 Yeates, 278.....	663
Sheldon v. Perkins.....	32 Vt. 550.....	624
Sherman v. Dutch.....	16 Ill. 283.....	556
Shields v. N. S. Bank.....	3 Hun, 477; 5 N. Y. S. C. (T. & C.) 538... 202,	222 283
Shobe v. Bell.....	1 Randolph, 39.....	681
Shomo v. Zeigler.....	10 Phila. Rep. 611.....	597
Shove v. Raynor.....	3 Den. 78.....	847
Simms v. State.....	60 Ga. 145.....	758
Smith v. Cheetham.....	3 Caines, 57.....	680
— v. Eames.....	3 Scam. 78.....	380, 381
— v. Floyd.....	18 Barb. 522.....	311, 312
Snell v. Lonckes.....	12 Barb. 385.....	858
Sparks v. Wakeley.....	7 N. Y. Week. Dig. 80....	597
Spinely v. De Willott.....	7 East, 108.....	616
Sprouce v. Com.....	2 Virg. Cas. 375.....	367
Stanton v. State.....	13 Ark. (8 Eng.) 317....	607
Starkweather v. Seeley.....	45 Barb. 166.....	916
State v. Anderson.....	2 Bailey, 565.....	658
— v. —.....	5 Harrington, 493.....	373
— v. —.....	4 Nev. 265.....	609
— v. Andrews.....	29 Conn. 100.....	595, 605
— v. Arthur.....	2 Dev. 217.....	477
— v. Ayer.....	3 Foster (N. H.) 301....	604, 694
— v. Babcock.....	1 Conn. 401.....	634, 647, 658
— v. Baker.....	20 Mo. 238.....	758
— v. —.....	63 N. C. 276.....	607
— v. Baldy.....	17 Iowa, 39.....	669
— v. Barton.....	19 Mo. (4 Bennett) 227....	634
— v. Benton.....	2 Dev. & Bat. 196....	355, 399 408, 479, 492
— v. Bone.....	7 Jones, 121.....	355
— v. Bonwell	2 Harrington, 529....	373, 399 656
— v. Brannon	45 Mo. 329.....	647
— v. Brewer.....	8 Mo. 373.....	758

		SECTION
State v. Brooks.....	9 Ala. 10.....	509
— v. Broughton.....	9 Ired. 96.....	758
— v. Brown.....	15 Kans. 400.....	333
— v. Bryant.....	10 Yerg. 527.....	509
— v. Bullard.....	16 N. H. 139.....	669
— v. Burnside.....	37 Mo. 343.....	359, 690
— v. Calhoun.....	1 Dev. & Bat. 374.....	725
— v. Cameron.....	2 Chandler (Wis.) 172.....	469
— v. Carstaphen.....	2 Hayw. 238.....	656
— v. Carver.....	49 Me. 588.....	509
— v. Caulfield.....	23 La. Ann. 148.....	363, 674
— v. Clark.....	42 Vt. 629.....	338
— v. Cockman.....	1 Wins. N. C. No. 2-95.....	355
— v. Collins.....	3 Devereaux, 117.....	725
— v. Cox.....	6 Ired. 440.....	725
— v. Crank.....	2 Bailey, 66.....	399
— v. Craton.....	6 Ired. 164.....	477
— v. Creighton.....	1 Nott. & McC. 256.....	725
— v. Cucuel.....	2 Vroom (N. J.), 249.....	604
		655, 674
— v. Darocha.....	20 La. Ann. 356.....	259
— v. Davis.....	29 Mo. 391.....	359, 694
— v. Duncan & T.	7 Yerg. 271.....	509
— v. Ellington.....	7 Ired. 61.....	356
— v. Evans.....	21 La. Ann. 321.....	643
— v. Fassett.....	16 Conn. 457.....	758
— v. Felton.....	25 Iowa, 67.....	658
— v. Fowler.....	1 Walker, 318.....	441
— v. Fox.....	1 Dutch. 566.....	695
— v. —.....	Ga. Decis. part 1, 35.....	634
— v. Frank.....	23 La. Ann. 213.....	658
— v. Freeman.....	13 N. H. 488.....	725
— v. Gillick.....	7 Iowa (Clark), 287..	498, 690
— v. Gut.....	13 Minn. 341.....	259
— v. Hascall.....	6 N. H. 352.....	613, 702
— v. Hopkins.....	1 Bay, 373.....	690, 693
— v. Howard.....	17 N. H. 171.....	328, 334, 403
		419, 695
— v. Huzel.....	27 La. Ann. 375.....	323
— v. Igo.....	21 Mo. (6 Bennett), 459..	634
— v. Jewell.....	33 Me. (3 Reding), 583...	338
		419
— v. Johnson.....	1 Walk. 392.....	358
— v. Kingsbury.....	58 Me. 239.....	330
— v. Lautenschlager.....	22 Minn. 514.....	443
— v. Madoil.....	12 Fla. 151.....	698
— v. Marshall.....	8 Ala. 302.....	404, 515
— v. —.....	6 N. H. 352.....	616
— v. McClear.....	11 Nev. 39.....	252
— v. McElmurray.....	3 Strobb. 33.....	648, 658
— v. McKee.....	1 Bailey, 651.....	648, 656, 658
— v. McQuaige.....	5 S. C. (Richardson), 429..	492
— v. Middleton.....	5 Porter, 484.....	504
— v. Miller.....	1 Dev. & Bat. 500.....	647, 656
— v. Morea.....	2 Ala. 275.....	488
— v. Murphy.....	33 Iowa, 270.....	678

TABLE OF CASES CITED.

349

		SECTION
State v. Noblett.....	2 Jones' Law (N. C.), 418.	585
— v. Nolan.....	13 La. Ann. 276.....	419, 436
— v. Offutt.....	4 Blackf. 355.....	758
— v. Ostrander.....	18 Iowa, 434.....	333, 397, 405
— v. Oxford.....	30 Tex. 428.....	758
— v. Parks.....	21 La. Ann. 251.....	701
— v. Parrant.....	16 Minn. 178.....	644
— v. Patrick.....	3 Jones' Law (N. C.), 443.	690
		701
— v. Peter.....	Ga. Decis. part 1, 46.....	634
— v. Plower.....	1 Walk. 318.....	358
— v. Populus.....	12 La. Ann. 710.....	643
— v. Potter.....	18 Conn. 166 ...	346, 466, 487
— v. Prescott.....	7 N. H. 290.....	634, 647
— v. Price.....	10 Rich. Law, 351...	483, 485
— v. Quarrel.....	2 Bay, 150.....	700, 702
— v. Quinby.....	51 Me. 395.....	493, 515
— v. Rand.....	33 N. H. 216.....	603
— v. Rickey.....	5 Halstead (N. J.), 83...	503
— v. Rose.....	32 Mo. 560.....	359
— v. Ryan.....	13 Minn. 370.....	658
— v. Sater.....	8 Iowa, 420.....	388
— v. Shelledy.....	8 Iowa, 477.....	387
— v. Slack.....	1 Bailey, 330.....	703
— v. Smith.....	2 Ired. 402.....	445, 474
— v. Snyder.....	20 Kans. 306.....	589, 602
— v. Stallmaker.....	2 Brevard, 1.....	477
— v. Symonds.....	36 Me. 128.....	509
— v. Thompson.....	9 Iowa, 188.....	333, 397
— v. Tilghman.....	11 Ired. 513.....	582, 607
— v. Tinnall.....	10 Rich. Law (S. C.), 212.	663
— v. Town.....	Wright, 75.....	419
— v. Upton.....	20 Mo. 397.....	674
— v. Ward.....	14 La. Ann. 673.....	363, 694
— v. —.....	39 Vt. 226.....	419
— v. Webster.....	13 N. H. 491.....	334
— v. Willard.....	79 S. C. 660.....	63
— v. Williams.....	3 Stew. 454.....	488
— v. Wilson.....	8 Clarke, 407.....	434
— v. Wise.....	7 Richard, 412.....	474
— v. Wright.....	53 Me. 328.....	509
States v. State.....	28 Ala. 25.....	419, 423
Staup v. Com.....	74 Pa. St. 458 ...	318, 362, 372
Stephens v. Santee.....	49 N. Y. 35-38.....	347
Stevens v. People.....	19 N. Y. 549.....	658, 659
Stewart v. People.....	23 Mich. 63.....	390, 623
— v. State.....	8 Eng. (Ark.), 720.....	304
— v. —.....	50 Miss. 587.....	451
— v. —.....	1 Ohio, 66.....	404
Stone v. State.....	4 Humph. 27....	634, 640, 671
Stout v. People.....	4 Park. Cr. 71.....	354, 366
Streeter v. Hearsey.....	11 Johns. 168.....	447
Stryker v. Turnbull.....	Col. & Caines, 457.....	884
Sweatman, Matter of.....	1 Cow. 144, 151, e.....	851
Taber v. Hutson.....	5 Ind. 322.....	556

