# CRIMINAL CODE

## OF CANADA.

*BY THE SAME AUTHOR.*

**A Practical Guide to Police Magistrates and Justices of the Peace.**

With an alphabetical synopsis of the Criminal Law and an analytical Index by JAMES CRANKSHAW, B.C.L., Barrister Montreal Bar. 1 vol. royal 8vo of 742 pages, 1895. ½ calf, $5.00.

"The work, while necessarily concise in its matter, is in reality very full in its treatment of the whole subject, and is the most complete work of its kind yet published in Canada."—*Canadian Law Times*, Toronto.

**An Analytical Synopsis of the Criminal Code, and of the Canada Evidence Act.**

By JAMES CRANKSHAW, B. C. L., Barrister, Montreal Bar. 1 vol. royal 8vo of 176 pages, 1899. Paper, $1.25 ; ½ skiver, $2.00.

"This analytical synopsis will doubtless be of great service to students and professors, and also to judges, magistrates and practitioners, who will find it valuable as an auxiliary hand book to larger commentaries and treatises on our criminal law."—*Mail and Empire*, Toronto.

C. THEORET, Law Publisher, Montreal.

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THE

# CRIMINAL CODE

## OF CANADA

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AND THE

## CANADA EVIDENCE ACT

WITH THEIR AMENDMENTS, INCLUDING THE AMENDING ACTS
OF 1900 AND 1901,

AND EXTRA APPENDICES

CONTAINING: THE IMPERIAL CRIMINAL EVIDENCE ACT, THE FOREIGN ENLISTMENT ACT, THE CANADIAN INTERPRETATION ACT AMENDMENT ACT, THE VICTORIA DAY ACT, THE DEMISE OF THE CROWN ACTS, THE ALIEN LABOR ACT, THE YUKON TERRITORY ACTS, THE CANADIAN FUGITIVE OFFENDERS' ACT AND EXTRADITION ACTS, THE EXTRADITION CONVENTION WITH THE UNITED STATES, AND A LIST OF EXTRADITION TREATIES, ETC.

BY

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BARRISTER, MONTREAL BAR.

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**SECOND EDITION.**

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TO THE LATE

SIR JOHN S. D. THOMPSON, K.C.M.G., Q.C., P.C.,

*Prime Minister and Minister of Justice*

OF THE DOMINION OF CANADA

THIS WORK

IS MOST RESPECTFULLY DEDICATED.

# PREFACE

## TO THE SECOND EDITION.

In the present edition, the statutory changes, additions and amendments made to the *Code* and to the *Canada Evidence Act* since they came into force (including the provisions of the Amending Acts of 1900 and 1901), have been incorporated in and added to the sections affected thereby.

Many of the comments and annotations of the first edition have been revised and amplified, the cases and authorities,—English, Canadian and American,—relating to the subjects thereof having been brought down to the present date.

Some of the subjects which have thus received special attention are Capacity for Crime, Compulsion, Necessity, Insanity, Execution of Warrants and Sentences, Suppression of Riots, Self-Defence, Defence of dwelling-house, Chatisement, Excess, Parties to Offences, Criminal Liability of Masters for Acts of Servants, Treason, Levying War, Riots, Forcible Entry and Detainer, Prize Fights, Sedition, Perjury, Escapes and Rescues, Sunday Observance, Indecent Acts, Obscene Publications, Seduction, Gaming, Betting, Lotteries, Vagrancy, Criminal Negligence, Murder, Manslaughter, Circumstantial Evidence, Indecent Assaults, Kidnapping, Unlawful Imprisonment, Rape, Abortion, Bigamy, Polygamy, Abduction, Libel, Theft, Receiving Stolen Goods, False Pre-

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The statutes relating to the Identification of Criminals and to the Granting of Tickets of Leave to Penitentiary and Prison Convicts are set out in their proper places; while appropriate extracts from and references to provincial statutes affecting the Criminal Law and the administration of Criminal justice have been made and annotated; and some of the penal clauses of the *Customs Act*, of the *Inland Revenue Act*, of the *Banking Act*, and of the *Dominion Elections Act*, 1900, as well as all the important sections of the *Adulteration Acts* have been introduced and annotated.

In Extra Appendices, at the end of the book, will be found the Imperial *Criminal Evidence Act*, the *Foreign Enlistment Act*, the Canadian *Interpretation Act Amendment Act*, the *Victoria Day Act*, the *Demise of the Crown Acts*, *the Alien Labor Act* (as amended to date), the *Yukon Territory Acts*, and the Canadian *Fugitive Offenders' Act* and *Extradition Acts*, with a list of extradition treaties between Great

Britain and foreign countries and references to certain special treaties, etc., which provide for the transfer to British territory, for purposes of trial, of any British subject who, after having committed a criminal offence within the limits of the British Empire, has escaped to and is found in certain of the territories of a foreign State with which there is any such special treaty, etc., such, for instance, as the Dominions of the Turkish Empire, of China, of Japan, of Corea and of Siam; which treaties, etc., have the effect of extending, as to British subjects, the provisions of the *Fugitive Offenders' Act* to certain places beyond the limits of the British Empire.

To make room for the additional matter above referred to, without materially increasing the bulk of the work as a whole, the Parliamentary Debates inserted at the end of the first edition have been eliminated from the present edition. These debates were never intended to serve as authority; but were included in the first edition, because it was thought that, while the Code was new, they might be considered useful in elucidating some of the subjects debated by the Parliamentary Committee which discussed the sections of the Code before being passed into law.

The Tables of Offences, (indictable and non-indictable), of their respective punishments, and of the tribunals by which they are triable, are placed, as in the first edition, at the end of the different Titles which relate to them; but, with regard to the list of limitations of time for prosecuting offences and with reference to the forms of indictment, (with statements of offences), a change has been made by placing this list and these forms all together at the end of the first division of the work.

J. C.

Montreal, 1st July 1901.

# PREFACE

## TO THE FIRST EDITION.

The present edition of the CRIMINAL CODE OF CANADA is designed to give a full general view of our criminal law and criminal procedure, and to be of practical use to Judges, Magistrates, Crown Officers, Lawyers, and others concerned in the administration of Justice. To this end, appropriate references to and extracts from the leading English, Canadian and American authors and reports, Imperial and Canadian Statutes, and the English Draft Code with the Report of the Royal Commissioners thereon, have been made, in the preparation of the notes and comments; many of the different sections of the Code itself are compared and collated; forms of indictment, tables of offences, indictable and non-indictable, and lists of the limitations of time for prosecuting offences, are placed at the end of the different Titles to which they respectively relate; the full text of the *Canada Evidence Act* 1893, is placed after the sections of the Code relating to procedure; and, at the end of the book, there is an extra appendix containing the *Extradition Act*, the *Extradition Convention* of 1889-90 with the United States, the *Fugitive Offenders' Act*, and the House of Commons Debates, of 1892, on the Code.

J. C.

Montreal, 18 Nov. 1893.

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(Amended by 56 V., c. 32, by 57-58 V., c. 57, by 58-59 V., c. 40, by 63-64 V., 46, and by 1 Edw. VII, c. 42.)

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—— R. *v.*, (1 Leach, 285)..... 526
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# LIST OF ABBREVIATIONS.

Abb. (N. Y.) App.. .. .. ..Abbott, New York Court of Appeals.
[ ] A. C.. .. .. .. .. .. ...Appeal Cases, (English Law Reports) [1891, and onwards].
Ad. & E. (*or* A. & E.).. ....Adolphus & Ellis Reports.
Ala.. .. .. .. .. .. .. .. ...Alabama.
Alb. L. J.. .. .. .. .. . . .Albany Law Journal.
All. N. B.. .. .. .. .. .. ...Allen's New Brunswick Reports.
Allen (*Mass*).. .. .. .. ....Allen, Massachusetts.
Am. & Eng. Ency. L.. .. ..American and English Encyclopædia of Law.
Am. Jur.. .. .. .. .. .. .. ..American Jurist.
Am. Rep.. .. .. .. .. .. ...American Reports.
Ann. Reg.. .. .. .. .. .. ...Annual Register.
Anon.. .. .. .. .. .. .. .. ....Anonymous.
App. Cas.. .. .. .. .. .. ...Appeal Cases (English Law Reports, 1890, and previously).
Arch. Cr. Pl. & Ev.. .. ....Archbold's Criminal Pleading and Evidence.
Arch. Qr. Sess.. .. .. .. ....Archbold's Quarter Sessions.

B. & Ald.. .. .. .. .. .. ....Barnewall & Alderson.
B. & Ad.. .. .. .. .. .. ....Barnewall & Adolphus.
B. & B. (*or* Brod. & B.)....Broderip & Bingham.
B. & C. (*or* B. & Cr.).. ....Barnewall & Cresswell.
B. C. R.. .. .. .. .. .. .. ..British Columbia Reports.
Bac. Ab.. .. .. .. .. .. ....Bacon's Abridgement.
Barn.. .. .. .. .. .. .. .. ....Barnardiston.
Beck. Med. Jur.. .. .. .. ..Beck's Medical Jurisprudence.
Bell C. C.. .. .. .. .. .. ...Bell's Crown Cases.
B. & S.. .. .. .. .. .. .. ....Best & Smith.
B. & P.. .. .. .. .. .. .. ....Bosanquet & Puller.
Bing.. .. .. .. .. .. .. .. ..Bingham.
Bish. New Cr. L. Com.. ....Bishop's New Criminal Law Commentaries.
Bish. Cr. Proc.. .. .. .. ....Bishop's Criminal Procedure.
Bl. Com.. .. .. .. .. .. .. ....Blackstone's Commentaries.
Bos. & P., N. R.. .. .. .. ..Bosanquet & Puller, New Reports.
Boys Cor.. .. .. .. .. .. ...Boys on Coroners.
Broom's Leg. Max.. .. .. ..Broom's Legal Maxims.
Broom's Com.. .. .. .. .. ..Broom's Common Law Commentaries.
Bro. Med. Jur. Ins.. .. ....Brown's Medical Jurisprudence of Insanity.
Bro. P. C.. .. .. .. .. .. ..Brown's Parliament Cases.
Bucknill Cr. Lun.. .. .. ...Bucknill on Criminal Lunacy.
Bucknill & Tuke Psych. Med.. .. .. .. .. .. .. ....Bucknill & Tuke on Psychological Medicine.
Bull. N. P.. .. .. .. .. .. ....Buller's Nisi Prius.
Burb. Dig.. .. .. .. .. .. ...Burbridge's Digest Criminal Law.
Burr.. .. .. .. .. .. .. .. ....Burrow.

Cald. .. .. .. .. .. .. .. .. ....Caldecott's Cases.
Cal.. .. .. .. .. .. .. .. .. ...California.

