WESTERN AUSTRALIA.

ANNO DECIMO SEXTO

VICTORIÆ REGINÆ.

No. VIII.

An Ordinance for further improving the administration of Criminal Justice. 14th & 15th Vict., chap. 100

WHEREAS offenders frequently escape conviction on their trial by reason of the technical strictness of Criminal proceedings in matters not material to the merits of the case; and whereas such technical strictness may safely be relaxed in many instances, so as to ensure the punishment of the guilty, without depriving the accused of any just means of defence, and whereas a failure of Justice often Preamble.

takes place on the trial of persons charged with felony and misdemeanor, by reason of variance between the statement in the indictment on which the trial is had, and the proof of names, dates, matters and circumstances therein mentioned, not material to the merits of the case, and by the misstatement whereof the person on trial cannot have been prejudiced in his defence: Be it therefore enacted, by His Excellecy the Governor of Western Australia and its Dependencies, by and with the advice and consent of the Legislative Council thereof, that from and after the passing of this Ordinance, whenever on the trial of any indictment for any felony or misdemeanor, there shall appear to be any variance between the statement in such indictment and evidence offered in proof thereof, in the name of any district, town or place mentioned or described in any such iudictment, or in the name, or description of any person or persons, or body politic or corporate therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein, or in the name, or description of any person or persons, body politic or corporate therein stated or alleged to be injured or damaged, or intended to be injured or damaged by the commission of such offence, or in the christian name, or surname, or both christian or surname, or other description whatsoever, if any person or persons whomsoever therein named or described, or in the name or description of any matter or thing whatsoever therein named or described, or in the ownership of any property named or described therein, it shall and may be lawful for the Court before which the trial shall be had, and if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order such indictment to be amended, according to the proof, by some Officer of the Court or other person, both in that part of the indictment in which such variance occurs, and in every other part of the indictment which it may become necessary to amend, on such terms as to postponing the trial to be had before the same or another jury, as such Court shall think reasonable; and after any such amendment the trial shall proceed, whenever the same shall be proceeded with, in the same mannner in all respects, and with the same consequences, both with respect to the liability of witnesses to be indicted for prejury and otherwise, as if no such variance had occurred, and the order for the amendment shall either be endorsed on the indictment, or shall be engrossed and filed, together with the indictment, among the records of the Court, provided that in all such cases where the trial shall be so postponed as aforesaid, it shall be lawful for such Court to respite the recognizances of the

The Court may amend certain variances not material to the merits of the case, and by which the defendant cannot be prejudiced in his defence, and may either proceed with, or postpone the trial, to be had before the same or another jury.

prosecutor and witnesses, and of the defendant and his surety or sureties, if any, accordingly; in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence respectively, and the defendant shall be bound to attend to be tried at the time and place to which such trial shall be so postponed, without entering into any fresh recognizances for that purpose, in such and the same manner as if they were originally bound by their recognizances to appear and prosecute or give evidence at the time and place to which such trial shall have been so postponed; provided also that where any such trial shall be to be had before another jury, the Crown and the defendant shall respectively be entitled to the same challenges as they were respectively entitled to before the first jury was sworn.

Verdict and judgments valid after amendment.

II. AND be it enacted, that every such verdict and judgment which shall be given, after the making of any amendment, under the provisions of this Ordinance, shall be of the same force and effect in all respects, as if the indictment had originally been in the same form in which it was after such amendment was made.

Records to be drawn up in amended form without noticing the amendment.

III. AND be it enacted, that if it shall become necessary at any time, for any purpose whatsoever, to draw up a formal record in any case where any amendment shall have been made under the provisions of this Ordinance, such record shall be drawn up in the form in which the indictment was after such amendment was made, without taking any notice of the fact of such amendment having been made.

The means by which the injury was inflicted need not be specified in indictments for murder and manslaughter.

IV. AND be it enacted, that in any indictment for murder or manslaughter, preferred after the passing of this Ordinance, it shall not be necessary to set forth the manner in which, or the means by which the death of the deceased was caused, but it shall be sufficient in every indictment for murder to charge that the defendant did feloniously, wilfully, and of his malice aforethought, kill and murder the deceased, and it shall be sufficient in every indictment for manslaughter, to charge that the defendant did feloniously kill and slay the deceased.