		SECTION
Talmadge v. Northrup.....	1 Root, 522.....	595, 661
Tatum v. Preston.....	53 Miss. 654.....	451
Taylor v. Western P. R. R. Co.....	45 Cal. 32.....	451
Terry v. Fellows.....	21 La. Ann. 375.....	556
Thomas v. Chapman.....	45 Barb. 98.....	622, 624
— v. Com.....	2 Rob. 795.....	758
— v. Crosswell.....	4 Johns. 491.....	884
— v. People.....	67 N. Y. 218.....	271, 817, 322, 324
Thompson v. Mallet.....	2 Bay, 94.....	661
— v. People.....	24 Ill. 60.....	381
— v. —.....	3 Park. Cr. 467.....	305
— v. State.....	24 Ga. 297.....	694
Thompson's Case.....	8 Gratt. 638.....	586, 672, 684
Thorn's Case.....	4 C. H. Rec. 81.....	299, 312
Toledo P. & W. R. R. Co. v. Darst.....	12 Am. Railway Rep. 448; 61 Ill. 231.....	930
Tomer v. Dinsmore.....	8 Neb. (Brown), 384.....	699
Tooll v. Com.....	11 Leigh, 714.....	437, 634
Tower v. Hewitt.....	11 Johns. 134.....	839
Townsend v. Philips.....	10 Johns. 98.....	898
Treat v. Barber.....	7 Conn. 275.....	556
Trim v. Com.....	18 Gratt. 983.....	601
Trubody v. Brain.....	9 Price, 76.....	618
Turner v. State.....	57 Ga. 107.....	758
Tyler v. Gardiner.....	35 N. Y. 596.....	894
United States v. Blodgett.....	35 Ga. 336.....	403
— v. Boyden.....	1 Lowell's Dec. 268.....	666
— v. Callender.....	Callender's Trial (pamph.), 19-21.....	409
— v. Coolidge.....	2 Gallison, 364.....	665, 812
— v. Devlin.....	6 Blatch. 71.....	256, 471
— v. Dumplin Island.....	1 Barb. 24.....	941, 945
— v. Fries.....	1 Whart. St. Tr. 606.....	690, 691
— v. Gilbert <i>et al.</i>	2 Sumner, 21.....	671
— v. Hanway.....	U. S. Cirt. Ct. Phila. 1862.....	466
— v. Hare.....	(pamph.).....	409
— v. Johns.....	1 U. C. C. 363.....	256
— v. Marchant.....	4 Mason, 160; 12 Wheat, 480.....	445, 474
— v. McHenry.....	6 Blatch. 503.....	337
— v. Morris.....	1 Curtis C. C. 23.....	437, 468
— v. Perez.....	9 Wheat. 579.....	812
— v. Reid.....	12 How. 361.....	624
— v. Reynolds.....	1 Utah T. 226-319.....	424
— v. Shackleford.....	18 How. 588.....	255, 490
— v. Talman.....	10 Blatchf. 21.....	776
— v. Watson.....	8 Int. Rev. Rec. 170.....	812
— v. White.....	5 Cranch C. C. 457.....	498
— v. Williams.....	1 Dill. 485.....	505
— v. Wilson.....	1 Baldwin, 78-81.....	420, 477
— Trust Co. v. Harris.....	2 Bosw. 75.....	575
Valton v. N. L. F. Life Ins. Co.....	17 Abb. Pr. 268.....	61, 450
Van Cleef v. Fleet.....	15 Johns. 147.....	898

TABLE OF CASES CITED.

351

		SECTION
Vancock <i>v.</i> State.....	12 Tex. 469.....	509
Vanderhuyden <i>v.</i> Reid.....	1 Hopk. 408.....	890
Vanderslice <i>v.</i> Newton.....	4 N. Y. 130.....	556
Vanderwerker <i>v.</i> People.....	5 Wend. 530.....	855
Van Wyck <i>v.</i> Alley.....	1 Hopk. 552.....	890
Vermilyea, <i>Ex parte</i>	6 Cow. 555.....	349
— <i>v.</i> Pulmer.....	52 N. Y. 471.....	857, 858
Vicary <i>v.</i> Farthing.....	Cro. Eliz. 411.....	663
Voorhees <i>v.</i> Martin.....	12 Barb. 508.....	949
Vulte <i>v.</i> Martin.....	44 How. Pr. 24.....	915
Wade <i>v.</i> State.....	12 Ga. 25.....	690, 701
Wager, matter of.....	6 Paige, 11.....	909
Wakeman <i>v.</i> Sprague.....	7 Cow. 720.....	276
Walker <i>v.</i> Borland.....	21 Mo. 289.....	556
Walrath <i>v.</i> State.....	8 Neb. (Brown), 81.....	659
Walsh <i>v.</i> Sun Mut. Ins. Co.....	2 Rob. 646; 17 Abb. Pr. 356.....	884
Walter <i>v.</i> People.....	32 N. Y. (5 Tiff.) 147.....	418
	454, 460, 462.....	
Ward <i>v.</i> State.....	1 Humph. 253.....	438
Warner <i>v.</i> N. Y. C. R. R. Co.....	52 N. Y. 437.....	562, 576
— <i>v.</i> Robinson.....	1 Root, 194.....	680
Watkins <i>v.</i> Weaver.....	10 Johns. 107.....	827
— <i>v.</i> Wilcox.....	6 N. Y. S. C. (T. & C.) 544.....	732
Waw-Kon-chaw-nee-Kaw <i>v.</i> U. S.....	1 Morris, 332.....	387
Weis <i>v.</i> State.....	22 Ohio St. 486.....	677
Wells <i>v.</i> Cox.....	1 Daly, 515.....	563
Westley <i>v.</i> State.....	11 Humph. 502.....	658
Weston <i>v.</i> People.....	6 Hun, 140.....	293
Wheelock <i>v.</i> Lee.....	7 N. Y. Week. Dig. 323; 5 Abb. New Cas. 72.....	860
		861
Whipple <i>v.</i> Walpole.....	10 N. H. 130.....	556
Whitney <i>v.</i> State.....	8 Mo. 165.....	634
— <i>v.</i> Whitman.....	3 Mass. 405.....	661
Whittlesey <i>v.</i> Delancy.....	73 N. Y. 571.....	859
Wiggin <i>v.</i> Plumer.....	11 Foster (N. H.), 251.....	361
Wilcox <i>v.</i> Hoch.....	62 Barb. 509.....	571
Wiley <i>v.</i> State.....	1 Swan (Tenn.), 256.....	640
Williams <i>v.</i> Montgomery.....	60 N. Y. 648.....	623
— <i>v.</i> Smith.....	6 Cow. 166.....	413
— <i>v.</i> State.....	3 Kelley, 453.....	836, 419, 433, 435
— <i>v.</i> —.....	32 Miss. 389.....	419, 421
Willis <i>v.</i> People.....	32 N. Y. 715.....	615
Wilson <i>v.</i> Abrahams.....	1 Hill, 207.....	670
— <i>v.</i> Barnum.....	1 Wall. Jr. 347.....	812
Winslow <i>v.</i> Morrill.....	68 Me. 362.....	584
Winsor <i>v.</i> Queen.....	118 Eng. Com. L. 170.....	26
Wise <i>v.</i> State.....	7 Rich. 412.....	629
Wolf <i>v.</i> Goodhue Fire Ins. Co.....	43 Barb. 400.....	572
Wood <i>v.</i> Stoddard.....	2 Johns. 194.....	415
Woods <i>v.</i> Rowan.....	5 Johns. 133.....	272
— <i>v.</i> State.....	43 Miss. 364.....	658
Wormley <i>v.</i> Com.....	10 Gratt. 658.....	865, 477, 478

		SECTION
Wright v. Columbia Ins. Co.....	2 Johns. 211.....	884
— v. Ill. Tel. Co.....	20 Iowa, 19.....	624
— v. State.....	18 Ga. 383.....	386, 397, 695
Wyatt v. Noble.....	8 Blackf. 507.....	467
— v. State.....	1 Blackf. 257.....	647, 656
Yates v. People.....	38 Ill. 527.....	661
Young v. Hubbell.....	8 Johns. 430.....	846

INDEX.

[*The references are to the sections.*]

- Abatement.** See GRAND JURORS; PLEA IN ABATEMENT.
Accusation, jury of, in France, when established and abolished, 35
See FRANCE.
Admiralty, trial by jury in cases of, 815-817
number of jurors in cases of, 817
See U. S. COURTS.
Ad Quod Damnum proceedings, jurors in, 941-946
inquisition in, 945
See FORMS; SPECIAL PROCEEDING.
Affidavits concerning deliberations of jury, 624
imputing improper motives to jury, 610 612, 622-624
of juror to establish verdict, 566
when will not be received, 610-612, 622-624
be received, 624
that he deemed accused innocent, 687, 688
See NEW TRIAL; VERDICT
Agreement, jurors to be discharged when unable to come to, 567
See VERDICT.
Albany, each ward of, is a town, 93
See DRAWING JURORS; SELECTING JURORS; TRIAL JURORS.
Alien not entitled to jury of part aliens, 208, 227
challenge on ground that juror is an, 436, 448
See CHALLENGES.
American Colonies, trial by jury introduced in, 49
See TRIAL BY JURY.
Answer to challenge to array need not be verified, 275
Appeal, what decisions cannot be reviewed on, 271, *n.*
from decision on challenge, 271, 290, 322, 405
in U. S. courts, 813
Appendix. See FORMS.
Archbishop of Turin, trial of, 41
Arkansas, U. S. jurors in Westn. Dist. in, 793
grand jurors in Westn. Dist. in, 798
Array, what is a challenge to the, 247
challenge to, how made, 257
what are principal challenges to, 258
quashed, in what cases, 259
effect of sustaining principal challenge to, 260, 266