Camp. .. .. .. .. .. .. .. .. ....Campbell's Reports.
Can. Ann. Dig. .. .. .. .. .. ....Canadian Annual Digest.
Can. Cr. Cas. (*or* C. C. C.)..Canadian Criminal Cases.
C. C. R. .. .. .. .. .. .. .. .....Crown Cases Reserved.
Can. L. J. .. .. .. .. .. . . ....Canada Law Journal.
Can. L. T. .. .. .. .. .. .. ....Canadian Law Times, (Occasional Notes).
Can. S. C. (*or* S. C. R.) .....Canada Supreme Court Reports.
Carr. .. .. .. .. .. .. .. .. .....Carrington's Criminal Law.
C. & K. .. .. .. .. .. .. .. .. ..Carrington & Kirwan.
C. & M. (*or* Car. & M.).....Carrington & Marshman.
C. & P. .. .. .. .. .. .. .. .. ...Carrington & Payne.
Ch. App. .. .. .. .. .. .. .....Chancery Appeals, (English Law Reports).
[ ] Ch. .. .. .. .. .. .. .. .. ..Chancery, (English Law Reports), [1891 and onwards].
Ch. D. .. .. .. .. .. .. .. .. .....Chancery Division, — English Law Reports, — (1876 to 1890).
Chit. .. .. .. .. .. .. .. .. .. ...Chitty's Criminal Law.
Chit. Rep. .. .. .. .. .. .. .....Chitty's Reports.
Clarke Cr. L. .. .. .. .. .. .. ...Clarke's Criminal Law of Canada.
Clarke Extrad. (*or* Cl. Extr.).. .. .. .. .. .. .. .....Clarke on Extradition.
Clarke Mag. Man. .. .. .. .. ...Clarke's Magistrate's Manual (Canada).
Cl. & F. .. .. .. .. .. .. .. .. ...Clark & Finnelly.
Co. Litt. .. .. .. .. .. .. .. .. ..Coke upon Littleton.
Collis. Lun. .. .. .. .. .. .. .....Collison on Lunacy.
Comb. .. .. .. .. .. .. .. .. .. ...Comberbach.
C. B. .. .. .. .. .. .. .. .. .. ..Common Bench Reports.
C. B., N. S. .. .. .. .. .. .. .....Common Bench Reports, New Series.
C. P. .. .. .. .. .. .. .. .. .. ..Common Pleas (English Law Reports).
[ ] C. P. .. .. .. .. .. .. .. .. ...Common Pleas (English Law Reports), [1891 and onwards].
C. P. D. .. .. .. .. .. .. .. .. ...Common Pleas Division (English Law Reports).
Com. Dig. .. .. .. .. .. .. .. ...Comyn's Digest.
C. S. C. .. .. .. .. .. .. .. .. ..Consolidated Statutes of Canada.
C. S. L. C. .. .. .. .. .. .. .. ...Consolidated Statutes of Lower Canada.
C. S. U. C. .. .. .. .. .. .. .. ...Consolidated Statutes of Upper Canada.
Cranch. .. .. .. .. .. .. .. .. ...Cranch's United States Supreme Court Reports.
Cr. L. Mag. .. .. .. .. .. .. ....Criminal Law Magazine.
Cro. .. .. .. .. .. .. .. .. .. .. ..Croke's Cases.
Cromp. & M. .. .. .. .. .. .. ...Crompton & Meeson's Reports.
C. M. & R. .. .. .. .. .. .. .. ..Crompton, Meeson & Roscoe's Reports.
Cow. (*N. Y.*). .. .. .. .. .....Cowen, New York.
Cowp. .. .. .. .. .. .. .. .. ...Cowper's Reports.
Cox C. C. (*or* Cox). .. .. .. Cox's Criminal Cases.
Cush. (*Mass.*). .. .. .. .. .. ...Cushing, Massachusetts.

Dalt. .. .. .. .. .. .. .. .. .. ...Dalton's Justices.
D. & M. .. .. .. .. .. .. .. .. ..Davison & Merivale's Reports.
Deac. .. .. .. .. .. .. .. .. .. ..Deacon.
Dears. .. .. .. .. .. .. .. .. .. ...Dearsly's Crown Cases.
Dears. & B. (*or* D. & B.)...Dearsly & Bell's Crown Cases.
De G. .. .. .. .. .. .. .. .. .. ..De Gex.
Den. .. .. .. .. .. .. .. .. .. ..Denison's Crown Cases.
Den. & P. .. .. .. .. .. .. .. ....Denison & Pearce.
Den. (*N. Y.*). .. .. .. .. .....Denio, New York.
Dor. Q. B. .. .. .. .. .. .. .....Dorion's Queens Bench Reports (Quebec).
Doug. .. .. .. .. .. .. .. .. .. ....Douglas.
D. & L. .. .. .. .. .. .. .. .. ...Dowling & Lowndes' Reports.
D. & R. .. .. .. .. .. .. .. .. ...Dowling & Ryland's Reports.

East.. .. .. .. .. .. .. .. .. .. ..East's Reports.
East P. C.. .. .. .. .. .. .. .. ..East's Pleas of the Crown.
E. & B. (*or* El. & Bl.).. .. .. Ellis & Blackburn's Reports.
E. B. & E.. .. .. .. .. .. .. .. ..Ellis, Blackburn & Ellis' Reports.
E. & E.. .. .. .. .. .. .. .. .. ..Ellis & Ellis' Reports.
Ency. Pl. & Pr.. .. .. .. .. ..Encyclopædia of Pleading & Practice.
Eng. L. & Eq.. .. .. .. .. .. ..English Law & Equity.
Exch. (*or* Ex.).. .. .. .. .. ..Exchequer Reports (1848-1856).
Ex. D. (*or* Exch. D.).. .. .. ..Exchequer Division, — English Law Reports, — (1875 to 1890).
[ ] Exch.. .. .. .. .. .. .. .. ..Exchequer, — English Law Reports, — [1891 and onwards].

Fed. Rep.. .. .. .. .. .. .. .. ..Federal Reporter (U. S. Circuit and District Court Reports).
Fort.. .. .. .. .. .. .. .. .. .. ..Fortescue.
F. & F.. .. .. .. .. .. .. .. .. ..Foster & Finlason.
Fost.. .. .. .. .. .. .. .. .. .. ..Foster's Crown Cases.

G. & D. (*or* Gale & D. *or* G. & Dav.).. .. .. .. .. .. .. ..Gale & Davison's Reports.
G. & O.. .. .. .. .. .. .. .. .. ..Gelbert & Oxley's Reports (Nova Scotia).
Greenl. Ev.. .. .. .. .. .. .. .. ..Greenleaf on Evidence.
Greenw. & M. Mag. Guide..Greenwood & Martin's Magisterial Guide.
Guy For. Med.. .. .. .. .. .. ..Guy on Forensic Medicine.

Hale P. C.. .. .. .. .. .. .. .. ..Hale's Pleas of the Crown.
Hamilton & Godkin's Leg. Med.. .. .. .. .. .. .. .. .. ..Hamilton & Godkin's Legal Medicine.
Han.. .. .. .. .. .. .. .. .. .. ..Hannay's New Brunswick Reports.
Harris Cr. L.. .. .. .. .. .. .. ..Harris Criminal Law.
Hawk. P. C.. .. .. .. .. .. .. ..Hawkin's Pleas of the Crown.
Hist. Cr. L.. .. .. .. .. .. .. ..History of the Criminal Law (Stephens).
H. L. C.. .. .. .. .. .. .. .. .. ..House of Lords Cases in Appeal.
How. St. Tr.. .. .. .. .. .. .. ..Howell's State Trials.
H. & N.. .. .. .. .. .. .. .. .. ..Hurlstone & Norman.

Ill.. .. .. .. .. .. .. .. .. .. .. ..Illinois.
Ind.. .. .. .. .. .. .. .. .. .. ..Indiana.
Inst.. .. .. .. .. .. .. .. .. .. ..Institutes (Coke's).
[ ] Ir.. .. .. .. .. .. .. .. .. ..Irish Law Reports.
Ir. C. L. R.. .. .. .. .. .. .. ..Irish Common Law Reports.
Ir. L. T.. .. .. .. .. .. .. .. ..Irish Law Times.

Jerv. Cor.. .. .. .. .. .. .. .. ..Jervis on Coroners.
Jur.. .. .. .. .. .. .. .. .. .. ..The Jurist.
Jur., N. S.. .. .. .. .. .. .. ..The Jurist, — New Series.
J. P.. .. .. .. .. .. .. .. .. .. ..Justice of the Peace Reports.

Keb.. .. .. .. .. .. .. .. .. .. ..Keble's Reports.
Kel.. .. .. .. .. .. .. .. .. .. ..Sir John Kelyng's Crown Cases.

Leach.. .. .. .. .. .. .. .. .. ..Leach's Cases.
L. & C.. .. .. .. .. .. .. .. .. ..Leigh & Cave's Crown Cases.
L. C. J.. .. .. .. .. .. .. .. .. ..Lower Canada Jurist.
L. C. L. J.. .. .. .. .. .. .. ..Lower Canada Law Journal.
L. C. R.. .. .. .. .. .. .. .. ..Lower Canada Reports.
Ld. Raym.. .. .. .. .. .. .. ..Lord Raymond.
Lev.. .. .. .. .. .. .. .. .. .. ..Levine.
Lew.. .. .. .. .. .. .. .. .. .. ..Lewin's Crown Cases.
L. J., (C. P.).. .. .. .. .. .. ..Law Journal (Common Pleas).

L. J. Dig.. .. .. .. .. .. .. ....Law Journal Digest (1890-95).
L. J. (Exch.).. .. .. .. .....Law Journal (Exchequer).
L. J. (M. C.).. .. .. .. ....Law Journal (Magistrates Cases).
L. J. (P. C.).. .. .. .. .. ..Law Journal (Privy Council).
L. J. (Prob.).. .. .. .. .. ..Law Journal (Probate).
L. J. (K. B.).. .. .. .. .. ..Law Journal (King's Bench).
L. J. (Q. B.).. .. .. .. .. ..Law Journal (Queen's Bench).

L. N.. .. .. .. .. .. .. .. ..Legal News (Montreal).

L. R. (App. Cas.).. .. .. ...English Law Reports (Appeal Cases).
L. R. (C. P.).. .. .. .. .. ..English Law Reports (Common Pleas).
L. R. (C. C. R.).. .. .. .....English Law Reports (Crown Cases Reserved).
L. R. (Exch.).. .. .. .. ....English Law Reports (Exchequer).
L. R. (H. of L.).. . .. .. ..English Law Reports (House of Lords).
L. R. (P. C.).. .. .. .. .....English Law Reports (Privy Council).
L. R. (P. D. A.).. .. .. ....English Law Reports (Probate Divorce & Admiralty).
L. R. (Q. B.).. .. .. .. .. ..English Law Reports (Queen's Bench).
L. R., Ir.. .. .. .. .. .. .....Irish Law Reports.
L. T.. .. .. .. .. .. .. .. ..Law Times.
L. T., N. S.. .. .. .. .. .....Law Times, — New Series.

M. & G. (*or* M. & Gr.).. ...Manning & Granger's Reports.
Man. L. R.. .. .. .. .. .. ...Manitoba Law Reports.
Marsh.. .. .. .. .. .. .. .. ...Marshall's Reports.
Med. Jur.. .. .. .. .. .. .. ...Medical Jurisprudence.
M. & Sel.. .. .. .. .. .. .....Maule & Selwyn.
M. & W.. .. .. .. .. .. .. ...Meeson & Welsby.

Mer.. .. .. .. .. .. .. .. .. ...Merivale.
Metc. (*Mass.*).. .. .. .. .. ...Metcalf's Reports. Massachusetts.
Mew's Ann. Dig.. .. .. .. .. ..Mew's Annual Digest of English Reports.
Mich.. .. .. .. .. .. .. .. .. ...Michigan.
Mod.. .. .. .. .. .. .. .. .. ...Modern Reports.
Mon. L. Dig.. .. .. .. .. .. ...Monthly Law Digest. (Montreal.)
M. L. R.. .. .. .. .. .. .. .. ..Montreal Law Reports (Queen's Bench).
M. & M.. .. .. .. .. .. .. .. ..Moody & Malkin.
Moo (*or* Mood. C. C.).. .....Moody's Crown Cases.
Moo. & R. (*or* M. & Rob.)..Moody & Robinson.
M. & P.. .. .. .. .. .. .. .. ...Moore & Payne.
M. & S. (*or* Moo. & S.).. ..Moore & Scott.