Forms of indictment in cases of forgery and uttering, stealing

V. AND be it enacted, that in any indictment for forging, uttering, stealing, embezzling, destroying, or concealing; or for obtaining by false pretences, any instrument, it shall be sufficient to describe

and embezzleing, or obtaining by false pretence.

such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac-simile thereof, or otherwise describing the same or the value thereof.

In engraving plates, &c.

VI. AND be it enacted, that in any indictment for engraving or making the whole or any part of any instrument, matter, or thing whatsoever, or for using or having the unlawful possession of any plate or other material, upon which the whole or any part of any instrument, matter, or thing whatsoever shall have been engraved or made, or for having the unlawful possession of any paper upon which the whole or any part of any instrument, matter, or thing whatsoever shall have been made or printed, it shall be sufficient to describe such instrument, matter, or thing, by any name or designation by which the same may be usually known, without setting out any copy or fac-simile of the whole or any part of such instrument, matter, or thing.

In other cases.

VII. AND be it enacted, that in all other cases, wherever it shall be necessary to make any averment in any indictment, as to any instrument, whether the same consists wholly or in part of writing, print, or figures, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac-simile of the whole or any part thereof.

Intent to defraud particular persons need not be alleged or proved in cases of forgery, uttering, or false pretences.

VIII. AND be it enacted, that from and after the passing of this Ordinance, it shall be sufficient in any indictment for forging, uttering, offering, disposing of, or putting off any instrument whatsoever, or for obtaining or attempting to obtain any property by false pretences, to allege that the defendant did the act with intent to defraud, without alleging the intent of the defendant to be to defraud any particular person, and on the trial of any of the offences in this section mentioned, it shall not be necessary to prove an intent on the part of the defendant to defraud any particular person, but it shall be sufficient to prove that the defendant did the act charged with an intent to defraud.

IX. AND whereas offenders often escape conviction by reason that such persons ought to have been charged with attempting to

commit offences, and not with the actual commission thereof; for remedy thereof, be it enacted, that if on the trial of any person charged with any felony or misdemeanor, it shall appear to the Jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty of an attempt only to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the Jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the said indictment, and no person so tried as herein lastly mentioned, shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanor for which he was tried.

A person indicted for felony or misdemeanor may be found guilty of an attempt to commit the same, and shall be liable to the same consequences as if charged with, and convicted of the attempt only.

X. AND whereas it is enacted, by certain Act of the Imperial Parliament, passed in the 1st. year of the reign of Her present Majesty, intituled "*An Act to amend the laws relating to offences against the person*" (and which said Act has been adopted in this Colony), that, "*on the trial of any person for any of the offences therein before mentioned, or for any felony whatever when the crime charged shall include an assault against the person, it shall be lawful for the Jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding;*" and whereas great difficulties have arisen in the construction of such enactment, for remedy thereof, be it enacted, that the said enactment shall no longer be applicable to the administration of justice in this colony.

No person so tried to be afterwards prosecuted for the same.

XI. AND be it enacted, that if upon the trial of any person upon any indictment for robbing, it shall appear to the jury upon the evidence that the defendant did not commit the crime of robbery, but that he did commit an assault with intent to rob, the defendant shall not by reason thereof be entitled to be acquitted, but the Jury shall be at liberty to return as their verdict that the defendant is guilty of an assault with intent to rob, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for feloniously assaulting with intent to rob; and no person so tried as is herein lastly mentioned, shall be liable to be afterwards prosecuted for any assault with intent to commit the robbery for which he was so tried.

On the trial for an indictment for robbery, the jury may commit of an assault with intent to rob.

No person so tried to be afterwards prosecuted for the same.

Person tried for misdemeanor not to be acquitted if the offence turn out to be a felony, unless the court so direct.

XII. AND be it enacted, that if upon the trial of any person for any misdemeanor, it shall appear that the facts given in evidence amount in law to a felony, such person shall not be entitled by reason thereof to be acquitted of such misdemeanor, and no person tried for such misdemeanor, shall be liable to be afterwards prosecuted for felony on the same facts, unless the Court before which such trial may be had, shall think fit, in its discretion, to discharge the Jury from giving any verdict upon such trial, and to direct such person to be indicted for felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor.

