11

IN THE

SUPREME COURT.

THE PEOPLE

AGAINST

CHARLES BENNETT.

Points for Defendant.

This was an indictment against the defendant for grand larceny. It charged him with having on the 12th day of March, 1866, at the town of Cortlandville, stolen a quantity of hams and shoulders, of the value of $130. The defendant pleaded not guilty. The indictment was brought to trial in the Court of Sessions of Cortland county in March, 1867. and a verdict of guilty was rendered. The prisoner was sentenced to the State's Prison for the term of five years, and a bill of exceptions having been settled, the case is brought here by writ of error.

POINT FIRST.

The second count in the indictment charges the goods stolen to be the property of the county of Cortland. The defendant interposed a challenge to the jurors drawn, on the ground that they, being inhabitants of said county of Cortland, were disqualified from sitting as jurors. The challenge was overruled, and the Court decided that the jurors were not so disqualified. (Fol. 16 to 19.)

The Court erred in overruling said challenge, as the reasons assigned are held in the books as good grounds of challenge to the array for favor.

Wood v. Stoddard, 2 *Johnson*, 194.
Bac. Abr. title *Juries* (*E.*)
Graham's Prac., 2*d edition*, 301–2.
3 *Burr*, 1847, 2 *Cow. Treatise*, 886 (2*d ed.*)
1 *R. S.*, 837, *sec.* 4, (*5th edition.*)

The provision in the Revised Statutes (1 R. S., 901, sec. 4,) that "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," has no application, for the reason that this section is applicable to the trial of *civil actions*, and not to indictments.

POINT SECOND.

The Court of Sessions erred in refusing to quash the indictment, for the reasons set forth at folio 19 and 20.

First—While it is conceded that the caption may be omitted, yet the indictment should show on its face that it was found and presented by a grand jury. This fact was necessary in order to authorize the Court of Sessions to try the defendant. "No person can be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury." Constitution, Art. 1, Sec. 6. For aught that appears, the indictment was found by a petit jury, as there are no words in the indictment itself descriptive of a grand jury. (See folio 10 to 14.)

Second—It is not alleged that the jury were charged and sworn by the Court of Sessions to inquire for the people of the State of New York, and for the body of the county of Cortland.

An indictment must state that the grand jury were then and there sworn and charged, and the omission of the words "then and there" will be fatal even on motion in arrest of judgment.

The People vs Gurnsey, 3 *Johns. Cases*, 265.
See also The People v. Fisher, 4 *Parker*, 206.

Third—Where a fact necessary to give jurisdiction is omitted in the indictment, the omission will not be cured by a statement of the fact in a caption to the indictment, or record of conviction.

Houser vs. The People, 46 *Barbour*, 33.

Fourth—The motion was in time, although made after a plea of not guilty.

The People v. Dawson, 25 *N. Y. Reports*, 399.

POINT THIRD.

The Court erred in charging that the title of Gates to the property was sufficient to sustain a verdict of guilty under the first count in the indictment, and also in charging that the title of Cortland county to the property was sufficient to sustain a verdict of guilty under the second count, (folio 65, 66,) and also in refusing to charge the second, third and fourth propositions found on pages 15 and 16, and in refusing to direct the jury to acquit the prisoner as requested at folio 47.

The only testimony in regard to the ownership of the property was given by Gates, the keeper of the Poor House. He testified that the pork was purchased by him for the use of the Poor House, under the direction of the County Superintendent of the Poor, (Alvah Benjamin,) and the hams and shoulders taken therefrom were smoked by the inmates of the County House. Gates was employed by the Superintendent at a salary of $400 per year. He says, "I had no interest in these hams, except as the employee of the Superintendent of the Poor." (See folio 31 to 36.)

First—It is clear that Gates was not owner, either general or special, of the property in question. He was the mere servant of the real own-

er, (the Superintendent of the Poor,) and his possession was the possession of his master.