Neb.. .. .. .. .. .. .. .. .. ...Nebraska.
N. B. R.. .. .. .. .. .. .. .. ..New Brunswick Reports.
N. & M. (*or* Nev. & M.)....Neville & Manning.
N. & P. (*or* Nev. & P.).. ..Neville & Perry.
N. S. R.. .. .. .. .. .. .. .. ..Nova Scotia Reports.

Odg. Lib. & Sl.. .. .. .. .....Odgers on Libel & Slander.
Oke's Mag. Syn.. .. .. .. .. ..Oke's Magisterial Synopsis.
Ont. App. R. (*or* Ont.A.R.).Ontario Appeal Reports.
Ont. Rep. (*or* O. R.).. .. .. Ontario Reports.
Ont. P. R.. .. .. .. .. .. .. ..Ontario Practice Reports.

Paley Sum. Con.. .. .. .. .. ..Paley on Summary Convictions.
P. E. I. Rep.. .. .. .. .. ...Prince Edward Island Reports.
P. Wms.. .. .. .. .. .. .. .....Peere Williams.
Pa.. .. .. .. .. .. .. .. .. ...Pennsylvania.
P. & D. (*or* P. & Dav.).....Perry & Davison

P. D.. .. .. .. .. .. .. .. ....Probate Divorce & Admiralty Division, — English Law Reports.
Plow. (*or* Plowd).. .. .. .. ..Plowden.
P. & B.. .. .. .. .. .. .. .. ...Pugsley & Burbridge's Reports, New Brunswick.
Pugs.. .. .. .. .. .. .. .. ....Pugsley's Reports, New Brunswick.

Q. B.. .. .. .. .. .. .. .. .. ...Queen's Bench Reports (1841-1852).
Q. B. D.. .. .. .. .. .. .. ....English Law Reports (Queen's Bench Division).
[ ] K. B.. .. .. .. .. .. .. ...English Law Reports (King's Bench), [1900 and onwards].
[ ] Q. B.. .. .. .. .. .. .....English Law Reports (Queen's Bench), [1891 and onwards].
Q. L. R.. .. .. .. .. .. .. ...Quebec Law Reports.
Que. Jud. Rep. (K. B.).. ..Quebec Judicial Reports (King's Bench).
Que. Jud. Rep. (Q. B.).. ..Quebec Judicial Reports (Queen's Bench).
Que. Jud. Rep. (S. C.).. ...Quebec Judicial Reports (Superior Court).
Que. P. R.. .. .. .. .. .. ..Quebec Practice Reports.

Ray Med. Jur. of Ins.. .. ..Ray's Medical Jurisprudence of Insanity.
R. S. C.. .. .. .. .. .. .. ...Revised Statutes of Canada.
R. S. B. C.. .. .. .. .. .. ..Revised Statutes of British Columbia.
R. S. N. B.. .. .. .. .. .. ..Revised Statutes of New Brunswick.
R. S. N. S.. .. .. .. .. .. ..Revised Statutes of Nova Scotia.
R. S. O.. .. .. .. .. .. .. ..Revised Statutes of Ontario.
Rev. de Jur.. .. .. .. .. .. ...Revue de Jurisprudence, P. Q.
Rev. Leg. (*or* R. L.).. .. ...Revue Légale, (P. Q.).
Roscoe Cr. Ev.. .. .. .. .....Roscoe's Criminal Evidence.
R. & C.. .. .. .. .. .. .. ...Russell & Carsley's Reports, Nova Scotia.
R. & G.. .. .. .. .. .. .. ..Russell & Geldert's Reports, Nova Scotia.
R. & R. (*or* Russ. & Ry.)...Russell & Ryan.
Russ. Cr.. .. .. .. .. .. .....Russell on Crimes.
R. & M. (*or* Ry. & M.).. ...Ryan & Moody.

Salk.. .. .. .. .. .. .. .. ....Salkeld's Reports.
S. C. R.. .. .. .. .. .. .. ...Supreme Court Reports, (Canada).
Show.. .. .. .. .. .. .. ....Shower.
Sid.. .. .. .. .. .. .. .. ....Siderfin.
Sir T. Raym.. .. .. .. .. ...Sir T. Raymond's Reports.
Sm. L. C.. .. .. .. .. .. ....Smith's Leading Cases.
Sol. J.. .. .. .. .. .. .. ..Solicitor's Journal.
Stark, Ev.. .. .. .. .. .. ..Starkie on Evidence.
Stark.. .. .. .. .. .. .. ...Starkie's Reports.
Steph. Comm.. .. .. .. .....Stephen's Commentaries.
Steph. Dig. C. L.. .. .. .....Stephen's Digest of Criminal Law.
Steph. Dig. Cr. Pro.. .. ....Stephen's Digest of Criminal Procedure.
Steph. Gen. View C. L.. ....Stephen's General View of Criminal Law.
Steph. Hist. C. L.. .. .. ....Stephen's History of the Criminal Law.
Stone's Just. Man.. .. .. .. Stone's Justices Manual.
Str.. .. .. .. .. .. .. .. ...Strange's Reports.
St. Tr.. .. .. .. .. .. .. ....State Trials.

Tasch. Cr. Code.. .. .. .. ..Taschereau's Criminal Code.
Times L. R.. .. .. .. .. ....Times Law Reports.
T. R.. .. .. .. .. .. .. .. ....Term Reports.
Tayl. Ev.. .. .. .. .. .. ...Taylor on Evidence.
Taunt.. .. .. .. .. .. .. ....Taunton's Reports.
Tex.. .. .. .. .. .. .. .. ..Texas.
Tyrw. (*or* Tyr.).. .. .. ....Tyrwhitt.

U. C., C. P.. .. .. .. .. .. .. ..Upper Canada, Common Pleas.
U. C., O. S.. .. .. .. .. .. .. ....Upper Canada, Old Series.
U. C., Q. B.. .. .. .. .. .. .. ..Upper Canada, Queen's Bench.

Va.. .. .. .. .. .. .. .. .. .. .. ...Virginia.
Ventr.. .. .. .. .. .. .. .. .. .. ....Ventris.
Ves.. .. .. .. .. .. .. .. .. .. .. ....Vesey.
Viner's Abr.. .. .. .. .. .. .. .. ..Viner's Abridgment.
Vt.. .. .. .. .. .. .. .. .. .. .. ..Vermont.

Wall. Jr.. .. .. .. .. .. .. .. ....Wallace Junior's United States Circuit Court.
Warb. L. Cas.. .. .. .. .. .. .. ....Warburton's Leading Criminal Law Cases.
W. Bl.. .. .. .. .. .. .. .. .. .. ....William Blackstone's Reports.
Whart. C. L.. .. .. .. .. .. .. .. ..Wharton's Criminal Law.
Whart. & St. Med. Jur.. .. ..Wharton & Stile's Medical Jurisprudence.
Wheat.. .. .. .. .. .. .. .. .. .. ...Wheaton's Reports.
Wis.. .. .. .. .. .. .. .. .. .. .. ..Wisconsin.
W. N.. .. .. .. .. .. .. .. .. .. ....Weekly Notes.
W. R.. .. .. .. .. .. .. .. .. .. ....Weekly Reporter.
Wms. Saun.. .. .. .. .. .. .. .. ....William's Saunder's Reports.
Woodm. & T. For. .... .. .. ..Woodman & Tidy's Forensic Medicine.

# AMENDMENTS

*Not incorporated in the body of this Edition.*

**Lotteries.**—Section 2 of the Criminal Code Amendment Act, 1901, (1 Edw. VII, c. 42) amends section 205 of the Criminal Code by substituting for subsection 6 thereof, as enacted by chapter 46 of the Statutes of 1900, the following:--

"6. This section does not apply to —

(*a*) the division by lot or chance of any property by joint tenants, or tenants in common, or persons having joint interests (*droits indivis*) in any such property; or —

(*b*) raffles for prizes of small value at any bazaar held for any charitable or religious object, if permission to hold the same has been obtained from the city or other municipal council, or from the mayor, reeve, or other chief officer of the city, town or other municipality, wherein such bazaar is held, and the articles raffled for thereat have first been offered for sale and none of them are of a value exceeding fifty dollars."

NOTE. — Subsection 6 of section 205 of the Criminal Code, — as it stood originally,—contained, besides sub paragraphs (*a*) and (*b*), two other sub paragraphs (*c*) and (*d*) relating, as to one of them, to the "distribution by lot among the members or ticket holders of any incorporated society established for the encouragement of art, of any paintings, drawings or other work of art produced by the labour of the members of, or published by or under the direction of, such incorporated society;" and relating, as to the other of them, to "the Credit Foncier du Bas-Canada" and to "the Credit Foncier Franco-Canadien." But both these subparagraphs have been struck out, — one by the Criminal Code Amendment Act, 1900, and the other by the Criminal Code Amendment Act, 1901. So, that, as the law now stands, there is no exemption in favor of distributions by lot among members of art societies, nor in favor of the Credit Foncier du Bas-Canada nor the Credit Foncier Franco-Canadien.

**Cattle Frauds.**. — Section 2 of the Criminal Code Amendment Act 1901 amends section 331A of the Criminal Code as enacted by chapter 46 of the statutes of 1900, by repealing the same and substituting the following therefor: —

**331A.** Every one is guilty of an indictable offence and liable to three years' imprisonment who —

(*a*) without the consent of the owner thereof fraudulently takes, holds, keeps in his possession, conceals, receives, appropriates, purchases or sells, or fraudulently causes or procures, or assists in the taking possession, concealing, appropriating, purchasing or selling of any cattle which are found astray; or

(*b*) fraudulently refuses to deliver up any such cattle to the proper owner thereof, or to the person in charge thereof on behalf of such owner, or authorized by such owner to receive such cattle; or

(*c*) without the consent of the owner, fraudulently, wholly or partially obliterates, or alters or defaces, or causes or procures to be obliterated, altered or defaced, any brand or mark on any cattle, or makes or causes or procures to be made any false or counterfeit brand or mark on any cattle."

**Imprisonment in Penitentiary, etc.** — Section 2 of the Criminal Code Amendment Act, 1901, amends section 955 of the Criminal Code by inserting at the end of subsection 2 thereof the following paragraph: —

"(*b*) In the Province of Manitoba any one sentenced to imprisonment for such a term may be sentenced to imprisonment in any one of the common gaols in that Province unless a special prison is prescribed by law."

NOTE.—All the other amendments made to the Code by the 1 Edw. VII. c. 42. will be found incorporated in the sections to which they relate. (See sections 707A, 714A, and 801, *post.*)

# INTRODUCTION.

**Basis of the Code.** — The CRIMINAL CODE OF CANADA, before being passed into law, was submitted to and carefully considered and revised by legal experts selected from and forming a Joint Committee of the two Houses of Parliament, and was also critically examined and fully discussed in each House by a Committee of the whole. It is founded upon the English Draft Code of 1880, on Stephen's Digest of the Criminal Law of England, on Burbridge's Digest of the Canadian Criminal Law, and upon Canadian Statutes. It is a codification of both the common and the statutory law relating to criminal matters and criminal procedure; but, while it aims at superseding the staturory law, it does not abrogate the rules of the common law. These are retained, and will be available, whenever necessary, to aid and explain the express provisions of the Code and of such statutes as remain unrepealed, or to supply any possible omissions, or to meet any new combination of circumstances that may arise; so that, in this respect, all that elasticity which is claimed for the Common law rules and principles of the old system is preserved for the system established by the Code.