Person indicted for embezzlement as a clerk, &c., not to be acquitted if the offence turn out to be larceny, and vice versa.

XIII. AND be it enacted, that if upon the trial of any person indicted for embezzlement as a clerk, servant, or person employed for the purpose, or in the capacity of clerk, or servant, it shall be proved that he took the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted, but the Jury shall be at liberty to return as their verdict that such person is not guilty of embezzlement, but is guilty of simple larceny, or of larceny, as a clerk, servant, or person employed for the purpose or in the capacity of a clerk or servant, as the case may be, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such larceny; and if upon the trial of any person indicted for larceny, it shall be proved that he took the property in question, in any such manner as to amount in law to embezzlement, he shall not by reason thereof, be entitled to be acquitted, but the jury shall be at liberty to return as their verdict, that such person is not guilty of larceny, but is guilty of embezzlement, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement, and no person so tried for embezzlement or larceny as aforesaid, shall be liable to be afterwards prosecuted for larceny or embezzlement upon the same facts.

Upon an indictment for jointly receiving, persons guilty of separately receiving may be convicted.

XIV. AND be it enacted, that if upon the trial of two or more persons indicted for jointly receiving any property, it shall be proved that one or more of such persons separately received any part of such property, it shall be lawful for the jury to convict upon such indictment, such of the said persons as shall be proved to have received any part of such property; And whereas it frequently happens that

the principal in a felony is not in custody or amenable to justice, although several accessories to such felony, or receivers at different times of stolen property, the subject of such felony may be in custody or amenable to justice, for the prevention of several trials, be it enacted, that any number of such accessories or receivers may be charged with substantive felonies in the same indictment, notwithstanding the principal felon shall not be included in the same indictment or shall not be in custody, or amenable to justice.

Separate accessories and receivers may be included in the same indictment in the absence of the principal felon.

XV. AND be it enacted, that it shall be lawful to insert several counts in the same indictment against the same person for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person, within the space of six calendar months, from the first to the last of such acts and to proceed thereon for all or any of them.

Three larcenies from the same person within six months may be included in the same indictment.

Where a single taking is charged, the prosecutor not required to elect, unless it appear that there were more than three takings, or more than six months between the first and the last takings.

XVI. AND be it enacted, that if upon the trial of any indictment for larceny, it shall appear that the property alleged in such indictment to have been stolen at one time, was taken at different times, the prosecutor shall not by reason thereof, be required to elect upon which taking he will proceed, unless it shall appear that there were more than three takings, or that more than the space of six calendar months elapsed between the first and the last of such takings, and in either of such last-mentioned cases, the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three as appear to have taken place within the period of six calendar mounths from the first to the last of such takings.

Coin or bank notes may be discribed simply as money.

XVII. AND be it enacted, that in every indictment in which it shall be necessary to make any averment as to any money, or any note of any Bank, it shall be sufficient to describe such money or bank note, simply as money, without specifying any particular coin or bank note, and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin, or of any bank note. although the particular species of coin of which such amount was composed, or the particular nature of the bank note, shall not be proved, and in cases of embezzlement and obtaining money or bank notes by false pretences, by proof that the offender embezzled or obtained any piece of coin, or any bank note, or any portion of the value thereof, although such piece of coin or bank note may

have been delivered to him, in order that some part of the value thereof should be returned to the party delivering the same, or to any other person, and such part shall have been returned accordingly.

Certain provisions of 23, Geo. 2, c. 11, extended.

