Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Hugo Levinger v. Our Sovereign Lady the Queen, from Victoria; delivered July 26th, 1870.

Present:—

LORD CAIRNS.
SIR JAMES W. COLVILE.
SIR JOSEPH NAPIER.

IN this case the Appellant was arraigned at Melbourne, in the Supreme Court of the Colony of Victoria, upon an information for murder, to which he pleaded not guilty, and put himself upon the country. He then suggested and set forth that he was an alien, and prayed the Queen's writ for having a Jury *de medietate* summoned for his trial on the information. This was granted, and a jury was returned and impanelled accordingly. The single question raised on this Appeal is whether the Appellant was entitled to challenge peremptorily one of the jurors who was an alien. The Supreme Court disallowed the challenge; the trial proceeded, and the Appellant was convicted.

The rule of the Common Law, as it has been modified by the 37th section of the Victorian Statute, provides that every person arraigned for any treason felony or misdemeanour, shall be admitted to challenge peremptorily to the number of twenty jurors. (Juries Statute 1865, No. 272.)

The right of peremptory challenge at Common Law, was a principal incident of the trial of felony. When Sir E. Coke comments upon the 33 Hen. VIII. c. 23, which for a time took away the right of peremptory challenge in cases of high treason, he says, "the end of challenge is to have "an indifferent trial, and which is required by law,

"and to bar the party indicted of his lawful chal-
"lenge is to bar him of a principal matter con-
"cerning his trial" (3 Inst. 27). In *Mansel* v. *Reg.* 8 Ell. & B. p. 71, Lord Campbell, C. J., observes that "unless this power were given under certain restric-
"tions to both sides, it is quite obvious that justice "could not be satisfactorily administered; for it "must often happen that a juror is returned on the "panel, who does not stand indifferent, and who "is not fit to serve upon the trial, although no legal "evidence could be adduced to prove his unfit-
"ness."

The Victorian Statute provides in section 36, "that in all inquests to be taken before any Court "wherein the Queen is a party, howsoever it be, "notwithstanding it be alleged by them that sue "for the Queen that the jurors of those inquests or "some of them be not indifferent for the Queen, "yet such inquests shall not remain untaken for "that cause; but if they that sue for the Queen "will challenge any of those jurors, they shall as-
"sign for their challenge a cause certain, and the "truth of the same challenge shall be inquired of "according to the custom of the Court, and it shall "be proceeded to the taking of the same inquisi-
"tions as it shall be found if the challenges be "true or not, after the discretion of the Court."

The right of the Crown, thus restricted, may be considered as in effect equivalent to a peremptory challenge if, without having to resort to such of the jurors as have been 'set by' for the time on the part of the Crown, there can be procured, from those returned on the panel, enough of persons not objected to to make a jury. The restriction in practice imposed on the Crown is that it shall not exercise its prerogative so as to make it necessary to put off the trial for want of a jury, such as the party arraigned is entitled to have upon his trial.

The right of this party to challenge peremptorily (but restricted to the number of twenty) is preserved under the 37th section in all cases of arraignment for any treason or felony, and it has been extended by this section to cases of misdemeanour.

It has been contended on the part of the Crown that this right of peremptory challenge, thus secured, was taken away in part by the Appellant's

having obtained the benefit of the 38th section, by which he was enabled, when arraigned for the felony, to claim a trial by a jury *de medietate*. The early statute which conferred this privilege on aliens in cases at the suit of the king was the 28 Edw. III. c. 13, s. 2, enacted "for the benefit and in favour of "aliens." The words of the enactment are in the affirmative, professing to confer a privilege, not to take away a right confessedly material to secure an indifferent trial which is required by law.

Under the 37th section of the Victorian Statute the right of peremptory challenge on the part of the prisoner on his arraignment is certain; but it is not equally certain that this right was taken away in part by the necessary operation of the 38th section; or that the rule of the Common Law, as to peremptory challenge, was interfered with in any such case by the necessary operation of 28 Edw. III. c. 13. In a case where the question arose as to the taking away by implication the right of peremptory challenge in felony (*Gray* v. *Reg.* 11 Cl. & Fin. 480), Tindal, C.J., said, "If the question be whether his "right to the peremptory challenge has or has not "been taken away, it appears to me that in accord- "ance with the general principle of decision applied "to Criminal Cases, 'tutius erratur in mitiori "'sensu,' the decision of such question is to be "given in favour of the prisoner, who is not to be "deprived by implication of a right of so much "importance to him, given by the Common Law and "enjoyed for many centuries, unless such implica- "tion is absolutely necessary for the interpretation "of the statute." An example of the like construction is to be found in Hawk. P. C. bk. 1, ch. 7, s. 9 (Felony and Misprision of Felony), where it is said, "If a statute create a felony, and says that the "offender shall suffer death, yet he shall in such "case have the benefit of clergy, for this, being a "privilege allowed by the Common Law, cannot "be taken away without express words."