**Codification.** — In the Report of the Royal Commissioners appointed to consider the provisions of the English Draft Code, the following general remarks are to be found with reference to codification: —

"The question whether the reduction of the criminal law of England, written and unwritten, into one code is either desirable or practicable is one which has been much considered. In 1833, 1836, and 1837, three different commissions were issued, under which eight Reports were made. In 1845, a fourth commission was issued, under which five Reports were made. In the fourth report of the Commissioners of 1845 is a draft of a Bill for consolidating, into one statute, the written and unwritten law relating to the definitions of crimes and punishments. This Bill was in-

troduced into the House of Lords, in 1848, by Lord Brougham, but was not further proceeded with.

"In 1852, Lord St. Leonards, then Chancellor, took up the matter, and gave directions for preparing separate Bills for the codification of the criminal law on separate subjects. One Bill, for the codification of the law as to offences against the person, was accordingly prepared, and was introduced in the House of Lords, by Lord St. Leonards, and referred to a Select Committee comprising (amongst others) Lords Lyndhurst, Brougham, Campbell, Truro, and Cranworth. That Select Committee considered the Bill, and made many amendments in it, but had not completely revised it when, on the change of government, the matter dropped.

"In 1853, the consideration of the subject was resumed, and Lord Cranworth (then Chancellor) sent a copy of the Bill, as amended by the Select Committee, to the Judges, requesting their opinions on it. These opinions were unfavorable; and the Chancellor thereupon requested and received, in answer to the criticisms of the Judges, a memorandum, from Messrs. Greaves and Lonsdale, the gentlemen who had prepared the Bill.

"These papers were laid before the House of Lords, and are the Sessional Papers No. 19 and No. 180 of 1854.

"The plan of codification was abandoned by Lord Cranworth; but eight Bills were prepared under his directions, and, after much consideration, nine other Bills were prepared in 1856.

"Of these last, seven became, with some alterations, the Acts well known as Greaves' Criminal Consolidation Acts, 24 and 25 Vict., cc. 94, 95, 96, 97, 98, 99 and 100. These Acts have, undoubtedly, worked very well, and there have been few difficulties as to the interpretation of their clauses; but they make no attempt at codification. For example, c. 100, sec. 1 enacts that whosoever is convicted of murder shall suffer death, but leaves it to the common law to say what is murder; and sec. 20 enacts that whosoever shall unlawfully wound shall be liable to penal servitude, but leaves it to the common law to say under what circumstances wounding is not unlawful.

"The Reports above mentioned contain a great deal of very valuable information. We have consulted and referred to them; and though we dare not say we have considered everything of value to be found in such an immense mass of printed matter, we hope that nothing very material has escaped our notice.

"We have also considered, with care, Lord St. Leonards' Bill as amended by the Select Committee, and the criticisms of the judges as found in the Sessional Papers of 1854. These criticisms (many of which were unsubstantial and needlessly refined) may be taken to shew that to frame a code properly is a very *difficult* task; but we do not think they, by any means, justify the conclusion that the undertaking is *impracticable*.

"We deem it expedient to make an attempt to remove certain misconceptions, relating to codification, which we have reason to believe affect the judgment formed by many persons upon the possibility and the utility of the undertaking. These misconceptions seem to us to originate in a wrong estimate of what can be and is proposed to be effected by codification.

"It is assumed that the object of the process is to reduce to writing the whole of the law upon a given subject in such a manner, that, when the code becomes law, every legal question which can arise upon the subject with which it deals will be provided for by its express language. When any particular attempt at codification is judged by this standard, it is easy to shew that the standard is not attained.

"It is also common to argue that, even if such a standard were attained, the result would not be beneficial, as it would deprive the law of its 'elasticity,' by which is understood the power which the Courts of Justice are said to possess of adjusting the law to changing circumstances by their decisions on particular cases. It is said that the law of this country is in a state of continual development; that judicial decisions make it more and more precise and definite by settling questions previously undetermined; and that the result is to adjust the law to the existing habits and wants of the country. To this process it is said that codification, so far as it goes, would put an end, and that the result would be to substitute a fixed inelastic system for one which possesses the power of adjustment to circumstances.

"It appears to us that these observations may be answered by pointing out the object and limits of codification, and by examining the real nature of the change which codification would produce.

"In the first place, it must be observed that codification merely means the reduction of the existing law to an orderly written system freed from the needless technicalities, obscurities, and other defects which the experience of its administration has disclosed,

The process must be gradual. Not only must particular branches of the law be dealt with separately, but each separate measure intended to codify any particular branch must of necessity be more or less incomplete. No one great department of law is absolutely unconnected with any other. For instance, bigamy is a crime, but, in order to know whether a person has committed bigamy, it is necessary to know whether his first marriage was valid. Thus, the definition of the crime of bigamy cannot be completely understood by any one who is unacquainted with the law relating to marriage. The definition of theft, again, involves a knowledge of the law relating to property, and this connects itself with the law of contract and many other subjects.

"There are, moreover, principles, underlying every branch of the law, which it would be impracticable to introduce into a Code dealing with a particular branch only. The principles which regulate the construction of statutes supply an illustration of this. A criminal code must, of course, be construed like any other Act of Parliament, but it would be incongruous to embody in a criminal code the general rules for the construction of statutes, even if it were considered desirable to reduce them to a definite form.

"It is, however, easy to exaggerate the degree of this incompleteness. Practically, the great leading branches of the law are to a great extent distinct from each other; and there is probably no department which is so nearly complete in itself as the Criminal Law. The experience of several foreign countries and of British India has proved that the law relating to crimes is capable of being reduced to writing in such a manner as to be highly useful. Indeed, a very large and important part of the criminal law of this country is already reduced to writing, in statutes, and, in particular, that portion dealt with by the Consolidation Acts of 1861. And there is no distinction, in the nature of the subject, between the parts of the criminal law which are written and the parts which are not written. High treason is defined by statute, and so is bribery. Why should it be impossible to define murder or theft?

"The unwritten portion of the criminal law includes the three following parts: 1., principles relating to matter of excuse and justification for acts which are *primâ facie* criminal; 2., the definitions of murder, manslaughter, assault, theft, perjury, forgery, libel, unlawful assembly, riot, and some other offences of less fre-

quent occurrence and importance; and 3., certain parts of the law relating to procedure. To do for these parts of the criminal law what has already been done for the rest of it is, no doubt, a matter requiring labour and care; but when so much of the work has been already done, it seems unreasonable to doubt either that the remaining part of the criminal law can be reduced to writing, or that, when it is written down and made to form one body with the parts already written, the whole will not be improved.

"The objection most frequently made to codification,—that it would, if successful, deprive the present system of its *'elasticity.'*—has, we have reason to believe, exercised considerable influence; but when it is carefully examined, it will, we think, turn out to be entitled to but little, if any, weight. The manner in which the law is, at present, adapted to circumstances is, *first*, by legislation, and, *secondly*, by judicial decisions. Future legislation could, of course, be, in no degree, hampered by codification. It would, on the other hand, be much facilitated by it. The objection under consideration applies, therefore, exclusively to the effects of codification on the course of judicial decision. Those who consider that codification will deprive the common law of its 'elasticity' appear to think that it will hamper the judges in the exercise of a discretion which they are, at present, supposed to possess in the decision of new cases as they arise.

"There is some apparent force in this objection, but its importance has, to say the least, been largely exaggerated, and it is, in our opinion, certainly not sufficient to constitute, (as some people regard it), a fatal objection to codification. In order to appreciate the objection, it is necessary to consider the nature of this so-called discretion which is attributed to the judges. It seems to be assumed that, when a judge is called on to deal with a new combination of circumstances, he is at liberty to decide according to his own views of justice and expediency; whereas, on the contrary, he is bound to decide in accordance with principles, already established, which he can neither disregard nor alter, whether they are to be found in previous judicial decisions or in books of recognized authority. The consequences of this are, *first*, that the elasticity of the common law is much smaller than it is often supposed to be; and, *secondly*, that, so far as a Code represents the effect of decided cases and established principles, it takes from the judges nothing which they possess at present.

"For example, it never could be suggested that a judge in this country has any discretion, at the present day, in determining what ingredients constitute the crime of murder, or what principles should be applied in dealing with such a charge under any possible state of circumstances: and yet the common law definition of murder has in its application received a remarkable amount of artificial interpretation. The same observation is applicable to every other known offence.

"In fact, the elasticity so often spoken of as a valuable quality would, if it existed, be only another name for uncertainty. The great richness of the law of England in principles and rules embodied in judicial decisions, no doubt, involves the consequence that a code, adequately representing it, must be elaborate and detailed; but such a code would not, (except perhaps in the few cases in which the law is obscure), limit any discretion now possessed by the judges. It would simply change the form of the rules by which they are bound.

"The truth is that the expression, '*elasticity*,' is altogether misused when it is applied to English law. The great characteristic of the law of this counry, at all events of its criminal law, is, that it is extremely detailed and explicit, and leaves hardly any discretion to the judges. This may be shown by comparing it with the law of France. The criminal law of France is founded upon the *code Pénal*, but the decisions of the courts as to the meaning of the code, do not form binding precedents; and the result is that the French Courts can, (within the limits prescribed by the words of the *Code Pénal*), decide according to their own views of justice and expediency. In the exercise of this discretion, they are, of course, guided, though they are not bound, by previous decisions. The result is that French criminal law under the *Code Pénal*, is infinitely more elastic than the Criminal Law of England is or ever has been, although the latter is founded on unwritten definitions and principles. For instance, it is stated in a work of great authority, (Chauveau et Hélie, "*Théorie du Code Pénal*," III, 487-9, Edn. 1861), that, after holding for 27 years, that to kill a man in a duel did not fall within the definition of "*Assassinat*," given in the *Code Pénal*, the Court of Cassation decided, in 1837, that such an act did fall within it. The authors of the work in question argue, at great length, that the earlier decisions were right, and ought to be followed. A comparison of the provisions

contained in Part III of our Draft Code, (1) with the provisions, on the same and similar subjects, in the *Code Pénal*, and the German STRAFGESETZBUCH (2) will show how numerous and important are the questions which these codes leave to be decided, as they arise, by judges and juries. We may observe, that it is this generality of language, leaving so much to be supplied by judicial discretion, which gives to the foreign Codes that appearance of completeness which creates so much misconception as to what can or ought to be effected by a code for this country.

"We think that the precise and explicit character of our own law is one of its most valuable qualities, and that one great advantage of codification would be that in giving the result of an immense amount of experience in the shape of definite rules, it would preserve this valuable quality.