- Array**, irregularity in drawing, not challenge to, 261
 challenge to, for favor, what based upon, 262
 how tried, 263, 264, 271, 800
 duty of triers on challenge to, 264
 demurrer to challenge to, 264, 265
 challenge to, when too late, 267, 274, 289
 what not cause of challenge to, 268, 269
 omission to notify juror, ground of challenge to, 269
 answer to challenge to, need not be verified, 275
 what not ground for principal challenge to, 276-280
 not drawing jurors fourteen days before court, ground of
 challenge to, 281
 jurors drawn by *de facto* officer not ground of challenge to,
 282
 what cannot be tried on challenge to, 284
 partiality in clerk, ground of challenge to, 285
 exclusion of certain persons not ground of challenge to, 286
 what held in Pennsylvania no ground of challenge to, 287
 person challenging, must be prepared to prove cause, 288
 who entitled to challenge, 458, 459
 of grand jurors, challenge to, 494, 495
 what is ground of challenge to, in justices' courts, 827
 not ground of challenge to in justices' courts, 829
 See CHALLENGE; JUSTICES' COURTS; TRIERS; U. S. COURTS;
 FORMS.
- Arrest** of trial juror in Kings County for non-attendance, 179, 205,
 224
 N. Y. County for non-attendance, 142, 143,
 205
 See BRIBE; TRIAL JUROR.
- Assize** in reign of Henry II., jury first found in its distinct form, 7
- Attachment** against juror refusing to serve in justice's court, 849
 sheriff's jury to try title to property taken on, 900
- Attendance** of trial juror, how compelled, 115-120
 in Kings County, 178-
 188
 in N. Y. County, 141-
 157
- Austrian Empire**, trial by jury abolished in, 47
- Baden**, trial by jury in, 46
- Ballots** must be destroyed when jurors discharged, 65, subd. 2
 how disposed of when jurors excused, 66, subd. 3
 prepared, 90, 129, 165
 for grand jurors, how prepared, 733, 748
 when to be destroyed, 743, 744
 in justices' courts, how prepared, 830
 drawn, 831
 See DRAWING JURORS.
- Bankruptcy** proceedings, trial by jury in, 819
- Bavaria**, trial by jury in, 46
- Belgium**, trial by jury in, 37
- Bias** for or against the prisoner, 410
 against crime generally, 435
 See CHALLENGE; OPINION.
- Bill of Rights**, declaration of, 25

- Bill of Rights**, qualification of jurors under, 25
- Bribe** to juror to give verdict, 233
 punishment of juror for accepting, 233
 to officer to evade jury duty, 154, 156
 punishment of officer for accepting, 155, 156, 184, 185
- Brougham, Lord**, on trial by jury, 26
- Buffalo**, selecting, drawing, and procuring attendance of jurors in, 189-193
- By-standers.** See **TALESMEN**.
- Capital offense**, when prisoner on trial for, could not have counsel, &c., 23
 peremptory challenges on trial for, 451-455, 457-459, 480, 802
 See **PEREMPTORY CHALLENGES**.
- Carnegy of Finhaven**, verdict before and after trial of, 28
- Casting lots** by jurors, 679-681, 684
- Cause**, what is challenge for, 248
 See **CHALLENGE**.
- Causes of challenge**, what are, 253
 See **CHALLENGE**; **FAVOR**; **PEREMPTORY CHALLENGES**; **PRINCIPAL CAUSE**.
- Challenge** that juror was not of vicinage, 6
 definition of, 246
 in civil cases, who first to, 246 *n.*
 criminal cases, who first to, 246 *n.*
 classes of, 247-252
 for cause, what is, 248
 objection may be treated as, 251 *n.*
 what are causes of, 253
 practice as to, 254
 when pecuniary interest not cause of, 270
 exception to, how reviewed, 271, 290, 322
 objection to qualification must be taken by, 271, 290, 447, 449, 450
 when person must avail himself of right to, 289 *n.*
 when in discretion of court, 309 *n.*
 the shaping of questions on, in discretion of court, 341
 that juror was grand juror, 375, 376
 said he would not convict prisoner, 382, 428
 is citizen and taxpayer, 413
 stockholder in similar company, 413 *n.*
 for pecuniary interest in result, 412-415
 being an infidel, 416
 having been convicted of infamous crime, 417
 on trial for polygamy, 424
 that juror thought offense charged no crime, 427
 statute unconstitutional, 430
 for being a Freemason, 431
 belonging to association formed to enforce law, 432-434
 alienage, 436, 448
 partiality, when to be made, 438-441
 when cannot be withdrawn, 443
 is a right to *reject* not to *select*, 445, 474

- Challenge** by one side after juror found indifferent by other, 446, 478
 on ground of lack of property qualifications, 447, 449, 450
 in civil cases in England, 461 *n.*
 to array, what is, 247
 how made, 257
 who entitled to, 458, 459
 when too late, 267, 274, 289
 demurrer to, 264, 265
 answer to, need not be verified, 275
 trial of, 263, 264, 271, 800
 duty of triers on, 264
 irregularity in drawing, no ground of, 261
 what not good cause of, 268, 269
 omission to notify juror, cause of, 269
 not drawing jurors 14 days before court,
 ground of, 281
 jurors drawn by *de facto* officer, not ground of,
 282
 what cannot be tried on, 284
 lies for partiality in clerk, 285
 because certain persons have been excluded,
 286
 what, in Pennsylvania was held no cause of,
 287
 person making, must be prepared to prove
 cause of, 288
 for favor, what based upon, 262
 of grand jurors, 494, 495
 in justices' courts, what is ground of, 827
 not ground of, 828
 to favor, what is, 249, 328
 must specify, 291, 292
 of person challenging not available, 291, *n.*
 grounds of, 310-316
 when not sustained, 317, 318
 evidence on, 316, 319-322
 in action for libel on opera manager, 310
 not affected by statute on principal challenge,
 324
 after principal challenge overruled, 325, 327
 grand jurors, 494-510
 when to be made, 754, 755
 on account of exclusion of some, 496
 for belonging to association, 497
 having formed opinion, 498
 being hostile to party, 498
 in justices' courts, 447-450, 827, 828, 832, 833
 to officer who notified juror, what not cause of, 270
 peremptory, what is a, 252
 number of, &c., 451-493
 in U. S. courts, 798-803
 to poll, what is a, 250, 254
 for principal cause, what is, 251, 328
 grounds of, 328-350
 to talesmen, when valid, 283

- Challenge**, trial of, 293-298, 306, 322
 in U. S. courts, 801
 in U. S. courts, 255, 256, 800-805
 waiver of, 442-444, 465-467, 489
 what is not waiver of, 442
 See **ARRAY**; **CORONER'S JURY**; **DE LUNATICO INQUIREN-**
 DO PROCEEDINGS; **FAVOR**; **GRAND JURY**; **OPINION**;
 PEREMPTORY CHALLENGE; **PLEA IN ABATEMENT**;
 PRINCIPAL CAUSE; **TALESMEN**; **TRIAL OF CHAL-**
 LENCE; **TRIEES**; **UNITED STATES COURTS**
- Chancery**, practice in court of, on questions of fact, 23
- Charge** to grand jurors, 767-774
 trial jurors, 553-557
- City Court** of Brooklyn, how special jury obtained in, 176
- Civil Cases** in England, trial of, 21
 who challenges first in, 246, *n.*
 where no peremptory challenges in, 461, *n.*
- Civil Courts**, separation from ecclesiastical, 16
- Clerk of Court**, duty of, on discharge of juror, 65, subd. 2
 punishment of, failing to make return in N. Y.
 county, 78
 duty of, 78
 in Kings county, duty of, 84
 duty of, on rendition of verdict, 576
 receiving list of grand jurors, 733
 obtaining struck jury, 880
 foreign jury, 885, 886
 of grand jury, how selected, 710, 757
 duty of, 710, 711, 757
 trial jury, duty of, 533
- Cockburn**, Chief Justice, on trial by jury, 26
- Code Napoleon** in France, when introduced, 35
- Commissioner** of jurors in N. Y. county, duty and powers of, 73,
 78, 122-133, 137, 143-146,
 148-151
 Kings county, duty and powers of, 158-
 172, 175, 176, 180-188
 See **BALLOT**; **DRAWING JURORS**; **SELECTING JURORS**;
 TRIAL JURORS
- Communication** to jury in justices' court, 841-844
 from sheriff, ground for new trial, 589, *n.*,
 592
 See **CHALLENGE**; **JUSTICES' COURT**; **NEW TRIAL**;
 SHERIFF'S JURY; **VERDICT**
- Compromise verdict**, 547, 548, 682-685, 687, 688
 See **NEW TRIAL**; **VERDICT**
- Compurgators**, who were, 13
- Confederation**, articles of, did not speak of jury trial, 50
 See **TRIAL BY JURY**
- Conscientious** scruples on capital punishment, 417-425, 460
 nuisances, 426
 penitentiary punishment, 423
 polygamy, 424
 See **CHALLENGES**; **NEW TRIAL**
- Conspiracy** against juror, punishment for, 806-809
 See U. S. COURTS

- Constable, duty of, in** creditors' proceedings, 958
 cases of forcible entry and detainer, 913-915
 habitual drunkard proceedings, 963
 laying out highways through uninclosed lands, 926, 928
 encroachment proceedings, 947
 insolvent debtor's proceedings, 953
 justices' court, 821-840
 on summoning jurors, 826
 when disqualified to act in justices' court, 822, 825
 to have charge of jury in justices' court, 838-840
 duty of, in plank road and turnpike cases, 934
 proceedings to lay out roads and highways, 922
 courts of special sessions, 852-855
 jury of, to try title to property, 897-901
 how and when to be summoned, 899
 number of, 899
 See JUSTICE'S COURT; SHERIFF'S JURY; SPECIAL PROCEEDINGS; TRIAL BY JURY
- Constitutional** provision as to indictment by grand jury, 53
 right, trial by jury is a, 52
- Contempt, when** clerk of court in N. Y. county guilty of, 78
 See CLERK OF COURT.
- Coroner, duty and power of, on** origin of fires, 965-968
 origin, power, &c., of, 19
 when justice of the peace to act as, 866
 See CORONER'S INQUEST; CORONER'S JURY.
- Coroner's inquest, earliest** statute as to taking, 19
 none in Scotland, 30
 jury, 865-877
 number of, 865, 867
 how summoned, 865, 867, 868
 qualifications of, 865, 867, 868
 in N. Y. county, 867
 punishment for refusing to serve on, 867
 no challenges to, 868
 oath to, 869
 deceased to be viewed by, 870
 where testimony to be taken by, 870
 who to swear and examine witnesses before, 871
 can ask questions of witnesses, 872
 must hear all the evidence, 872, 873
 have none present while deliberating, 874
 reduce verdict to writing, 875
 what inquisition of, to contain, 875
 may find several inquisitions, 876
 no compensation to, 877
 See FORMS
- Corrupting** jurors, 232-235, 520
 in U. S. courts, 806-809
 See BRIBE; EMBRACERY; MISCONDUCT OF JURORS;
 UNITED STATES COURTS
- Counties, custom of** Anglo-Saxons as to, 8