The composition of a jury *de medietate* is prescribed by the statute, but the incidents of the trial are annexed by the Common Law, and are therefore implied and included in the statute. If on a *venire* of half denizens and half aliens, the Sheriff returns twelve as aliens, and among them some who in

truth are not such, the party may challenge the array for want of a sufficient number of aliens. (Hawk. P. C. bk. 2, ch. 43, s. 43.) There is no express provision in the statute for this, but it is not excluded, and that is enough. The right and the privilege are consistent and stand well together. Not only is there no inconsistency in retaining the right of peremptory challenge in a case like the present, and claiming the privilege of having a trial by a jury *de medietate*, but there are sufficient reasons for making use of both.

In addition to what has been observed by Lord Campbell, C.J., as to peremptory challenge, and which applies to all jurors impanelled on a trial for felony, there may be aliens with national prejudices and hostile feelings against the prisoner; and objections which he could not make out by legal evidence. There is not a reason assigned in books of authority in favour of the right of peremptory challenge that is not at least as applicable (if not in some instances more so) to an alien as to any of the other jurors. It is to be observed that by the 38th section an alien juror impanelled on a jury *de medietate* is not liable to be challenged for want of freehold or of any other qualification required by the Act. This is in accordance with the principle of the earlier statutes (9 Hen. VI., c. 29, and others), by which the laws relating to aliens as to holding property, were not allowed to interfere with the privilege of having a trial by a jury *de medietate*. The 34th section of the Victorian Statute makes the want of qualification according to the Act a ground of challenge, and, therefore, it was necessary to remove this hindrance to an alien juror serving on such a jury, under the 38th section. This section places him in the same position as if he had the qualification required by the Act, but leaves him subject to be challenged for any other cause of challenge; that is to say, for any personal disqualification at Common Law, except alienage itself. The statute being in the affirmative, leaves the Common Law as to these unaffected. This is in accordance with the view of Mr. Justice Willes in delivering the opinion of the Judges in *Mulcahy* v. *The Queen*, 3 L. R., H. of L. Cas. 315.

But for the express saving in favour of the alien juror, the disqualifications as to property would have attached, as in the case of a denizen juror. In every instance where the Legislature has not interfered in his favour, it will be found that an alien juror is dealt with as if he were a denizen. The closing words of the 38th section are obviously introduced *ex abundanti cautelâ*, and the words immediately preceding refer to challenges for cause, as distinguished from those that are peremptory.

It was not necessary to draw any distinction between the alien and the denizen moiety of the jury with reference to the law of peremptory challenge, the reason for which applied to both; but it was necessary to distinguish with reference to challenges for cause, and to make special provision as to these for the case of alien jurors on a jury *de medietate*. The words of the section relate to challenges for cause only, and are in the affirmative: so that the right of peremptory challenge is not in any way prejudiced.

Whenever the case requires it, and the reason of the rule applies, the law of juries, in the absence of a positive provision to the contrary, is applicable to jurors on a jury *de medietate*. The instance of a challenge to the array has been mentioned. There is another instance in the extension of the law as to a *tales*, where although the words in the statute were appropriate to the common trials of English, yet the law was extended to a jury *de medietate*. The case is reported in Popham 36, and is fully set out in 10th Rep. 104–6. No case has been cited before the decision of the Supreme Court in 1866, and no text book of authority has been referred to, in which the distinction contended for between the alien and the denizen portion of the jury *de medietate*, as to the law of peremptory challenge, has been suggested. The case of *Reg.* v. *Giorgetti*, 4 Foster & Finlayson, 546, seems to have proceeded on the principle that an alien juror impanelled was subject to peremptory challenge. As to the exercise of the right of the Crown, under the special circumstances of that case, it seems to have been reasonably restricted so as not to prejudice or abridge the right of the prisoner to have a jury *de medietate* to try him, so far, at least, as it was practicable to obtain such a jury.

The result is, that their Lordships are of opinion that the challenge put forward by the Appellant in this case ought to have been allowed. That neither in the provision for the composition of the jury *de medietate*, nor in that for relieving the alien jurors from liability to be challenged for want of a qualification under the Act, nor in that for preserving the liability for other causes of challenge existing at Common Law, is there to be found anything that takes away, or is inconsistent with, the right of peremptory challenge given by the Common Law and preserved by the Statute as a principal incident of the trial of the felony, and consequent upon arraignment. Their Lordships, therefore, will humbly advise her Majesty that the Appeal should be allowed, that the verdict and conviction should be quashed, and a *venire de novo* awarded.