XVIII. WHEREAS by an Act of the Imperial Parliament, passed in England, in the twenty-third year of the reign of His late Majesty King George the Second, intituled "an Act to render prosecutions for perjury and subornation of perjury more easy and effectual," certain provisions were made to prevent persons guilty of perjury and subornation of perjury from escaping punishment by reason of the difficulties attending such prosecutions, and whereas it is expedient to amend and extend the same, be it enacted, that it shall be lawful for the Commissioner of the Civil Court, or for any Justice of the Peace, Chairman of any Court of General or Quarter Sessions of the Peace, or for any Judge of any Court of Record, or for any Justices of the Peace in Special or Petty Sessions, or for any Sheriff or his lawful Deputy, before whom any writ of inquiry or writ of trial from any superior Court shall be executed, in case it shall appear to him or them that any person has been guilty of wilful and corrupt perjury in any evidence given, or in any affidavit, deposition, examination, answer or other proceeding, made or taken before him or them, to direct such person to be prosecuted for such perjury, in case there shall appear to him or them a reasonable cause for such prosecution, and to commit such person so directed to be prosecuted, until the next General or Quarter Sessions of the Peace for the district within which such perjury was committed, unless such person shall enter into a recognizance with one or more sufficient surety or sureties, conditioned for the appearance of such person at such next General or Quarter Sessions of the Peace, and that he will there surrender and take his trial, and not leave the Court without permission, and to require any person he or they may think fit to enter into a recognizance conditioned to prosecute or give evidence against such person so directed to be prosecuted as aforesaid, and to give to the party so bound to prosecute, a certificate of the same being directed, which certificate shall be given without any fee or charge, and shall be deemed sufficient proof of such prosecution having been directed as aforesaid, and upon the production thereof, the costs of such prosecution shall and are hereby required to be allowed by the Court before which any person shall be prosecuted or tried in pursuance of such direction as aforesaid, unless such last-mentioned Court shall specially otherwise direct; Provided always, that no such direction or certificate shall be given in evidence upon

The Commissioner of the Civil Court or any Justice may direct a person guilty of perjury in any evidence, &c., to be prosecuted.

And commit the party unless he enter into recognizance to appear and take his trial; and bind person to give evidence.

And give certificate of prosecution being directed, which shall be sufficient evidence of the same.

any trial to be had against any person upon a prosecution so directed as aforesaid.

Extending the 23 of Geo. 2, c. 11, s. 1, to other officers, and simplifying indictments for perjury and other like offences.

XIX. AND be it enacted, that in every indictment for perjury, or for unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly taking, making, singing or subscribing any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what Court or before whom the oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing was taken, made, signed, or subscribed, without setting forth the bill, answer, information, indictment, declaration, or any part of any proceeding, either in Law or in Equity, and without setting forth the commission or authority of the Court or person before whom such offence was committed.

Extending the 23 of Geo. 2, c. 11, s. 2, as to form of indictments for subornation of perjury and other like offences.

XX. AND be it enacted, that in every indictment for subornation of perjury or for corrupt bargaining, or contracting with any person to commit wilful and corrupt perjury, or for inciting, causing, or procuring any person unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly to take, make, sign, or subscribe any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, it shall be sufficient, wherever such perjury or other offence aforesaid shall have been actually committed, to allege the offence of the person who actually committed such perjury or other offence in the manner hereinbefore mentioned, and then to allege that the defendant unlawfully, wilfully, and corruptly did cause and procure the said person, the said offence in the manner and form aforesaid, to do and commit; and wherever such perjury or other offence aforesaid shall not have been actually committed, it shall be sufficient to set forth the substance of the offence charged upon the defendant, without setting forth or averring any of the matters or things hereinbefore rendered unnecessary to be set forth or averred in the case of wilful corrupt perjury.

On trials for perjury and subornation, a certificate of the trials of the indictment on which the perjury

XXI. AND be it enacted, that a certificate containing the substance and effect only (omitting the formal part) of the indictment and trial for any felony or misdemeanor, purporting to be signed by the clerk of the Court, or other officer having the custody of the re-

was committed, sufficient evidence of such trials.

cords of the Court where such indictment was tried, or by the duputy of such clerk or other officer, (for which certificate a fee of six shillings and eight-pence, and no more, shall be demanded or taken), shall, upon the trial of any indictment for perjury or subornation of perjury, be sufficient evidence of the trial of such indictment for felony or misdemeanor, without proof of the signature or official character of the person appearing to have signed the same.

Venue in the margin sufficient, except when local description is necessary.

XXII. AND be it enacted, that it shall not be necessary to state any venue in the body of any indictment, but the colony or other jurisdiction named in the margin thereof shall be taken to be the venue of all the facts stated in the body of such indictment; provided that in cases where local description is or hereafter shall be required, such local description shall be given in the body of the indictment.

What defects shall not vitiate an indictment.