"We do not, however, mean to assert that this particularity is always necessary. Wherever precise and definite propositions are to be conveyed, our rules for the construction of statutes, in many cases, prohibit the employment of general language, and require elaboration and detail in the structure of a Code; but where the principles of our law admit of any matter being left to the so called discretion of the judge or jury, as the case may be, this discretion can be preserved in a code by the use of general language. An illustration is supplied by the Extradition Act, (33 and 34 Vict. c. 52, s. 3), which enacts, amongst other things, that, a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character. It is obvious that the employment of the expression, '*an offence of a political character*,' might, under circumstances easy to imagine, impose upon the tribunal the necessity of deciding questions of extreme delicacy and difficulty, towards the decision of which the mere words of the Legislature would contribute little or nothing. Another illustration may be found in section 39 of 33 and 34 Vict. c. 9, where a crime is referred to as '*of the character known as agarian*.' Numerous instances occur in the Draft Code in which we have thus, designedly and of necessity, employed general language. In the part on 'Matters of excuse and justifi-

(1) Part III of the English Draft Code relates to *Matters of Justification or Excuse*, and corresponds with Part II of the Criminal Code of Canada.

(2) German Penal Statutes.

cation,' such expressions as the following frequently occur: '*Force reasonably necessary for preventing the continuance or renewal of a breach of the peace*': and '*Force not disproportioned to the danger to be apprehended from the continuance of the riot.*' In the provision relating to provocation, we speak of '*an insult of such a nature as to deprive an ordinary person of the power of self-control;*' and many other expressions of the like kind occur in different parts of the Draft Code. All of them leave, and are intended to leave, a considerable latitude to the jury in applying the provisions of the Draft Code to particular states of fact. In other cases a considerable amount of discretion is given to the court. Thus, for instance, it is declared to be a question of law whether a particular order given for the suppression of a riot is '*manifestly unlawful*': whether the occasion of the sale, publishing, or exhibition of certain classes of books, engravings, &c. is such '*as might be for the public good*,' and whether there is evidence for the jury of '*excess*.' Again, all the provisions relating to libel are so drawn that wide latitude would be left to the jury in determining whether a given publication is or is not libellous.

"We believe, upon the whole, that upon a detailed examination of the Draft Code, it will be found that, in respect of elasticity, it makes very little, if any, change in the existing law. It clears up many doubts and removes many technicalities, but it neither increases nor diminishes, to any material extent, if at all, any discretion at present vested in either Judges or Juries.

"It may be objected that section 5 of the Draft Code constitutes an exception to this general remark. It provides that, for the future, all offences shall be prosecuted either under the Code or under some other statute, *and not at common law*. The result of this provision would be to put an end to a power attributed to the judges, in virtue of which they have, (it has been said), declared acts to be offences at common law, although no such declaration was made before. And it is indeed the withdrawal of this supposed power of the judge to which the argument of want of elasticity is mainly addressed.

"It is worth while to give instances of the manner in which at different times this doctrine has been put forward and acted upon. Of the weakness of the administration of justice in the Middle Ages, the impediments opposed to it by what was then called maintenance, the establishment of the Court of Star Chamber pro-

fessedly to remedy its defects, and the abuses which led to the abolition of that Court in Charles I.'s reign, it is unnecessary to speak. It would seem, however, that in early times the courts were so little disposed to exercise the supposed power of declaring new offences that perjury by a witness was never treated as an offence, (except under certain statutes of Henry VIII and Elizabeth), till it was declared to be one by the Court of Star Chamber.

"After the Restoration, the Court of King's Bench took upon itself some of the functions of the Star Chamber. In the well known case of Sir Charles Sedley, for instance, who conducted himself in public with gross indecency, the justices told him that notwithstanding there was not then any Star Chamber, yet they would have him know that the Court of King's Bench was the *custos morum* of all the King's subjects (17 St. Tri. 155). (3) In the case of Edmund Caril, who was prosecuted for publishing obscene libels in 1727, the court seems to have proceeded upon a similar principle, and the same course appears also to have been taken in several instances upon the prosecution of blasphemous libels. The principle was stated in very wide terms in discussions upon the law of copyright, first by Mr. Justice Willes, (Lord Mansfield's colleague), and afterwards by Lord Chief Baron Pollock. Mr. Justice Willes spoke of justice, moral fitness, and public convenience which when applied to a new subject make common law without a precedent. (Millar v. Taylor, 4 Burr. 2312), (4) Lord Chief Baron Pollock, many years afterwards, referring to this passage, observed. 'I entirely agree with the spirit of this passage so far as it regards the repressing what is a public evil, and preventing what would become a public mischief.' (Jefferys v. Boosey, 4 H. L. C., 936) (5).

"Though the existence of this power as inherent in the judges has been asserted by several high authorities for a great length of time, we do not think that any attempt would be made to exercise it at the present day; and any such attempt would be received with great opposition and would place the Bench in an invidious position.

"In by-gone ages, when legislation was scanty and rare, the powers referred to may have been useful and even necessary; but

(3) Sir Charles Sedley's Case, 17 St. Tri., 155.
(4) Millar v. Taylor, 4 Burr., 2312.
(5) Jefferys v. Boosey, 4 H. L. C., 936.

that is not the case at the present day. Parliament is regular in its sittings and active in its labors; and if the protection of society requires the enactment of additional penal laws Parliament will soon supply them. If Parliament is not disposed to provide punishments for acts which are upon any ground objectionable or dangerous, the presumption is that they belong to that class of misconduct against which the moral feeling and good sense of the community are the best protection. Besides, there is every reason to believe that the criminal law is and for a considerable time has been sufficiently developed to provide all the protection for the public peace and for the property and persons of individuals which they are likely to require under almost any circumstances which can be imagined; and this is an additional reason why its further development ought in our opinion to be left in the hands of Parliament. If it should turn out that we have overlooked some common law offence, we think it better to incur the risk of giving a temporary immunity to the offender than to leave any one liable to a prosecution for an act or omission which is not declared to be an offence by the Draft Code itself or some other Act of Parliament.

"But whilst we exclude from the category of indictable offences any culpable act or omission not provided for by this or some other Act of Parliament, there is another branch of the unwritten law which introduces different considerations, namely, the principles which declare what circumstances amount to a justification or excuse for doing that which would be otherwise a crime, or at least would alter the quality of the crime. In the cases of ordinary occurrence, the decisions of the Courts and the opinions of great lawyers enable us to say how the principles of the law are to be applied. And ,so far, the unwritten law may be digested without extreme difficulty and with practical advantage, and, so far, it may be settled and rendered certain. In our opinion, the principles of the common law on such subjects, when rightly understood, are founded on sense and justice. There are a few points on which we venture to suggest alterations, which we shall afterwards state in detail. At present, we desire to state that in our opinion it is, if not absolutely impossible, at least not practicable to foresee all the various combinations of circumstances which may happen but which are of so unfrequent occurrence that they have not hitherto been the subject of judicial consideration, although they

might constitute a justification or excuse, and to use language at once so precise and clear and comprehensive as to include all cases that ought to be included and not to include any case that ought to be excluded."

**Judicial objections to the abolition of the common law.**—Although, as stated by the Royal Commissioners, in the beginning of their remarks, above quoted, the opinions of the English Judges on the Bills sent to them by Lord Cranworth were unfavorable, it would seem, that the main objection of these judges was not directed so much against the principle of codification itself as against any such system of codification as involved the abolition of the common law and all its rules.

For, instance, LORD CHIEF BARON POLLOCK said: "The abolition of the common law might be productive of very dangerous consequences. I have no such confidence in the sagacity of any man or any set of men as to expect that every contingency be provided for. Under the protection of the common law, (aided by such statutes as have been passed in *furtherance* of it), I know that the peace of society and the safety of individuals is amply provided for; but I cannot feel the same security if the common law be abolished, and we have nothing to look to but a code."

BARON PARKE said: "In my opinion, the proposed measure, *which is to abrogate the common law with respect to criminal offences*, and put an end to all its rules and definitions of offences, is a measure likely to produce no benefit in the administration of criminal justice, but decidedly the reverse. My objection to the proposed measure is founded on the danger of confining provisions against crimes to enactments and repealing in this respect the rules of the common law, which are clear and well understood and have the incalculable advantage of being capable of application to new combinations of circumstances, perpetually occurring, which are decided, when they arise, by inference and analogy to them and upon the principles on which they rest. Whatever care be used in defining offences and in the language of the proposed enactments, it will be impracticable to make the definitions embrace every possible case that can arise, and consequently many acts which are criminal, and closely fall within the principle of the rules of the common law, will be dispunishable, *whereas, if the common law is suffered to continue*, it may justly and legally be applied to them."

AND MR. JUSTICE CROMPTON SAID: "*I think it unadvisable to use the advantage of the power of applying the principles of the common law to new offences, and combinations of circumstances,* arising from time to time, which it is hardly possible that any codification, however able and complete, should effectually anticipate."

**The Criminal Code of Canada does not repeal the common law.** — The clause above referred to by the Royal Commissioners as forming section 5 of the English Draft Code, is not inserted in the Criminal Code of Canada; so that we thus preserve the common law not only so far as it affords a DEFENCE, (see section 7, at p. 11 *post*), in cases not expressly provided for, but also so far as it may afford a GROUND OF PROSECUTION, in cases not expressly provided for.

**Statutory amendments to the Code and to the Canada Evidence Act.** — Since the coming into force of the Criminal Code and of the *Canada Evidence Act*, a number of statutes have been passed making alterations in and additions and amendments to them. In the present edition, these alterations additions and amendments,—up to and inclusive of those made at the last session of the Dominion Parliament in 1901, — are incorporated in and added to the different sections to which they relate, — with this exception, that, with regard to the amendments made, in 1901, to sections 205, 331A, and 955, they will be found on the two pages which immediately preceding the present introduction.

Since the printing of the reference, made,—on page 573, *post*, —to the Canadian *Alien Labor Act*, that Act has been amended by the 1 Edw. VII. c. 13; and, in Extra Appendix D,—set out at pp. 1063-1065, *post*,—the original *Alien Labor Act*, (60-61 V., c. 11), and its amendments, (61 V., c. 2, and 1 Edw. VII, c. 13), will be found, in full.

# THE CRIMINAL CODE, 1892.

[55-56 VICT., c. 29.]

(Amended by the 56 Vic., c. 32, the 57-58 Vic., c. 57, the 58-59 Vic., c. 40, and the 63-64 Vic., c. 46)

## FIRST DIVISION — CRIMINAL OFFENSES

## TITLE I.

### INTRODUCTORY PROVISIONS.

#### PART I.

#### PRELIMINARY.

**1. Short title.** — This Act may be cited for all purposes as *The Criminal Code*, 1892.

**2. Commencement of Act.** — This Act shall come into force on the first day of July, 1893.

**3. Explanations of terms.** — In this Act the following expressions have the meanings assigned to them in this section unless the context requires otherwise:

(*a.*) The expression "ANY ACT," or "ANY OTHER ACT," includes any Act passed or to be passed by the Parliament of Canada, or any Act passed by the legislature of the late province of Canada, or passed or to be passed by the legislature of any province of Canada, or passed by the legislature of any province included in Canada before it was included therein; R.S.C., c. 174, s. 2 (*a*).

(*b.*) The expression "ATTORNEY-GENERAL" means the Attorney-General or Solicitor-General of any province in Canada in which any proceedings are taken under this Act, and, with respect to the Northwest Territories and the District of Keewatin, the Attorney-General of Canada; R. S. C., c. 150, s. 2 (*a*).

(*c.*) The expression "BANKER" includes any director of any incorporated bank or banking company; R.S.C., c. 164, s. 2 (*g*).

