

may be had after a verdict for the defendant in case of the misdirection of the Judge, but not for a wrong conclusion of the Jury, *Wilson v. Rastall*, 4 T. R. 753; *Brook v. Middleton*, 10 East. 268; *Green v. Hall*, 9 Exch. 247. It is settled there also that, if it be actually commenced, it is the action of the informer, and consequently the Attorney-General cannot enter a *nolle prosequi* as to the informer, *Dr. Foster's case*, 11 Rep. 656, and in no case can the king bar the suit of the party grieved, nor proceed in it after the death of the plaintiff, see 2 Hawk. P. C. 392, and so if the *q. t.* informer die after verdict his executor may have judgment for his moiety, *Com. Dig. Action upon Stat. E. 2*, and it has been long held that informations do not abate by the death of the informer as to the king's part, *Hammond v. Griffith*, Cro. Eliz. 583. These principles would, it should seem, apply here, but the action is in the name of the State except where otherwise provided in the law; an order of Court being made, which is, technically, no part of the judgment, for the payment to him of the share to which he is entitled, *Rawlings v. the State*, 2 Md. 201; and by Art. 42, sec. 10⁹ of the Code, it is enacted that the part of any fine or forfeiture belonging to an informer shall not be remitted by the Governor, but he may remit any fine or forfeiture, or any part thereof, not belonging to an informer, and see sec. 11¹⁰ as to a *nolle prosequi* by the Governor; see also the note to *Kirkham v. Wheeley*, 1 Salk. 30, 6th Ed.; *Bac. Abr. tit. Action, qui tam*.

Suit on penal statute as bar to subsequent prosecution.—A suit actually depending on a penal statute may be pleaded in bar of a subsequent prosecution, being expressly averred to be for the same offence, as it may, though laid on a day different from that in the former. Notice of action is no commencement of it, *Gordon v. Powis*, 2 W. Black. 781, *contra* *Blackstone J.*, but its commencement is the day of suing out the writ, *Combe v. Pitt*, 3 Burr. 1423, from which case it appears also that the plea must aver the priority of the suit, and *the particular day must be 262 shown, and the very hour of its commencement may be shown if necessary. And a *bona fide* acquittal or conviction in any action on a penal statute, whether by the party grieved or a common informer, or a release *bona fide* from the party grieved or common informer after such conviction is a good bar of any subsequent prosecution for the same offence, but the Statute is express, otherwise, that no release of a common person can discharge a popular action.¹¹ However, the record of a recovery in another action cannot be given in evidence on the general issue but must be pleaded specially, for if it be pleaded, the plaintiff may reply *nul tiel record*, or that the recovery was by fraud to defeat a real prosecutor, which he cannot be prepared to show on the general issue, and the plea must also show that the plaintiff in the former action had priority of suit, *Jackson*

⁹ Code 1911, Art. 41, sec. 9.

¹⁰ Code 1911, Art. 41, sec. 10. Until the traverser pays the costs of the prosecution, a *nolle prosequi* granted by the governor is inoperative. *State v. Morgan*, 33 Md. 44.

¹¹ See *Girdlestone v. Brighton Co.*, 4 Ex. D. 107; 3 Ex. D. 137.