XXIII. AND be it enacted, that no indictment for any offence shall be held insufficient for want of the averment of any matter unnecessary to be proved, nor for the omission of the words "as appears by the Record," or of the words "with force and arms," or of the words "against the peace," nor for the insertion of the words "against the form of the statute" inserted "against the form of the statutes," or vice versâ, nor for that any person mentioned in the indictment is designated by a name of office or other descriptive appellation instead of his proper name, nor for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened, nor for want of a proper or perfect venue, nor for want of a proper or formal conclusion, nor for want of or imperfection in the addition of any defendant, nor for want of the statment of the value or price of any matter or thing, or the amount of damage, injury, or spoil, in any case where the value or price or the amount of damage, injury, or spoil, is not the essence of the offence.

Formal objections to indictment shall be taken before jury are

XXIV. AND be it enacted, that every objection to an indictment for any formal defect apparent on the face thereof, shall be taken by demurrer or motion to quash such indictment, before the jury

shall be sworn, and not afterwards; and every Court before which any such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the Court or other person, and thereupon the trial shall proceed, as if no such defect had appeared.

sworn. Court may amend any formal defect.

XXV. AND be it enacted, that no person prosecuted shall be entitled to traverse or postpone the trial of any indictment found against him at any General or Quarter Sessions of the Peace: Provided always that if the Court, upon the application of the person so indicted or otherwise shall be of opinion that he ought to be allowed a further time, either to prepare for his defence or otherwise, such Court may adjourn the trial of such person to the next subsequent General or Quarter Sessions of the Peace, upon snch terms, as to bail or otherwise, as to such Court shall seem meet, and may respite the recognisances of the prosecutor and witnesses accordingly; in which case the prosecutor and witnesses shall be bound to attend to prosecnte and give evidence at such subsequent General or Quarter Sessions of the Peace, without entering into any fresh recognisances for that purpose.

Provision as to traversing indictment.

XXVI. AND be it enacted, that in any plea of autrefois convict or autrefois acquit, it shall be sufficient for any defendant to state he has been lawfully convicted or acquitted (as the case may be) of the said offence charged in the indictment.

Provision as to plea of autrefois convict and autrefois acquit.

XXVII. AND be it enacted, that whenever any person shall be convicted of any one of the offences following, as an indictable misdemeanor, that is to say, any cheat or fraud, punishable at common Law; any conspiracy to cheat or defraud, or to extort money or goods, or falsely to accuse of any crime, or to obstruct, prevent, pervert, or defeat the course of public justice; any escape or rescue from lawful custody on a criminal charge; any public and indecent exposure of the person; any indecent assault, or any assault occasioning actual bodily harm; any attempt to have carnal knowledge of a girl under twelve years of age; any public selling or exposing for public sale, or to public view, of any obscene book, print, picture, or other indecent exhibition; it shall be lawful for the Court to sentence the offender to be imprisoned for any term now

Punishment for certain indictable misdemeanours.

warranted by Law, and also to be kept to hard labour during the whole or any part of such term of imprisonment.

Interpretation of terms.

XXVIII. AND be it enacted, that in the construction of this Ordinance, the word "indictment" shall be understood to include "information," "inquisition," and "presentment," as well as indictment; and also any "plea," "replication," or other pleading, and any criminal record; and the terms "finding of the indictment" shall be understood to include "the taking of an inquisition," and "the exhibiting of an information," and "the making a presentment;" and whenever in this Ordinance, in describing or referring to any person or party, matter or thing, any word importing the singular number or masculine gender, is used, the same shall be understood to include and shall be applied to several persons and parties, as well as one person or party; and females as well as males, and bodies corporate as well as individuals, and several matters and things, as well as one matter or thing; and the word "property" shall be understood to include goods, chattels, money, valuable securities, and every other matter or thing, whether real or personal, upon or with respect to which any offence may be committed.

XXIX. AND be it enacted, that all sums of money payable under this Ordinance shall be paid over to the Colonial Treasurer of the said colony, for the public uses thereof.

CHARLES FITZGERALD,
GOVERNOR AND COMMANDER-IN-CHIEF.

Passed the Council, 22nd Dec. 1852.

A. O'GRADY LEFROY,
Clerk of the Council.

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