(*d.*) The expression "CATTLE," includes any horse, mule, ass, swine, sheep or goat, as well as any neat cattle or animal of the bovine species, and by whatever technical or familiar name known, and shall apply to one animal as well as to many; R.S.C., c. 172, s. 1.

(*e.*) The expression "COURT OF APPEAL" includes the following courts: R.S.C., c. 174, s. 2 (*h*).

(i.) In the province of Ontario, the Court of Appeal for Ontario; (As amended by the *Criminal Code Amendment Act*, 1900, (63 and 64 Vic., c. 46,) sec. 3, which came into force on the 1st of January 1901).

(ii.) In the province of Quebec, the Court of Queen's Bench, appeal side;

(iii.) In the provinces of Nova Scotia, New Brunswick and British Columbia, and in the North-West Territories, the Supreme Court in banc;

(iv.) In the province of Prince Edward Island, the Supreme Court of Judicature;

(v.) In the province of Manitoba, the Court of Queen's Bench;

It will be seen that, under the *Interpretation Act*, section 7, subsection 6, set out at p. 9, *post*, the expression "the Queen" means also her successors; so that, since the accession of His Majesty King Edward VII, the Court of Queen's Bench is called the Court of King's Bench.

(*f.*) The expression "DISTRICT, COUNTY OR PLACE" includes any division of any province of Canada for purposes relative to the administration of justice in criminal cases; R.S.C., c. 174, s. 2 (*f*).

(*g.*) The expression "DOCUMENT OF TITLE TO GOODS" includes any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate, warrant or order for the delivery or transfer of any goods or valuable thing, bought and sold note, or any other document used in the ordinary course of business as proof of the possession or control of goods, authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of such document to transfer or receive any goods thereby represented or therein mentioned or referred to; R.S.C., c. 164, s. 2 (*a*).

(*h.*) The expression "DOCUMENT OF TITLE TO LANDS" includes any deed, map, paper or parchment, written or printed, or partly written and partly printed, being or containing evidence of the title, or any part of the title, to any real property, or to any interest in any real property, or any notarial or registrar's copy thereof, or any duplicate instrument, memorial, certificate or document authorized or required by any law in force in any part of Canada respecting registration of titles, and relating to such title; R.S.C., c. 164, s. 2 (*b*).

(*i.*) The expression "EXPLOSIVE SUBSTANCE" includes any materials for making an explosive substance; also any apparatus, machine, implement, or materials used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance; and also any part of any such apparatus, machine or implement; R.S.C., c. 150, s. 2 (*b*). (1)

(*j.*) "FINDING THE INDICTMENT" includes also exhibiting an information and making a presentment; R.S.C., c. 174, s. 2 (*d*).

"Finding the indictment" included, prior to the Code, the taking of an inquisition: but it will be seen, by section 642, *post*, that, since the Code came into force, no one is to be tried upon a coroner's inquisition: and, upon the taking of any such inquisition whereby any person is charged with manslaughter or murder, the coroner, according to section 568, *post*, must, — if the person so affected be not already charged with the offence before a magistrate or justice, — have him brought or made to appear before a magistrate or justice for prosecution.

A criminal information is an accusation of crime made against a person by the Attorney General or the Solicitor General without sending an indictment before a grand jury, and is usually filed, as explained by Sir James F. Stephen, "in cases of misdemeanors having a tendency to disturb the public peace or to interfere with good government, as, for instance, cases of seditious libels or other libels in which the public are interested, cases of official corruption or fraud or misconduct, cases of bribery." (2)

Although a PRESENTMENT is made of a true bill when found by a grand jury upon an indictment laid before them, a presentment properly so called is a written charge made against a particular person by a grand jury accusing such person of an offence of which the grand jury have taken notice from their own knowledge and observation, without any previous indictment being laid before them. Lord Coke says, "every indictment is a presentment, but every presentment is not an indictment." (3)

(*k.*) Having in one's possession, includes not only having in one's own personal possession, but also knowingly —

(i.) having in the actual possession or custody of any other person; and

(ii.) having in any place (whether belonging to or occupied by

(1) This subsection (*i*) is in the same terms as sec. 9 of the *Imperial Explosive Substances Act* 1883, (46 Vic., c. 3).
(2) Steph. Dig. Cr. Proc., 126.
(3) 2 Inst. 739.

one's self or not) for the use or benefit of one's self or of any other person; R.S.C., c. 164, s. 2 (*l*); c. 165, s. 2; c. 167, s. 2; c. 171, s. 3; 50-51 V., c. 45, s 2 (*e*).

If there are two or more persons, any one or more of whom, with the knowledge and consent of the rest, have any thing in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them; (*As amended by 56 Vic., c. 32*).

(*l.*) The expressions "INDICTMENT" and "COUNT" respectively include information and presentment as well as indictment, and also any plea, replication or other pleading, and any record; R.S. C., c. 174, s. 2 (*c*).

(*m.*) The expression "INTOXICATING LIQUOR" means and includes any alcoholic, spirituous, vinous, fermented or other intoxicating liquor, or any mixed liquor a part of which is spirituous or vinous, fermented or otherwise intoxicating; R.S.C., c. 151, s. 1 (*d*).

The English Licensing Act 35 and 36 Vict., ch. 94, sec. 74, defines intoxicating liquor as "spirits, wine, beer, porter, cider, perry, and sweets, and any fermented, distilled, or spirituous liquor which cannot, according to any law for the time being in force, be legally sold without a license from the Commissioners of Inland Revenue."

The Canada Temperance Act, R. S. C., c. 106, s. 2, defines intoxicating liquors as "any and every spirituous or malt liquor and every wine and any and every combination of liquors or drinks that is intoxicating and any mixed liquor capable of being used as a beverage and part of which is spirituous or otherwise intoxicating."

By the Quebec License Act, 1900, (63 Vict., c. 12, sec. 2), the words intoxicating liquors mean, brandy, rum, whiskey, gin, wines of all descriptions, ale, beer, lager-beer, porter, cider and all other liquors containing an intoxicating principle, and all beverages, composed, wholly or in part, of any such liquors."

(*n.*) The expression "JUSTICE" means a justice of the peace, and includes two or more justices, if two or more justices act or have jurisdiction, and also any person having the power or authority of two or more justices of the peace; R.S.C., c. 174, s. 2 (*b*).

(*o.*) The expression "LOADED ARMS" includes any gun, pistol or other arm loaded with gunpowder, or other explosive substance, and ball, shot, slug or other destructive material, or charged with compressed air and ball, shot, slug or other destructive material;

(*o*[1].) The expression "MILITARY LAW" includes *The Militia Act* and any orders, rules and regulations made thereunder, the Queen's Regulations and Orders for the Army, any Act of the United Kingdom or other law applying to Her Majesty's troops

in Canada, and all other orders, rules and regulations of whatever nature or kind soever to which Her Majesty's troops in Canada are subject.

(*p*.) The expression "MUNICIPALITY" includes the corporation of any city, town, village, county, township, parish or other territorial or local division of any province of Canada, the inhabitants whereof are incorporated or have the right of holding property for any purpose; R.S.C., c. 164, s. 2 (*j*).

(*p*1.) In the sections of this Act relating to defamatory libel the word "NEWSPAPER" shall mean any paper, magazine or periodical containing public news, intelligence or occurrences, or any remarks or observations thereon, printed for sale and published periodically, or in parts or numbers, at intervals not exceeding thirty-one days between the publication of any two such papers, parts or numbers, and also any paper, magazine or periodical printed in order to be dispersed and made public, weekly or oftener, or at intervals not exceeding thirty-one days, and containing only or principally advertisements;

(*q*.) The expression "NIGHT" or "NIGHT TIME" means the interval between nine o'clock in the afternoon and six o'clock in the forenoon of the following day, and the expression "day" or "day time" includes the interval between six o'clock in the forenoon and nine o'clock in the afternoon of the same day;

(*r*.) The expression "OFFENSIVE WEAPON" includes any gun or other fire-arm or air-gun, or any part thereof, or any sword, sword blade, bayonet, pike, pike-head, spear, spear-head, dirk, dagger, knife, or other instrument intended for cutting or stabbing, or any metal knuckles, or other deadly or dangerous weapon, and any instrument or thing intended to be used as a weapon, and all ammunition which may be used with or for any weapon; R.S.C., c. 151, s. 1 (*c*).

(*s*.) The expression "PEACE OFFICER" includes a mayor, warden, reeve, sheriff, deputy sheriff, sheriff's officer, and justice of the peace, and also the warden, keeper or guard of a penitentiary and the gaoler or keeper of any prison, and any police officer, police constable, bailiff, constable or other person employed for the preservation and maintenance of the public peace, or for the service or execution of civil process;

(*t*.) The expressions "PERSON," "OWNER," and other expressions of the same kind include Her Majesty and all public bodies, bodies corporate, societies, companies, and inhabitants of counties, parishes, municipalities or other districts in relation to such acts and things as they are capable of, doing, and owning respectively;

(*u*.) The expression "PRISON" includes any penitentiary, common gaol, public or reformatory prison, lock-up, guard room or

other place in which persons charged with the commission of offences are usually kept or detained in custody;

(*v.*) The expression "PROPERTY" includes: R.S.C., c. 164, s. 2 (*e*).

(i.) every kind of real and personal property, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods;

(ii.) not only such property as was originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged and anything acquired by such conversion or exchange, whether immediately or otherwise;

(iii.) any postal card, postage stamp or other stamp issued or prepared for issue by the authority of the Parliament of Canada, or of the legislature of any province of Canada, for the payment to the Crown or any corporate body of any fee, rate or duty, and whether still in the possession of the Crown or of any person or corporation; and such postal card or stamp shall be held to be a chattel, and to be equal in value to the amount of the postage, rate or duty expressed on its face in words or figures or both;

(*w.*) The expression "PUBLIC OFFICER" includes any inland revenue or customs officer, officer of the army, navy, marine, militia, North-west mounted police, or other officer engaged in enforcing the laws relating to the revenue, customs, trade or navigation of Canada;

(*x.*) The expression "SHIPWRECKED PERSON" includes any person belonging to, on board of or having quitted any vessel wrecked, stranded, or in distress at any place in Canada; R.S.C., c. 81, s. 2 (*h*).

(*y.*) The expression "SUPERIOR COURT OF CRIMINAL JURISDICTION" means and includes the following courts:

(i.) In the province of Ontario, the High Court of Justice for Ontario; (*as amended by* 63 *and* 64 *Vic., c.* 46, *sec.* 3, which came into force on the 1st January 1901).

(ii.) In the province of Quebec, the Court of Queen's Bench.

(iii.) In the provinces of Nova Scotia, New Brunswick and British Columbia, and in the North-West Territories, the Supreme Court;

(iv.) In the province of Prince Edward Island, the Supreme Court of Judicature;

(v.) In the province of Manitoba, the Court of Queen's Bench (Crown side);

Under the *Interpretation Act*, section 7, sub-section 6, set out at p. 9, *post*, the expression "the Queen" means also her successors; so that, since

the accession of His Majesty King Edward VII, the Court of Queen's Bench is called the Court of King's Bench.

(z.) The expression "TERRITORIAL DIVISION" includes any county, union of counties, township, city, town, parish or other judicial division or place to which the context applies; R.S.C., c. 174, s. 2 (*g*).