- County** interested, who competent jurors, *when*, 85
court, trial jurors, how drawn for, 193
 of Kings county, jury in special proceedings in, 176
- Courts**, separation of civil from ecclesiastical, 16
 of districts, how originally formed, 13
 equity may direct questions to be tried by jury, 21
 See NAMES OF COURTS UNDER EACH TITLE.
- Creditors' Proceedings**, against imprisoned debtors, 958-960
 jury in, how summoned, 958
 punishment for failing to attend in, 958
 number of jurors in, 958
 oath of jurors in, 958
 verdict of jurors in, 958
 See FEES; FORMS.
- Criminal Offenses**, act passed allowing counsel to accused in, 23
 who challenges first in trials of, 246, *n.*
 See CHALLENGES.
- Damages**, when jury to assess, 569
 not to assess, 569 *n.*
 jury only to find single, 570
 how severed, when several defendants, 573, *n.*
 when interest allowed as, 573, *n.*
 assessment of, on default, 812, *n.* 969-972
 for private property taken for public use, 53
 highways through uninclosed lands, 924-929
 right of way for railroads, 930
 See DEFAULTS; SPECIAL PROCEEDINGS; VERDICTS.
- Decision** of judge substituted for verdict in civil action in Scotland, 33
 See FACT.
- Declaration** of rights as to trial by jury, 49
- Defaults**, jury of inquiry on, 969-972
 when jury to assess damages on, 970
 further application on, 971
 new writ of inquiry on, 972
 assessment of damages on in U. S. courts, 812, *n.*
 See FORMS.
- De Lunatic Inquirendo Proceedings**, jurors in, 909-912
 number of jurors in, 909
 summoning jurors in, 909
 duty of sheriff in, 909
 qualifications of jurors in, 909
 jury to examine lunatic in, 909
 sign inquisition in, 910
 See FORMS; INQUISITION; SPECIAL PROCEEDINGS.
- Demurrer** to challenge to array, 264, 265
 See CHALLENGE.
- Discharge of Jury**, when unable to agree, 567
 trial to be continued until, 207
 in U. S. courts without verdict, 812, *n.*
 See U. S. COURTS; VERDICT.

- District Attorney.**—See PROSECUTING OFFICER.
District of Columbia, drawing jurors in, 791
 discharging U. S. grand jurors in, 791
District Courts of N. Y. Co., how jurors selected for, 143
Drawing Grand Jurors, 737, 738, 746-749
Drawing Trial Jurors, mode of, 94-113
 compensation to judges for, 177
 for trials of indictments, 222-227
 in justices' courts, 831
 Kings county, 165-176
 N. Y. county, 131-140
 courts of special sessions, 853
 and grand jurors in U. S. courts, 779, 780,
 785, 791, 796
 See GRAND JURORS; INDICTMENTS; JUSTICES' COURTS; SPECIAL PROCEEDINGS;
 TRIAL JURORS; U. S. COURTS.
Duties of Grand Jurors, 706-726
Duties of Trial Jurors, 511-557
 See GRAND JURORS; TRIAL JURORS.
Ealdor-man, who was, 12
Ecclesiastical Courts, separation of, from civil, 16
Embracery, how punished, 214
 See CORRUPTING JURORS
Empaneling Jury, 194-207, 230
 irregularity in, 197, *n.*
 new trial for irregularity in, 702-705
 in U. S. courts, 776
 See CHALLENGE; NEW TRIAL; U. S. COURTS;
 VERDICT.
Encroachments on Highways, jury in proceedings on, 947-950
 See FORMS; HIGHWAY ENCROACHMENT PROCEEDINGS; SPECIAL PROCEEDINGS.
England, trial of civil causes in, 21
Equity Actions, trial by jury in, 857-864
 joined with legal, jury in, 860
 See SPECIAL PROCEEDINGS; WAIVING JURY.
Equity, courts of, may direct questions to be tried by jury, 21
Erskine, Lord, on trial by jury, 26
Evidence of right to exemption, 64
 rules of, to guide jury, 549
Examination of juror as to qualification, 394, 399, 400, 401, 403,
 406
 See CHALLENGE; QUALIFICATION; QUESTIONS.
Excusing grand juror, 708, 741
 struck juror, 882
 trial juror, 74, 75, 83, 404, 514-516
Exemption from service, who may claim, 63
 in Kings county, who may claim, 80
 N. Y. county, who may claim, 70
 U. S. Courts, 776, 800, 805
 what is evidence of right to, 64
 in Kings county, 81

Exemption, what is evidence of right to in N. Y. county, 71

See CHALLENGE; U. S. COURTS.

Extra compensation in protracted cases, 238

Fact, questions of, to be tried by jury, 21

may be tried by judge, 21, 33

how tried by courts of equity, 21, 857-864

practice in court of chancery relative to questions, 22

tried by jury not to be otherwise re-examined, 55

See EQUITY; SPECIAL PROCEEDINGS; TRIAL BY JURY.

False certificate, penalty for giving, in Kings county, 187

N. Y. county, 152

Information, penalty for giving, in Kings county, 186

N. Y. county, 153, 154

Favor, what is challenge to, 249, 328

challenge to must specify, 291, 292

challenge to person's own, not available, 291, *n.*

grounds of challenge to, 310-316

challenge to, in action for libel on opera manager, 310

evidence on, 316, 319-322

when not sustained, 317

sustained, 318

not affected by statute on principal challenge,
324

after principal challenge overruled, 325, 327

array for, what based on, 262

See CHALLENGE; FORMS.

Federal Courts, jurors in, 775-819

See U. S. COURTS.

Fees of coroner's jury, no provision for, 877

grand jurors, 236, 244, 245

in U. S. Courts, 798, 799

jurors in creditors' proceedings, 960

laying out highways, 929

insolvent debtors' proceedings, 960

justices' courts, 849

plank road and turnpike cases, 936

protracted cases, 238

proceedings to lay out roads and highways, 922

special proceedings, 240

on writ of inquiry, 240

trial jurors, 236-246

See CORONER'S JURY; SPECIAL PROCEEDINGS; SPECIAL
SESSIONS.

Felony, peremptory challenge on trial for, 451-454, 456-459, 464,
480, 802

person indicted for, must be present on trial, 229

See INDICTMENT; PEREMPTORY CHALLENGE.

Feud, when person liable to vengeance of, 10

Feudal Nations, who tried in courts in, 3

Fine of grand jurors, 740

when suspended, 740

officer of national guard, 72

sheriff for neglect of duty, 216-219

trial juror for non-attendance, 115

- Fine of trial jurors in justice's court**, 849
 Kings county, 179, 205, 213, 226
 N. Y. county, 141-143, 205, 213, 226
 roads and highway proceedings, 922
 See **GRAND JURORS**; **SHERIFF**; **SPECIAL PROCEEDINGS**.
- Fires**, jury to investigate origin of, 965-968
 how summoned, 965, 966
 inquisition of, 967
 what cities have no, 968
 See **FORMS**; **SPECIAL PROCEEDINGS**.
- Forcible Entry and Detainer**, jury in cases of, 913-915
 number of jurors in, 913
 jurors, how summoned in, 914
 oath of jurors in, 914
 if jury cannot agree in, 915
 See **FORMS**; **SPECIAL PROCEEDINGS**.
- Foreign Jury**, how obtained, 885, 886
 duty of clerk on obtaining, 885
 sheriff on obtaining, 886
- Foreman of Grand Jury**, duty of, 708-710
 how selected, 709, 753
 sworn, 709
 to administer oaths, 712, 756
 may examine witnesses, 717
 presents indictments to court, 725, 764
 indorses bill, 725
 in U. S. courts, 788
 See **FORMS**; **GRAND JURORS**; **U. S. COURTS**.
- Foreman of Trial Jury**, duty of, 533
- Formation of Jury** for trials of issues, 193-207
- Forms**.—See **INDEX TO FORMS**, *Ante*.
- France**, jury of accusation, when established and abolished, 85
 Code Napoleon, when introduced in, 35
 grand jury abolished in, 35
 trial by jury in, 35, 36
 verdict, how arrived at, in, 36
- General Verdict**, what is, 562, 572
 effect of, 572
 when good, 572, *n.*
 may be rendered, 573
 jury should not find, 573, *n.*
 inconsistent with special, 575
 See **SPECIAL VERDICT**; **VERDICT**.
- Geneva**, trial by jury in, 39
 verdict of jury in, 39
- Gild**, custom of Anglo-Saxons as to, 8
 consisted of ten families, 8
 community, Toethings-caldor, head of, 8
 duty and authority of men of, 9
 members of, entitled to compensation, 10
 bound by pledge, 10
- Grand Inquest**, how instituted, 17
 duty of members of, 17
 See **GRAND JURORS**; **GRAND JURY**.