Barbour's Crim. Law, 171.
Norton vs. The People, 8 *Cowen*, 137.
Roscoe's Crim. ev., 517.
Wharton's Crim. Law, 659.
The People vs. Call, 1 *Denio*, 120–123.
The People vs. Wood, 2 *Parker*, 22.
7 *Cowen R.*, 299, 6 *Barbour*, 362.
2 *Russel on Crimes*, 92, 2 *East.*, 652.

Second—The "county of Cortland" was not the owner, either general or special, of the property in question. It was not purchased or held as the property of the county within the statute (1 R. S., 846, sec. 1, 5th edition) It was purchased and held by the Superintendent of the Poor, as a body corporate, as supplies for the poor. Neither the county of Cortland, or the Board of Supervisors of said county, could have maintained an action of trespass for its removal or conversion. "All acts and proceedings by or against a county in its corporate capacity, shall be in the name of the Board of Supervisors of such county." (1 R. S., 846, sec. 3.) So that if the county could be considered the owner of this property, the ownership should have been laid in the Board of Supervisors.

Third—The title to this property was vested in the Superintendent of the Poor of Cortland county as a body corporate, and the indictment should have averred the ownership to be in said Superintendent.

By 2 R. S., 841, sections 32 to 50, Superintendents of the Poor are created a corporation with the usual powers of a corporation for public pur-

poses, and it is their duty to provide suitable places for keeping the poor; to establish prudential rules for the government of the paupers; to employ suitable keepers, officers and servants; to purchase furniture, implements and materials that shall be necessary for the maintenance of the poor; to sell and dispose of the proceeds of their labor; to draw from time to time on the County Treasurer for all necessary expenses incurred in the discharge of their duties; to audit and settle claims growing out of the support of the poor; to give a bond to account for all moneys which they shall receive; and to annually make an estimate of the sum necessary for the support of the poor for the ensuing year, and present the same to the Board of Supervisors, whose duty it shall be to raise this sum by assessment, and pay it to the County Treasurer, to be by him kept as a separate fund, distinct from the other funds of the county.

These provisions with others clearly show that Superintendents of the Poor in purchasing supplies for the poor, act independently of the county or the Board of Supervisors, and that the title to the supplies thus purchased, vests in the Superintendents as a body corporate.

Coats vs. The People, 4 *Parker Crim. R.*, 662.
Hayes vs. Symonds, 9 *Barbour*, 260.

Fourth—The Court should therefore have directed the jury to acquit the prisoner, because of the variance between the indictment and proof as to the ownership of the property. If it appears that the owner of the goods is another and

a different person from the person named in the indictment, the variance is fatal.

Wharton's Crim. Law, 659, *and cases above cited.*

POINT FOURTH.

The Court erred in refusing to charge that "in cases of felony, confessions are regarded as "the weakest and most suspicious of all testi- "mony, very liable to be obtained by artifice, "false hopes, promises of favor, menaces, sel- "dom remembered accurately, or reported with "precision, and incapable in their nature of be- "ing disproved by other negative evidence."

The witnesses on the part of the people had testified to the confessions of the prisoner made after his arrest, and under circumstances which seemed to encourage the suspicion that they must have misapprehended what he intended to say. Under such circumstances, the prisoner had the right to call upon the Court to instruct the jury as to the rule governing this species of evidence.

Courts are constantly in the habit of charging juries in the language of the above request, and Justice Blackstone uses those exact words in speaking of the weight to be attached to confessions in cases of *felony*. (4 Blackstone, 357. See also, 1 Russel on Crimes, 824, note (a).)

In New York the rule is laid down in substantially the same language.

"Evidence to establish a fact by the confessions of the party should always be scrutinized and received with caution, as it is the most dangerous evidence that can be admitted in a court of justice, and the most liable to abuse.

Law vs. Merrills, 6 *Wend.*, 277.
Garrison vs. Akin, 2 *Barbour*, 27.
Greenleaf's evidence, 272, *sec.* 214.

POINT FIFTH.

The judgment of the Court of Sessions should be reversed, and the defendant discharged.

R. H. DUELL,
Of Counsel for Defendant.