(*aa.*) The expression "TESTAMENTARY INSTRUMENT" includes any will, codicil, or other testamentary writing or appointment, as well during the life of the testator whose testamentary disposition it purports to be as after his death, whether the same relates to real or personal property, or both; R.S.C., c. 164, s. 2 (*i*).

(*bb.*) The expression "TRUSTEE" means a trustee on some express trust created by some deed, will or instrument in writing or by parol, or otherwise, and includes the heir or personal representative of any such trustee, and every other person upon or to whom the duty of such trust has devolved or come, whether by appointment of a court or otherwise, and also an executor and administrator, and an official manager, assignee, liquidator or other like officer acting under any Act relating to joint stock companies, bankruptcy or insolvency, and any person who is, by the law of the province of Quebec, an "*administrateur*" or "*fidéicommissaire;*" and the expression "trust" includes whatever is by that law an "*administration*" or "*fidéicommission;*" R.S.C., c. 164 ,s. 2 (*c*).

(*cc.*) The expression "VALUABLE SECURITY" includes any order, exchequer acquittance or other security entitling or evidencing the title of any person to any share or interest in any public stock or fund, whether of Canada or of any province thereof, or of the United Kingdom, or of Great Britain or Ireland, or any British colony or possession, or of any foreign state, or in any fund of any body corporate, company or society, whether within Canada or the United Kingdom, or any British colony or possession, or in any foreign state or country, or to any deposit in any savings bank or other bank, and also includes any debenture, deed, bond, bill, note, warrant, order or other security for money or for payment of money, whether of Canada or of any province thereof, or of the United Kingdom or of any British colony or possession, or of any foreign state, and any document of title to lands or goods as hereinbefore defined wheresoever such lands or goods are situate, and any stamp or writing which secures or evidences title to or interest in any chattel personal, or any release, receipt, discharge or other instrument, evidencing payment of money, or the delivery of any chattel personal; and every such valuable security shall, where value is material, be deemed to be of value equal to that of such unsatisfied money, chattel personal, share, interest or deposit, for the securing or payment of which, or delivery or transfer or sale of which, or for

the entitling or evidencing title to which, such valuable security is applicable, or to that of such money or chattel personal, the payment or delivery of which is evidenced by such valuable security; 53 Vic., c. 37, s. 20.

*(dd.)* The expression "WRECK" includes the cargo, stores and tackle of any vessel and all parts of a vessel separated therefrom, and also the property of shipwrecked persons;

*(ee.)* The expression "WRITING" includes any mode in which and any material on which, words or figures whether at length, or abridged are written, printed or otherwise expressed, or any map or plan is inscribed.

**4. Meaning of expressions in other Acts.** — The expressions "MAIL," "mailable matter," "POST LETTER," "POST LETTER BAG," and "POST OFFICE" when used in this Act have the meanings assigned to them in *The Post Office Act*, and in every case in which the offence dealt with in this Act relates to the subject treated of in any other Act the words and expressions used herein in respect to such offence shall have the meaning assigned to them in such other Act.

The "Post Office Act," (R. S. C., c. 35, amended by 52, Vict., c. 20, sec. 2), assigns to the above expressions the following meanings: —

The expression "MAIL" includes every conveyance by which post letters are carried, whether it is by land or by water;

The expression "MAILABLE MATTER" includes any letter, packet, parcel, newspaper, book or other thing which by this Act, or by any regulation made in pursuance of it, may be sent by post;

The expression "POST LETTER" means any letter transmitted by the post or delivered through the post or deposited in any post office or in any letter box put up anywhere under the authority of the Postmaster General; and a letter shall be deemed a post letter from the time of its being so deposited *or* delivered to the time of its being delivered to the person to whom it is addressed; and a delivery to any person authorized to receive letters for the post shall be deemed a delivery at the post office; and a delivery of any letter or other mailable matter at the house or office of the person to whom the letter is addressed, or to him, or to his servant or agent, or other person considered to be authorized to receive the letter or other mailable matter, according to the usual manner of delivering that person's letters shall be a delivery to the person addressed;

The expression "POST LETTER BAG" includes a mail bag, basket or box, or packet or parcel, or other envelope or covering in which mailable matter is conveyed whether it does *or* does not actually contain mailable matter;

The expression "post office" means any building, room, post office railway car, street letter box, receiving box or other receptacle or place where post letters or other mailable matter are received or delivered, sorted, made up or despatched;

**4a. Carnal knowledge.** — "CARNAL KNOWLEDGE" is complete upon penetration to any, even the slightest, degree, and even without the emission of seed. (*Transferred from sec.* 266, *post, by* 56 *Vic., c.* 32.)

**5. Offences against Imperial Statutes.** — No person shall be proceeded against for any offence against any Act of the Parliament of England, of Great Britain, or of the United Kingdom of Great Britain and Ireland, unless such Act is, by the express terms thereof, or of some other Act of such Parliament, made applicable to Canada or some portion thereof as part of Her Majesty's dominions or possessions.

## THE INTERPRETATION ACT

The *Interpretation Act*, (R.S.C., c. 1), which is still in force, — not having been repealed, — contains, in section 7 thereof, the following subsections, among others: —

(4) The expression "SHALL" shall be construed as imperative, and the expression "MAY" as permissive.

(6) The expression "Her Majesty," "the Queen," or "the Crown," means Her Majesty, her heirs and successors, sovereigns of the United Kingdom of Great Britain and Ireland;

(7) The expression "Governor," "Governor of Canada," "Governor General," or "Governor in Chief," means the Governor General for the time being of Canada, or other the chief executive officer or administrator for the time being carrying on the Government of Canada on behalf and in the name of the Queen, by whatever title he is designated;

(8) The expression "Governor in Council," or "Governor General in Council," means the Governor General of Canada, or person administering the Government of Canada for the time being, acting by and with the advice of, or by and with the advice and consent of, or in conjunction with, the Queen's Privy Council for Canada.

(13) The expression "PROVINCE" includes the North West Territories and the District of Keewatin.

(20) The expression "COUNTY" includes two or more counties united for purposes to which the enactment relates.

(21) Words importing the singular number or the masculine gender only, include more persons, parties or things of the same kind than one and females as well as males.

(22) The expression "PERSON" includes any body corporate and politic or party, and the heirs, executors, administrators or other legal representatives of such person, to whom the context can apply according to the law of that part of Canada to which such context extends.

(23) The expression "WRITING," "WRITTEN," or any term of like import includes words printed, painted, engraved, lithographed, or otherwise traced or copied.

(25) The expression "MONTH" means a calendar month.

(26) The expression "HOLIDAY" includes Sundays, New Years Day, the Epiphany, Good Friday, the Ascension, All Saints' Day, Conception Day, Easter Monday, Ash Wednesday, Christmas Day, the Birthday, (or the day fixed by proclamation for the celebrating of the birthday), of the reigning Sovereign, Dominion Day, Labor Day, (first Monday of September), and any day appointed for a general fast or thanksgiving. (4)

(27) If the time limited by any Act for any proceeding or the doing of anything under its provisions expires or falls upon a holiday, the time so limited shall be extended to, and such thing may be done on the day next following which is not a holiday.

(28) The expression "OATH" includes a solemn affirmation or declaration whenever the context applies to any person and case by whom and in which a solemn affirmation or declaration may be made instead of an oath; and in like cases the expression "SWORN" includes the expression "AFFIRMED" or "DECLARED."

(30) The expression "SURETIES" means sufficient sureties, and the expression "SECURITY" means sufficient security, and, whenever these words are used, one person shall be sufficient therefor unless otherwise expressly required.

(37) Whenever power is given to any person officer or functionary to do or to enforce the doing of any act or thing, all such powers shall be understood to be also given as are necessary to enable such person, officer or functionary to do or enforce the doing of such act or thing.

(54) Every Act shall, unless by express provision it is declared to be a private Act, be deemed to be a public Act, and shall be judicially noticed by all judges, justices of the peace and others without being specially pleaded.

(55) Every copy of any Act, public or private, printed by the Queen's Printer, shall be evidence of such Act and of its contents; and every copy purporting to be printed by the Queen's Printer shall be deemed to be so printed, unless the contrary is shewn.

**6. Punishments.** — Every one who commits an offence against this Act is liable as herein provided to one or more of the following punishments: —

(*a.*) Death;

(*b.*) Imprisonment;

(*c.*) Whipping;

(*d.*) Fine;

(*e.*) Finding sureties for future good behaviour;

(4) As amended by the 56 Vic., c. 30, and by 57-58 Vic., c. 55, sec. 1.

(*f.*) If holding office under the Crown, to be removed therefrom;

(*g.*) To forfeit any pension or superannuation allowance;

(*h.*) To be disqualified from holding office, from sitting in Parliament and from exercising any franchise;

(*i.*) To pay costs;

(*j.*) To indemnify any person suffering loss of property by commission of his offence.

## PART II.

## MATTERS OF JUSTIFICATION OR EXCUSE.

**7. General rules of the common law remain in force.** — All rules and principles of the common law which render any circumstances a justification or excuse for any act, or a defence to any charge, shall remain in force and be applicable to any defence to a charge under this Act except in so far as they are hereby altered or are inconsistent herewith.

**8. General rule under this Act as to justifications and excuses.** — The matters provided for in this part are hereby declared and enacted to be justifications or excuses in the case of all charges to which they apply.

As already mentioned in the Introduction, (*ante*), the English Draft Code contained a clause, — not inserted in our Code, — providing that no criminal proceedings should be taken at COMMON LAW, but that, in future, a party should only be proceeded against under some provision of the English Code or of some unrepealed statute not inconsistent therewith; and the English Draft Code also contained a clause, identical with the provisions of the foregoing sections 7 and 8 of our own Code, keeping in force, when not expressly altered, such common law rules as rendered any circumstances a justification or excuse for any act or a defence to any charge.

In addition to the remarks already quoted in the Introduction, (*ante*), the Royal Commissioners, at page 10 of their Report, made the following statement upon this subject: —

"We have already expressed our opinion that it is, on the whole, expedient that no crimes not specified in the Draft Code should be punished, though in consequence some guilty persons may thus escape punishment. But we do not think it desirable that if a particular combination of circumstances arises of so unusual a character that the law has never been decided with reference to it, there should be any risk of a Code being so framed that it would deprive an accused person of a defence to which the common law entitles him and render it the duty of the judge to direct the jury to find him guilty, although the facts proved shew that he had a defence on the merits and would have an undoubted claim to be pardoned

by the Crown. While, therefore, digesting and declaring the law as applicable to the ordinary cases, we think that the common law, *so far as it affords a defence*, should be preserved in all cases not expressly provided for. This we have endeavored to do by section 19 of the Draft Code." (1)

By the provisions of the above sections 7 and 8 and by the omission of any prohibitory clause such as that inserted in the English Draft Code against proceeding at common law, our own Code preserves the common law not only so far as it affords a DEFENCE in cases not expressly provided for, but also so far as it may afford A GROUND OF PROSECUTION in cases not expressly provided for.

**9. Children under seven.** — No person shall be convicted of an offence by reason of any act or omission of such person when under the age of seven years.

**10. Children between seven and fourteen.** — No person shall be convicted of an offence by reason of an act or omission of such person when of the age of seven, but under the age of fourteen years, unless he was competent to know the nature and consequences of his conduct, and to appreciate that it was wrong.