- Grand Jurors** cannot be petit jurors on trial of indictment, 228
 fees of, 236, 244, 245
 challenges to, 494-510
 duties of, 706-728
 excusing of, 708, 741
 how and when sworn, 709
 oath of, 709, 719-724
 sixteen form quorum, 713
 twelve must concur in finding, 714, 758, 768
 authorized to examine evidence, 715
 when should find indictment, 716
 not find indictment, 716
 duty of prosecuting officer to, 717, 759
 who may be present with, 718, 760
 when none must be present with, 718, 760
 may be compelled to testify, 721, 758
 secrecy of, on finding indictment, 721, 765
 punishment of, for disclosing finding, 722, 765
 duties of, while deliberating on finding, 724
 statutes, relating to, 727-774
 list of, how prepared, 728, 729
 number of, to be placed on list, 728, 729
 how selected, 730, 731
 qualifications of, 730
 ballots for, how prepared, 733, 748
 number of, how increased, 734-736
 drawing of, how conducted, 737, 738, 746-749
 number of, to be drawn, 737, 747, 750
 how summoned, 739, 746, 750, 761, 762
 when fined, 740
 amount of fine of, 740
 when fine of, may be suspended, 740
 court may discharge, 741
 having served, for how long exempt, 743
 ballots of, when to be destroyed, 743, 744
 drawn as petit jurors, effect of, 745
 number of, to be sworn, 753
 objection to, when to be made, 754, 755
 minutes of, by whom kept, 757
 what they cannot be compelled to disclose, 758
 affidavits of, when received, 758, *n.*
 charges to, 767-774
 penalty for intimidating, 806-809
 See CHALLENGE; EXCUSING GRAND JURORS; FINE;
 FOREMAN; FORMS; GRAND JURY; INDICTMENT;
 OATH; PLEA IN ABATEMENT.
- Grand Jurors in U. S. Courts**, 777-782, 787-797, 805
 penalty for corrupting, 806-809
 sending papers, &c., to, 806-809
 See U. S. COURTS.
- Grand Jury**, constitutional provision as to indictment by, 53
 in France abolished, 35
 origin of, 17, 18
 in Scotland, none in ordinary cases, 30
 clerk of, how selected, 710, 757
 duty of clerk of, 710, 711, 757

- Grand Jury**, duty of foreman of, 708-710, 725
no one tried unless by indictment by, 727
- Greece**, trial by jury in kingdom of, 37
- Habitual Drunkard proceedings**, jury in, 961-964
by whom jury demanded in, 961
how jury summoned in, 962, 963
number of jurors in, 963
verdict of jury, how rendered in, 964
See FORMS; SPECIAL PROCEEDINGS.
- Hesse**, trial by jury in, 46
- Highway Encroachment Proceedings**, jury in, 947-950
number of jurors in, 947-950
how jury summoned in, 947
oath of jury in, 948
finding of jury in, 949, 950
See FORMS; SPECIAL PROCEEDINGS.
- Highways through Uninclosed Lands**, jury to assess damages for laying out, 924-929
jury, how demanded, 924
drawn, 925, 927
qualifications of jurors, 925
number of jurors, 925
jury, how summoned, 926, 928
oath of jury, 927
See FORMS; SPECIAL PROCEEDINGS.
- Homestead Exemption Law**, jury to appraise property under, 907, 908
number of jurors, 908
- Hundreds**, custom of Anglo-Saxons as to, 8
consisted of ten gilds, 11
- Hundreds Court**, jurisdiction of, 11
-ealder, who was, 11
- Impanelling Jury**—See EMPANELING JURY.
- Impeaching** verdict by affidavits of jurors, 610-612, 622-624
See AFFIDAVITS; NEW TRIAL; VERDICT.
- Indictment**, by grand jury, constitutional provision as to, 53, 727
what is, 710, *n.*
number of grand jurors to find, 714
when grand jurors may find, 716, 719
should not find, 716
who prepared by, 717
none to be present while grand jury finding, 718
to be found on legal evidence, 720
finding of, to be kept secret, 721, 765
punishment for disclosing finding of, 722, 765
presented to court by foreman, 725, 764
how indorsed when found, 725
not found, 725

- Indictment**, effect of, if not indorsed, 725, *n.*
 when not to be opened or inspected, 764
 trial of, 220-232
 where to take place, 221
 See FINE; FOREMAN; GRAND JURORS; GRAND JURY;
 PROSECUTING OFFICER; TRIAL BY JURY.
- Inquest**, when justice may hold coroner's, 866
 See CORONER'S INQUEST; CORONER'S JURY.
- Inquiry**, jury of, into insanity of civil or criminal prisoner, 902, 903, 906
 convict after sentence of death, 904-906
 pregnancy of female convict, 905, 906
 writ of, on defaults, 970-972
 See FORMS; SPECIAL PROCEEDINGS.
- Inquisition** in Ad Quod Damnum proceeding, 945
 of coroner's jury, what to contain, 875
 must be in writing, 875
 coroner's jury may find more than one, 876
 of insanity of civil or criminal prisoner, 904-906
 convict after sentence of death, 904-906
 in De Lunatico Inquirendo proceedings, 910-912
 of origin of fires, 967
 pregnancy of female convict, 905, 906
 See CORONER'S JURY; FORMS; SPECIAL PROCEEDINGS.
- Insanity of** civil or criminal prisoner, jury to inquire into, 902, 903, 906
 convict after sentence of death, 904, 906
 See FORMS; SPECIAL PROCEEDINGS.
- Insolvent Debtor's proceedings**, jury in, 951-957
 how jury demanded in, 951
 summoned, 953
 number of jurors, 953, 954
 oath of jurors, 954
 verdict of jury, 955, 956
 no second hearing before jury in, 957
 penalty for juror not attending, 959
 fees of jurors in, 960
 See FEES; FORMS; SPECIAL PROCEEDINGS.
- Intimidating Juror**, penalty for, 806-809
- Intoxication of Juror** in justice's court, 832
 ground for new trial, 645, 669-678
 See JUSTICE'S COURT; MISCONDUCT; NEW TRIAL; VERDICT.
- Ireland**, trial by jury in, 34
- Issues** to be settled for trial by jury, when and how, 864
 See EQUITY ACTIONS; SPECIAL PROCEEDINGS.
- Judge**, when questions of fact may be decided by, 21, 33
 substituted as trier need not be sworn, 300
 See FACT.
- Jurors**.—See AFFIDAVITS; ARREST; ATTACHMENT; ATTENDANCE;
 BRIBE; CASTING LOTS; CHALLENGE; CORRUPTING;

COUNTY; DISCHARGING; DRAWING; DUTIES; EXAMINATION; EXCUSING; EXEMPTION; FEES; FINE; FORMS; GRAND JURORS; INDICTMENT; INTIMIDATING; JURY; MISCONDUCT; NEW TRIAL; NUMBER; OATH; QUALIFICATION; SPECIAL PROCEEDINGS; TOWN; TRIAL JUROR; U. S. COURTS; VERDICT; WITHDRAWING; WITNESSES

Jury of accusation in France, when established and abolished, 35
De Medietate Linguae, what is, 208, *n.*
under Homestead Exemption Law, 907, 908
of inquiry into insanity of civil or criminal prisoner, 902, 903, 906
convict after sentence of death, 904-906

pregnancy of female convict, 905, 906

See CORONER'S JURY; GRAND JURY; JURORS; TRIAL BY JURY; VERDICT.

Jury Lists, by whom made up, 57

See LISTS.

Jury system, origin, rise and growth of, 1-60
trial.—See TRIAL BY JURY.

year, duration of, 73

service in, 73

exemption for serving in, 73

Justice's Court, trial by jury in, 820-849

when to demand jury in, 820

number of jurors summoned in, 821, 823

who jurors summoned by, in, 821

qualifications of jurors in, 821, 826

when constable disqualified to act in, 822, 825

actions between towns in, 824

challenges in, 447-450, 827, 828

when objection to jury to be made in, 829

ballots, how prepared in, 830

drawn in, 831

juror may be set aside by justice in, 832

intoxication of juror in, 832

talesmen, when summoned in, 834

oath of juror in, 836

constable to have charge of jury in, 838-840

jury in, to be kept together until verdict, 838

communications to jury in, 841-844

jury in, may be sent to reconsider verdict, 845

when case cannot be withdrawn from jury in, 846

verdict to be delivered to justice, 847

punishment of juror refusing to serve in, 849

fees of jurors in, 849

See CONSTABLE; FEES; FORMS; SPECIAL PROCEEDINGS.

Justices in Eyre, duties of, 17

Kentucky, U. S. grand jurors in, 794

trial jurors in, 794

See U. S. COURTS.

Kings County, drawing, &c., trial jurors in, 158-188

evidence of right to exemption in, 81

who entitled to exemption in, 80

Kings County, fine and arrest for non-attendance in, 178, 179, 205, 213, 226

Libel, Campbell's bill, when adopted, 22

Fox's bill, when passed, 22

when jury to acquit accused in prosecutions for, 231

jury may determine law and fact in prosecutions for, 231

Life or Limb, no person to be twice put in jeopardy of, 53

List of Grand Jurors, how prepared, 728, 738, 750

in N. Y. city, 729

what to contain, 732, 738

duty of clerk on receiving, 733

Trial Jurors, by whom made, 57, 87, 126, 880

when made, 87-89, 880

in N. Y. city, 126

Kings county, 161-164

by whom made in N. Y. city, 126

Kings county, 161-164

in court of special sessions, 852

U. S. courts, accused to receive, 810

See GRAND JURORS; SPECIAL SESSIONS;

STRUCK JURY; TRIAL JURORS;

U. S. COURTS

Magna Charta, one of the main objects and date of, 4

Marine Court of N. Y., rule in, when order of arrest granted, 210

Marshal, duty of, in U. S. courts, 777, 782-784, 787, 794

Miller, Judge, on trial by jury, 51, *n.*

Minutes of Grand Jury, by whom kept, 757

See CLERK; GRAND JURORS; GRAND JURY.

Misconduct of Jurors, punishment for, 211-219, 226, 233, 235

Mistake in verdict, correction of, 563, 576, *n.*

See NEW TRIAL; VERDICT.

National Guard, duty of officer of, 72

New Trial, what is a, 577

when and how granted, 577

origin of practice of granting, 578

granting of, in discretion of court, 579

reasons for granting, 579, 582-705

granted in civil and criminal cases, 580

on ground of hearing outside testimony, 582-584, 590-592, 616

what not ground for granting, 585-588, 593, 594, 600, 601, 603-609, 625, 634-637, 641, 645, 647-649, 650-660, 663, 665-667, 670-674, 680-684, 694-696, 698-705.

on ground of presence of party, 589

stranger, 589, *n.*, 602

communication from sheriff, 589, *n.*

one juror stating facts to others, 595, 596

juror speaking with persons, 597, 605, 645

swearing jurors improperly, 598

visiting scene of *res gestæ*, 599, 646

- New Trial, on ground of** outside communication, 609, 619
 misconduct of prevailing party, 613,
 615, 616, 618, 626, 661
 fraud in criminal cases, 614
 handing papers not in evidence, 616, 617
 661, 663
 interference by either party, 626
 separation of jurors, 634-660
 intoxication of jurors, 645, 669-678
 first trial by 11 jurors, 659, 667
 reading judge's minutes, 662
 illness of juror, 665-667
 juror taking notes, 668
 casting lots, 679-681, 684
 levity, 686, 689
 deeming accused innocent, 687, 688
 pre-adjudication, 690-695
 excitement in community, 696, 697
 having been grand juror, 698
 relationship, 701
 irregularity in impaneling, 702-705
 See INTOXICATION; MISCONDUCT; SEPARATION; VERDICT.
- New York, by whom jury lists made in**, 57
 jury for Northern Dis. of, in U. S. courts, 785
 See LISTS; U. S. COURTS.
- New York County, drawing, &c., grand jurors in**, 737, 738
 trial jurors in, 122-157
 evidence of right to exemption in, 71
 who entitled to exemption in, 70
 fine and arrest for non-attendance in, 142, 143,
 205, 213, 226
 jury year in, 73
 who is resident of, under section 68, 69
 sheriff's jurors in, 144
 See SPECIAL PROCEEDINGS.
- North Carolina, U. S. grand jurors in**, 795
 trial jurors in, 795
 See U. S. COURTS.
- Notice to attend**, 76, 82
- Number of jurors in** admiralty cases, 817
 ad quod damnum proceedings, 942-944
 coroner's inquest, 865, 867
 creditors' proceedings, 958
 de lunatico inquirendo proceedings, 909
 forcible entry and detainer, 913
 habitual drunkard proceedings, 962, 963
 highway encroachment proceedings, 947-950
 laying out highways through uninclosed lands,
 925
 inquiry into insanity of prisoner, 904
 insolvent debtor's proceedings, 953, 954
 justice's court, 821, 823
 patent cases, 818
 plank-road and turnpike cases, 933
 inquiry into pregnancy of female convict, 905
 roads and highway proceedings, 922

- Number of jurors in Scotland in ordinary trials, 30**
 sheriff's jury to try title, 897
 special sessions, 852
 summary proceedings, 917-919
 See SPECIAL PROCEEDINGS.
- Oath of coroner's jury, 869**
 See CORONER'S JURY: FORMS.
 of grand jurors, 709, 719-724
 meaning of, 719-724
 See FORMS; GRAND JURORS.
 of trial jurors, 523-525
 in ad quod damnum proceedings, 944
 creditors' proceedings, 958
 forcible entry and detainer, 914
 habitual drunkard proceedings, 963
 highway encroachment proceedings, 948
 through uninclosed lands, 927
 insolvent debtor's proceedings, 954
 justice's court, 836
 plank-road and turnpike cases, 937
 roads and highways proceedings, 922
 summary proceedings, 919
 on voir dire, 402
 See FORMS; SPECIAL PROCEEDINGS; TRIAL JURORS.
 of triers, 300, 301
 witness before triers, 303
 See TRIERS; WITNESS.
- Officer disqualified as trial juror, 62**
 to be excused from serving, 66
 who notified juror, what not challenge to, 220
 See CHALLENGE; CLERK; SHERIFF.
- Opinion of juror on part of facts, 309, n., 395**
 challenge for preconceived, 321, 323, 324, 362, 367
 must be fixed to be ground of challenge, 330, 331, 336,
 358, 386, 388, 392
 that juror killed the person, 332, 333, 397
 formed from testimony on former trial, 334, 335, 345, 348,
 362, 411
 conversing with party, 335
 what disqualifies and what not, 337, 338
 where prior expressions of, disqualify, 339, 340
 on credibility of witness, 342
 constitutionality of statute, 343
 formed from previously convicting prisoner, 344, 348
 rumor and newspapers, 345, 346, 348, 369,
 372
 to disqualify must be formed and expressed, 347, 355, 358,
 376, 378
 expression of, against party, 349
 formed by attending meeting, in action for libel, 350
 that prisoner is guilty, 351, 361, 488
 a crime had been committed, 352, 390
 formed but not expressed, 353, 358
 that is hypothetical, 354, 355, 357, 362, 364, 366, 367
 formed and expressed on incomplete statements, 356

- Opinion** need not be expressed with malice, 357
 fixed and would take evidence to remove, 358
 formed only on rumors, 359, 360, 363, 365, 378, 381, 388, 385, 391
 of prisoner's guilt expressed emphatically, 361, 374, 380, 393
 that prisoner's character is bad, 368, 398
 unfavorable to prisoner, 369
 unexplained change of, 370
 formation and expression of, under laws of N. Y., 371
 formed without waiting to hear testimony, 372
 on the merits of the case, 379, 408
 formed from conversations, 383
 and expressed, of guilt or innocence of prisoner, 384, 387, 410
 partial but not positive, 389
 that the crime was committed by some one, 390
 to disqualify must be of the whole case, 395-397
- Ordinance** of congress relating to trial by jury, 51
- Origin** of grand jury, 17, 18
 See GRAND JURY.
 of practice of granting new trials, 578
 See NEW TRIAL.
 and progress of trial by jury, 1-59
 See TRIAL BY JURY.
- Panel**, definition of, 254
- Papers** read on trial, jury may take to room, 625
 See NEW TRIAL.
- Patent cases**, number of jurors in trial of, 818
 trial by jury in, 818
 See U. S. COURTS.
- Pecuniary interest** in result, 413
 See CHALLENGES.
- Peers or Equals**, trial by, 3
 See TRIAL BY JURY.
- Peremptory Challenges**, definition of, 252, 451-493, 798-803
 use of, and practice as to, 451 n.
 right of, absolute, 451 n.
 how long continues, 451 n., 468, 469
 when to be used, 451 n., 482, 486, 487
 number of, punishment death, 451-455, 457-459, 480
 less than death, 451-454, 456, 457-459, 464, 480
 on second trial, 452
 where several on trial, 453, 800
 in court of special sessions, 456
 civil cases, 461
 in England, no, 461 n.
 what cases there are no, 461 n., 463, 470
 waiver of, 465-467

- Peremptory Challenges**, none at common law in misdemeanors, 471
 withdrawing, 473, 474
 at common law, government has no, 475-479
 right to, after challenge for cause, 481
 by whom made, 483
 recalling, 485
 in U. S. courts, 490, 798-803
 when challenge to favor overruled, 492, 493
 See CHALLENGE; U. S. COURTS.
- Perjury**, person swearing falsely to evade jury duty, guilty of, 157
- Physicians**, punishment of, for giving false certificates, 152, 187
 jury of, to inquire into pregnancy of female convict, 905, 906
 See EXEMPTION; SPECIAL PROCEEDINGS.
- Place of Trial**, 52
- Plank Road and Turnpike cases**, jurors in, 931-940
 how jury applied for, in, 931
 drawn in, 932-934
 number of jurors in, 933
 how jury summoned in, 934, 935
 punishment for failing to appear in, 936
 fees of jurors in, 936
 oath of jurors in, 937
 duty of justice in, 938
 finding of jury in, 939, 940
 certificate of jury in, 940
 See FORMS; SPECIAL PROCEEDINGS.
- Plea in Abatement**, challenge to grand juror, by, 499-510
 what is not ground for, 499-503, 505, 506
 ground for, 504, 507, 510
 See CHALLENGE; GRAND JURORS; GRAND JURY.
- Pledge**, what was frank, 10
 free, 10
 peace, 10
- Political Offenses** in Prussia, trial of, 45
 See PRUSSIA.
- Poll**, what is challenge to, 250, 254
 See CHALLENGE.
- Polling Jury**, right of, 627, 631-633
 when sealed verdict rendered, 628
 where not matter of right, 629
 when objection to be made, on, 630, 633
 See NEW TRIAL; VERDICT.
- Polygamy**, challenge on trial for, 424
 See CHALLENGE.
- Portugal**, trial by jury in, 38
- Practice** as to challenges, 254
 See CHALLENGES.
- Preadjudication**, new trial on ground of, 690
 See NEW TRIAL; VERDICT.

- Pregnancy** of female convict, jury of inquiry into, 905, 906
 See FORMS; SPECIAL PROCEEDINGS.
- Prejudice** against accused, 349, 368
 business, 368
 See CHALLENGE.
- Presentments** by grand inquest, what they consisted of, 17
 See FOREMAN; GRAND JURORS; GRAND JURY.
- Principal Challenge**, causes for, 328-450
 statute concerning, has no effect on challenge to favor, 324
 to array, what is, 258
 effect of sustaining, 260, 266
 what not ground for, 276-280
 See ARRAY; CHALLENGE; FAVOR.
- Principal Cause**, what is challenge for, 251, 328
 See CHALLENGE.
- Prisoner**, when could not have counsel or witnesses, 23
 when first allowed to have counsel and witnesses, 23
- Prosecuting Officer**, duty and power of, 717-719, 759, 760
- Prussia**, trial by jury in, 45
 of political offenses in, 45
- Public Trial**, accused entitled to speedy and, 54
 See TRIAL BY JURY.
- Qualifications of jurors**, 60
 in reign of Elizabeth, 6
 George IV., 20
 formerly, in trial for high treason, 25
 in inquiry into insanity of convict, 904-906
 justices' courts, 821, 826
 Kings county, 79-84
 N. Y. county, 68-78
 objection to, how available, 271, 290, 447, 449, 450
 Scotland, 29
 courts of special sessions, 852
 for struck jury, 880, subd. 1
 in summary proceedings, 919
 U. S. courts, 776, 777, 780, 801, 805
 See CHALLENGES; SPECIAL PROCEEDINGS; U. S. COURTS.
- Questions** which have been allowed by the courts, 338, 368, 409, 429
 of juror's opinion, 394
 as to competency, jurors must answer, 399, 400
- Quo Warranto**, party to, entitled to trial by jury, 859, *n.*
 See TRIAL BY JURY.
- Recommendation** to mercy, when jury should make, 548
 See VERDICT.
- Reeve**, definition of, 12
 See SHERIFF.
- Relationship** of juror to party, ground of challenge, 313
 See CHALLENGE.
- Rhenish Hesse**, trial by jury in, 44
- Rhine Provinces**, trial by jury in, 43

- Right of Way** for railroads, assessing damages for, 930
 constitutional trial by jury, no relation to, 930
- Rights**, declaration of, as to trial by jury, 49
- Roads and Highways**, jury in proceedings to lay out, 922, 923
 how summoned, 922
 duty of constable in, 922
 punishment of jurors in, 922
 oath of jurors in, 922
 number of jurors in, 922
 certificate of jurors in, 923
 See **FORMS**; **SPECIAL PROCEEDINGS**.
- Russia**, trial by jury in, 48
- Sardinia**, trial by jury in, 40
- Scir-division**, what was comprised within, 12
- Scir-gerefa**, who was, 12
- Scotland**, no coroner's inquest in, 30
 court of session in, what consisted of, 31
 decision of judge for verdict of jury in, 33
 no grand jury in ordinary cases in, 30
 number of jurors in trials in, 30
 origin of jury, &c., in, 27-29
 qualifications of jurors in, 29
 when trial by jury introduced in, 31
 trial by jury in, 27-34
 for treason in, 30
 verdict, how rendered in, 30
- Sealed Verdict**, what is, 546, 561
 See **VERDICT**.
- Selecting** sheriff's jurors in N. Y. county, 144
 trial jurors, mode of, 87-93
 in Kings county, mode of, 158-164
 N. Y. county, mode of, 122-130
- Separation of jurors** after agreeing and before rendering verdict,
 641
 in capital cases, 634-639
 before case opened, 655
 after charge, before verdict, 659
 in felonies, 640, 657
 misdemeanors, 656
 new trial on ground of, 634-660
 See **NEW TRIAL**; **VERDICT**.
- Settling** issues for trial by jury, 864
 See **EQUITY CASES**.
- Setting** aside juror, 437, 476-479
 See **CHALLENGE**.
 aside verdict, 571
 See **NEW TRIAL**.
- Shire Court**, jurisdiction of, 12
 when held, 12
 who presided over, 12
- Shire reeve**, who was, 12
- Shires or Counties**, custom of Anglo-Saxons as to, 8
- Sheriff**, who was, 12
 may be fined for neglect of duty, 216-219
 duty of, when selecting jurors, 901, 906

- Sheriff, duty of** in ad quod damnum proceedings, 941-946
 creditors' proceedings, 958
 de lunatico inquirendo proceedings, 909
 insolvent debtor's proceedings, 953
 cases of forcible entry and detainer, 913-915
 on obtaining foreign jury, 886
 to summon grand jurors, 739, 749-752, 761, 762
 on origin of fires, 965-968
 in plank road and turnpike cases, 934
 on obtaining struck jury, 880, 881
 in summary proceedings, 917-921
- Sheriff's Jury** in N. Y. county, how selected, 144
 to try title to property, 897-901
 how and when to be summoned, 897, 898, 901
 number of jurors in, 897
 See FORMS; SPECIAL PROCEEDINGS.
- Sickness of juror**, new trial on ground of, 665-667
 in U. S. courts, 812, *n.*
 See NEW TRIAL; U. S. COURTS; VERDICT.
- South Carolina**, U. S. grand jurors in Westn. Dis. in, 796
 trial jurors in Westn. Dis. in, 796
 See U. S. COURTS.
- Special Findings**, when court may direct, 573
 must be in writing, 573
 See VERDICT.
- Special Juries** in U. S. courts, 784
 See U. S. COURTS.
- Special Proceedings**, in city court of Brooklyn, jury in, 176
 county court of Kings county, jury in, 176
 fees of jurors in, 240
 jurors in ad quod damnum proceedings, 941-946
 creditors' proceedings against imprisoned debtor, 958-960
 defaults, to assess damages on, 969-972
 de lunatico inquirendo proceedings, 909-912
 equity actions, 857-864
 fires, to investigate origin of, 965-968
 forcible entry and detainer, in cases of, 913-915
 habitual drunkard proceedings, 961-964
 highway encroachment proceedings, 947-950
 highways through uninclosed lands, to assess damages for laying out, 924-929
 homestead exemption law, to appraise property under, 907, 908
 insanity of convict after sentence of death, to inquire into, 904
 person imprisoned under civil or criminal process, to inquire into, 902, 903
 insolvent debtor's proceedings, 951-957
 plank road and turnpike cases, 931-940

- Special Proceedings**; pregnancy of female convict, to inquire into, 905, 906
 railroad uses, to assess damages for right of way for, 930
 roads and highways, in proceedings to lay out, 922, 923
 sheriff's or constable's, to try title to property, 897-901
 struck jury, 878-886
 summary proceedings to dispossess tenant, 916-921
 surrogate's court, 887-896
- Special Sessions**, trial by jury in, 850-856
 venire to issue to constable in, 852
 summoning jurors in, 852
 number of jurors in, 852
 qualifications of jurors in, 852
 duty of constable in, 852-855
 drawing of jurors in, 853
 talesmen in, 854
 verdict of jury in, 855, 856
 no fees to jurors in, 856
- Special Verdict**, what is, 562, 572
 should be found by, 572
 when may be rendered, 573
 by direction of court, 573
 when court no right to direct, 573, *n.*
 inconsistent with general verdict, 575
 See VERDICT.
- Specifications** against bankrupt's discharge, trial of, 819, *n.*
 See BANKRUPTCY; TRIAL; U. S. COURTS.
- State Trials**, notable, 24, *n.*
- Struck Jury**, 878-886
 when court will order, 878, 884, *n.*
 notice to obtain, 879
 manner of obtaining, 880, 883
 talesmen for, 283, *n.*, 882, 884, *n.*
 trial by, 882
 excusing one summoned for, 882
 cost of obtaining, by whom paid, 884
 when will not be ordered, 884, *n.*
 stay of proceedings to obtain, 884, *n.*
 setting aside, 884, *n.*
- Summary Proceedings**, jury in, 916-923
 no peremptory challenges in, 461, *n.*, 472
 when jury must be demanded in, 916
 how jury to be summoned in, 917
 qualifications of jurors in, 917
 number of jurors in, 917-919
 effect of more jurors than required, 918
 oath of jurors in, 919
 punishment of jurors in, 919
 how long jury to be kept together in, 920
 when jury to be discharged in, 921
 See FORMS.
- Summary Trials** in U. S. courts, 811

- Summary Trials** in U. S. courts, challenges in, 804
 See U. S. COURTS.
- Summoning Jurors**, 100, 107, 111, 112, 138, 139, 172, 175, 176, 222-227
 in justice's courts, 821, 825, 826
 courts of special sessions, 852
 U. S. courts, 777, 781-787, 790, 793, 794, 801
 See JUSTICE'S COURTS; SPECIAL SESSIONS; TRIAL JURORS; U. S. COURTS.
- Superior Courts** in England, trials in, 21
- Surrogate's Court**, trial by jury in, 887-896
 on appeals from, 887, 889
 issues of fact where tried in, 888
 practice in, prior to 1830, 890-892
 under revised statutes, 891-893
 jury trial a matter of right in, 894
 power and duty of appellate court from, 894
 when supreme court will not reverse, 895
 court of appeals will direct jury trial in, 896
- Talesmen**, when challenge to, is valid, 283
 may be fined and arrested, 205
 in justices' courts, 834
 courts of special sessions, 854
 for struck jury, 882
 in summary proceedings, 919
 when and how summoned, 202, 203, 223
 in U. S. courts, 783, 793, 794
 See CHALLENGE; JUSTICES' COURTS; SPECIAL SESSIONS; STRUCK JURY; SUMMARY PROCEEDINGS; U. S. COURTS.
- Territories**, discharging U. S. grand juries in, 791
 See U. S. COURTS.
- Territory** northwest of Ohio river, trial by jury in, 51
- Test** of competency of juror, 337, 373
- Throckmorton**, trial of Sir Nicholas, 24
- Time** of service of trial juror in Kings county, 82
 N. Y. county, 73
 U. S. courts, 780, 801
 See TRIAL JUROR; U. S. COURTS.
- Tithings**, what they consisted of, 8
- Towns** interested, competency of jurors when, 86
 jurors, how summoned in actions between, 824
- Treason**, accused to have copy jury lists on trial for, 810
 number of peremptory challenges on trial for, 802
 qualifications of jurors in trial for under bill of rights, 25
 trial for in Scotland, 30
- Trial**, accused entitled to speedy and public, 54
- Trial Juror**, attendance of, how compelled, 74, 115-120
 discharge of, when compulsory, 65
 discretionary, 74, 75
 in Kings county, 82
 N. Y. county, 73-75
- Trial Jurors**, penalty for accepting or giving bribe to, 233

- Trial Jurors**, in district courts, 143
 mode of drawing, 87-120
 in Buffalo, 189-193
 for county court, 193
 in Kings county, 158-188
 N. Y. county, 122-157
 duties of, 511-557
 evidence of right to exemption as, 64
 in Kings county, 81
 N. Y. county, 71
 exemption from service as, who may claim, 63, 800
 who may claim in Kings county, 80
 who may claim in N. Y. county, 70
 in U. S. courts, 776, 800
 when must be excused from serving as, 66
 may be excused from serving as, 75, 77, 83
 proof necessary to be excused from serving as, 75, 76, 83
 by whom to be excused, 75, 83
 time for which to be excused, 75, 77, 83
 to be excused must bring notice, 76
 fine for non-attendance as, 115
 and arrest for non-attendance as, in Kings county, 178, 179, 205, 213, 226
 and arrest for non-attendance as, in N. Y. county, 141-143, 205, 213, 226.
 qualifications of, 60
 in Kings county, 79
 N. Y. county, 68, 69
 mode of selecting, 87-120
 in Buffalo, 189-193
 district courts, 143
 Kings county, 158-188
 N. Y. county, 122-157
 time of service of, in Kings county, 82
 N. Y. county, 73
 towns, 92
- Trial Jury**, duty of clerk of, 533
 foreman of, 533
 formation of, 193-207
- Trial by Jury**, earliest record of a, 7
 to whom chiefly ascribed, 15
 when and by what purified, 25
 in admiralty cases, 815-817
 American colonies, 49
 articles of confederation did not mention, 50
 in Austrian Empire abolished, 47
 Baden, 46
 bankruptcy proceedings, 819 *n.*
 Bavaria, 46
 Belgium, 37
 Brougham on, 26

- Trial by Jury**, Cockburn on, 26
 declaration of rights as to, 49
 in England, 20-26
 equity cases, 857-864
 Erskine on, 26
 in France, 35
 Geneva, 39
 Greece, 37
 Hesse, 46
 Ireland, 34
 settling issues for, 864
 in justices' courts, 820-849
 Miller on, 51 *n.*
 motion for new trial after, 864
 ordinance of congress of 1787, on, 51
 origin and progress of, 1-59
 in patent cases, 818
 place where it shall be had, 53
 in Portugal, 38
 preservation of, in controversies over \$20, 55
 prevalence of, 59
 in Prussia, 45
 quo warranto proceedings, 859, *n.*
 Rhenish Hesse, 44
 Rhine provinces, 43
 right of, 52, 54, 220
 what does not affect, 980
 in Russia, 48
 Sardinia, 40
 Scotland, 27-34
 special sessions, 850-856
 individual States, 50
 surrogates' courts, 887-896
 territory northwest of Ohio river, 51
 U. S. courts, 811-819
 waiver of, 814, 859, *n.*, 861-863
 under William the Conqueror, 16
 in Wurtemberg, 46
- Trial** of Archbishop of Turin, 41
 for capital offense, 23
 of Carnegy of Finhaven, verdict before, 28
 after, 28
 challenge, 293-298, 306, 322
 in U. S. courts, 801
 by eleven jurors in criminal case, 659
 of indictments, 220-232
 issue, how long continued, 207
 by peers or equals, 3
 of political offences in Prussia, 45
 specifications against bankrupt's discharge, 819, *n.*
 by struck jury, 882
 of Sir Nicholas Throckmorton, 24
- Triers**, what are, 298
 agreement of, 308
 no challenge to, 302
 decision of, is final, 307

Triers, duty of, 304-305

- on challenge to array, 264
- when judge acts for, 304, 309
- effect of decision of judge acting for, 326
- judge acting for, need not be sworn, 300
- misconduct of, 307
- number of, 298
- oath of, 300, 301
 - witness before, 303
- method of selecting, 299

Turin, trial of Archbishop of, 41**Unanimity of jurors generally considered essential, 56**

- in France not necessary, 36
- Scotland not necessary, 32

United States Courts, assessment of damages on defaults, in, 812, *n.*

- grand jurors in, 777-782, 787-797, 805
- foreman of grand jurors in, 788
- fees of grand jurors in, 798, 799
- number of grand jurors to concur in finding, 789
- in territories may discharge grand jurors, 791
 - Dist. of Columbia may discharge grand jurors, 791
- power of grand jurors in, 792
- grand jurors in Arkansas, 793
 - Kentucky, 794
 - North Carolina, 795
 - South Carolina, 796
 - Vermont, 797
- corrupting grand jurors in, 806-809
- trial jurors in, 775-819
- challenge to trial jurors in, 800-805
- corrupting trial jurors in, 806-809
- discharging trial jurors in, 812, *n.*
- drawing trial jurors in, 779, 780, 785, 791, 796
- empaneling trial jurors in, 776
- exemptions of, 776, 800
- fees of trial jurors in, 798, 799
- qualifications of trial jurors in, 776, 777, 780, 801, 805
- summoning trial jurors in, 777, 781-787, 790, 793, 794, 801
- time of service of trial jurors in, 780, 801
- withdrawing trial jurors in, 812, *n.*
- in Arkansas, trial jurors in, 793
 - Kentucky, trial jurors in, 794
 - New York (Northern Dist.), trial jurors in, 785
 - North Carolina, trial jurors in, 795
 - South Carolina, trial jurors in, 796
 - Vermont, trial jurors in, 786, 797
- special juries in, 784
- talesmen in, 783, 793, 794

- United States Courts**, trial by jury in, 812-819
 when accused must demand, 811
 admiralty cases, 815-817
 bankruptcy proceedings, 819
 patent cases, 818
 waiver of, 814
- Utica**, each ward of, is a town, 93
- Venire**, how procured, 209
 what is, 208, *n.*
 in justices' court, 821, 825, 826, 835, 846
 special sessions, 852, 854
 See **FORMS; JUSTICES' COURTS; SPECIAL SESSIONS.**
- Verdict**, discharge of jury when unable to agree on, 567
 when jury cannot amend, 563 *n.*
 how jury to arrive at, 535-548
 judge no power to change, 575 *n.*
 duty of clerk on rendition of, 576
 by compromise, 547, 548, 682-685, 687, 688
 for damages, jury to assess them, 569
 definition of, 558
 plaintiff not to be called on delivery of, 568
 in discretion of jury, general or special, 573
 affidavits of jurors to establish, 566
 made to conform to finding, 565
 jury not to be questioned as to foundation of, 567
 what is general, 562, 572
 effect of general, 572
 when jury find general, court may direct special findings, 573
 of guilty under extenuating circumstances, 39
 impeached by affidavits of jurors, 610-612, 622-624
 general inconsistent with special, 575
 by intimidation from court, 567
 irregular, 573 *n.*
 judge's decision substituted for, 33
 mistake in announcing, 565
 , how corrected, 563, 565
 rendering, 576 *n.*
 subject to opinion of court, 571
 what it was originally, 6
 is a partial, 559
 power of jury over, 562
 what is a public, 560
 including punishment, when and where, 574
 what is sealed, 546, 561
 special, 562, 572
 should be found by special, 572
 special must be in writing, 573
 when court may direct special, 573
 no right to direct special, 573, *n.*
 of coroner's jury, 875
 may be more than one, 876
 in France by majority, 36

- Verdict**, in insolvent debtor's proceedings, 955-957
 justice's court, jury to be held until agreed on, 838
 when agreed on to give to justice, 47
 cannot agree on, 848
 jury may be sent to re-consider, 845
 Scotland how rendered, 30
 by nine jurors, 32
 special sessions, 855, 856
 See AFFIDAVITS; FORMS; NEW TRIAL; SPECIAL PROCEEDINGS; U. S. COURTS.
- Vermont**, charge to grand jury in, 797
 when jury to be summoned in U. S. courts in, 786
 See U. S. COURTS.
- Waiver of challenge**, 442-444, 465-467, 489
 to array, 267, 274, 289
 See ARRAY; CHALLENGE.
 of trial by jury, 859, *n.* 861-863
 judge may refuse to allow, 861, *n.*
 by plaintiff, what is, 863
 in U. S. courts, 814
 See TRIAL BY JURY, U. S. COURTS.
- Weregeld**, what was, 9
- Wite**, what was, 9
- Withdrawing juror**, 567, *n.*
 in U. S. courts, 812, *n.*
 See U. S. COURTS; VERDICT.
- Witness**, against himself, no person compelled to be, 53
 juror may be examined as, 620, 721, 758
 was originally a, 6, 13
 See GRAND JURORS.
- Writ of inquiry on defaults**, 970-972
 jurors' fees on, 240
 See FEES; SPECIAL PROCEEDINGS.
- Wurtemberg**, trial by jury in, 46

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