It is well established, as a general principle, that the essence of a criminal offence is the evil or wrongful intent with which the act is done. This is the doctrine embodied in the legal maxim, *Actus non facit reum nisi mens sit rea*, " the act itself does not make a man guilty unless his intention were so." (2) Of course, this principle is not to be taken as absolute and without limitation. For instance, " whenever the law positively forbids a thing to be done, it becomes thereupon *ipso facto* illegal to do it wilfully, or in some cases even ignorantly." (3) Thus, it has been held, in England, that a dealer in tobacco having in his possession adulterated tobacco, is, although ignorant of the adulteration, liable under the Imperial statute 5 and 6 Vic., c. 93, s. 3, to the penalties therein mentioned. (4) And there are a number of other cases affirming the doctrine that penalties may be incurred under a phohibitory statute without any intention on the part of the individual offending against the statute to infringe its provisions. (5) Even the wilful act of a servant has been held sufficient to make a master liable to a conviction under the licensing laws. As, where the servant of an innkeeper knowingly supplied liquor to a police constable on duty, it was held that the innkeeper was liable to conviction under the Imperial statute 35 and 36 Vic., c. 94, s. 16, sub-sec. 2, although he was ignorant of his servants' act. (6)

" In general, however, the intention of the party at the time of committing an act charged as an offence is as necessary to be proved as any other fact laid in the indictment, though it may happen that the proof of intention consists in shewing overt acts only, the reason in such cases being that

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(1) Section 19 of the English Draft Code is identical with the provisions of sections 7 and 8 of our Code.

(2) Broom's Leg. Max., (6th Ed.), 300.

(3) Ibid, 301; R. v. Prince, L.R., 2 C.C.R., 154; R. v. Bishop, 14 Cox, 404.

(4) R. v. Woodrow, 15 M. & W., 404.

(5) Att'y. Gen. v. Lockwood, 9 M. & W., 378, 401; R. v. Marsh, 4 D. & R., 201.

(6) Mullins v. Collins, L. R., 9 Q. B., 292; 43 L. J. M. C., 67.

every man is *prima facie* supposed to intend the necessary or even probable or natural consequences of his own act." (7)

Therefore, every person of the age of fourteen years and upwards is presumed to have capacity to discern good from evil, or right from wrong and to be capable of committing crime; and he is responsible and punishable for any criminal offence that he may commit, unless the presumption of his capacity be rebutted by positive proof of his incapacity, — from insanity, for example. (8)

A child within the age of seven is considered to be without any capacity to discern good from evil or right from wrong. Such a child is so *conclusively*, so *absolutely* presumed to be incapable of committing crime that the presumption of its incapacity cannot be rebutted.

Between the ages of seven and fourteen, there is still a presumption, but only *prima facie*, that the child is incapable; that is, the presumption is one which may be rebutted by clear and conclusive evidence of actual capacity. Therefore, when a child between seven and fourteen is charged with an offence, it must be proved not only that the child committed the act charged, but that he or she did it with a guilty knowledge of wrong doing. (9) So, that, where for instance a child between seven and fourteen was indicted for murder, it was held that it must be proved to have been conscious of the nature of the act. (10) And where a boy of eleven was charged with manslaughter, his schoolmaster had to be examined as a witness to shew the amount of his intelligence. (11)

This *prima facie* presumption of incapacity will, undoubtedly, grow weaker and become easier of rebuttal as the child advances towards its fourteenth year. In one case, an infant between eight and nine was convicted of and executed for the offence of burning two barns, it appearing, upon the evidence adduced, that he had malice, revenge, craft and cunning. (12) In another case, a child having, after killing his companion, hid himself, and, as it appeared by his hiding that he could discern between good and evil, he was hanged. (13) And where a boy of ten was found guilty upon his own confession of the murder of a girl of five, and the whole of his conduct shewed undoubted tokens of a mischievous discretion, the judges all agreed that he was a proper subject for capital punishment. (14)

In some of the United States of America the law prescribes different ages under which an infant is incapable of committing crime. In Texas, for instance, an infant under nine is absolutely incapable; and, in the case of an accused who is between 9 and 13, there is a *prima facie* presumption of its incapacity, so that evidence must be given of its capacity. (15) And in Illinois the ages respectively are 10 and 14. (16)

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(7) Broom's Leg. Max., (6th Ed.), 304; R. v. Moore, 3 B. & A., 188; R. v. Hicklin, L. R., 3 Q. B., 375.

(8) See sec. 11, *post*, as to Insanity.

(9) R. v. Owen, 4 C. & P., 236; Warb. L. Cas. 2nd Ed., 17; R. v. Smith, 1 Cox, 260.

(10) R. v. Vamplew, 3 F. & F., 520; Warb. L. Cas., 2nd Ed., 19; R. v. Boober, 4 Cox, C. C. 272.

(11) R. v. Clark, Warb. Lead. Cas., 2nd Ed., 18.

(12) Dean's Case, 1 Hale, 25, note (*a*); 1 Russ. Cr., 6th Ed., 115.

(13) Spigurnal's Case, 1 Hale, 26; 1 Russ. Cr., 6th Ed., 115.

(14) York's Case, Fost., 70, et seq.; 1 Russ. Cr., 6th Ed., 117.

(15) Parker v. S., 20 Tex. Ap. 451; 1 Russ. Cr. 6th Ed., 114.

(16) Angelo v. P., 96 Ill. 209; 36 Am. R. 132; 1 Russ. Cr., 6th Ed., 114.

Section 266, *post*, enacts that no one under the age of fourteen can commit the offence of rape. This is the common law rule.(17) Under the common law, a boy under 14 is presumed to be incapable of committing a rape. In the case of other crimes, *malitia supplet ætatem;* but, in the case of rape, the law presumes that a person under fourteen is physically impotent, — not merely wanting in discretion. (18) In other words, a child under fourteen is absolutely presumed to be physically unable to accomplish the sexual act to an extent necessary to make him guilty of rape.

But, although a boy under fourteen is absolutely presumed under the law of England and under the law of Canada, to be physically incapable himself of committing a rape or any offence in which carnal connection is a necessary ingredient,—such as an assault with intent to commit a rape(19), carnally knowing a girl under thirteen, (20), or sodomy, (21), — and although he cannot be convicted of having personally committed any of these offences, even if he be proved to have actually arrived at puberty, he may be convicted, as a principal, of having aided and assisted another to commit such an offence; (22), or he may be convicted of having committed an indecent assault or a common assault. (23)

**11. Insanity.** — No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility, or disease of the mind, to such an extent as to render him incapable of appreciating the nature and quality of the act or omission, and of knowing that such act or omission was wrong.

2. A person labouring under specific delusions, but in other respects sane, shall not be acquitted on the ground of insanity, under the provisions hereinafter contained, unless the delusions caused him to believe in the existence of some state of things which, if it existed, would justify or excuse his act or omission.

3. Every one shall be presumed to be sane at the time of doing or omitting to do any act until the contrary is proved.

**The Different kinds of insanity.** — The word "insane" is a general term, which is not confined, in its application, to persons wholly without understanding, but is applicable to every person who is *non compos mentis*, or of unsound or deranged mind, without regard to the cause or duration of the malady. (24)

Among persons who are insane or *non compos mentis*, are included idiots, lunatics, persons laboring under delirium tremens, imbeciles, persons suffering from delusions and hallucinations, monomaniacs, and homicidal maniacs.

(17) R. v. Groombridge, 7 C. & P., 582.

(18) 1 Hale, 630.

(19) R. v. Eldersbaw, 3 C. & P., 396; R. v. Philips, 8 C. & P., 736.

(20) R. v. Jordan, 9 C. & P., 118; R. v. Waite, 17 Cox, C. C., 554; [1892] 2 Q. B., 600. (It is a criminal offence, in England, to carnally know a girl under *thirteen;* and, in Canada, under section 269, *post*, of our Code, it is a criminal offence to carnally know a girl under *fourteen.*)

(21) R. v. Hartlen, 30 N. S. R., 317; 2 Can. Crim. Cas., 12.

(22) R. v. Eldershaw, 3 C. & P., 396; R. v. Allen, 1 Den., 364.

(23) R. v. Brimilow, 9 C. & P., 366; R. v. Williams, [1893], 1 Q. B., 320; 62 L. J. M. C., 69.

(24) Co. Litt., 246*b*, 247*a*.

**Idiots.** — An idiot is one who has been without understanding from his birth and who never has any lucid intervals. He is described as a person who, for instance, cannot number twenty nor tell the days of the week and does not know his father or mother, etc. (25)

**Lunatics.** — A lunatic is a person who has possessed reason but who, through disease, grief or other cause, has lost it. The term is especially applicable to one who has lucid intervals and may yet in contemplation of law recover his reason. (26) By "lucid interval" is meant not merely a cessation of the violent symptoms of the disorder, but a temporary restoration of reason such as to create responsibility for acts done during its continuance. (27) A lunatic is one who labors under a species of *dementia accidentalis vel adventitia*, which affects him at certain periods and vicissitudes, he having intervals of reason. The prevailing distinction in law is between *idiocy* and *lunacy;* the first being a *fatuity a nativitate* or *dementia naturalis*, which excuses the party as to his acts, and the other being accidental or adventitious madness, which, — whether permanent and fixed, or with lucid intervals, — goes under the name of *lunacy*, and excuses equally with *idiocy* as to acts done during the existence of the frenzy. (28)

**Delirium tremens.** — Delirium tremens or *mania a potu* is that diseased condition of the brain which is produced by excessive and prolonged use of spirituous liquors. It is properly a disease of the nervous system; and is one of the legally recognized forms of insanity. (29) See *Drunkenness, post.*

**Imbeciles.** — Imbecility may be physical or mental. An imbecile is one who is weak, feeble, impotent, decrepit, in body or in mind. Mental imbecility is a weakness of the mind due to defective development or to loss of the faculties; and may exist in different degrees between the limits of absolute idiocy on the one hand and perfect capacity on the other. (30)

**Delusions or hallucinations.** — Delusions or hallucinations constitute that species of mental unsoundness which is marked by persistent and incorrigible beliefs that things which exist only in the patient's imagination are real. (31)

**Monomania.** — This is a species of insanity in which there is a more or less complete limitation of the perverted mental action to a particular field, — such as a particular delusion, or an impulse to do some particular thing, — though the other mental functions may shew some signs of degeneration. (32)

**Homicidal mania.** — Much has been written by alienists and metaphysicians on this subject; (33) but homicidal mania has failed to obtain a standing in Court as an excuse for crime. One who kills another under circumstances which would otherwise amount to murder cannot escape punishment on the ground of insanity, unless it be shewn that, at the time,

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(25) 1 Bl. Com., 302; 1 Russ. Cr., 6th Ed., 118, 119.
(26) 1 Bl. Com., 304; Beverley's Case, 4 Coke, 124.
(27) Hall v. Warren, 9 Ves. Jr., 605.
(28) 4 Coke, 125; 1 Russ. Cr., 6th Ed., 120.
(29) Am. & Eng. Ency. L., 2nd Ed., vol. 9, p. 194, and vol. 16, p. 563.
(30) Am. & Eng. Ency. L., 2nd Ed., vol. 15, p. 1019, and vol. 16, p. 563, *note* 5.
(31) Am. & Eng. Ency. L., vol. 9, pp. 195, 196, and vol. 16, p. 563. See Lord Erskine's speech in Hadfields Case, 27 How. St. Tr., 1307.
(32) 16 Am. & Eng. Ency. L., 2nd Ed., 564.
(33) See 1 Whart. & S. Med. Jur. (4th Ed.), 578; Guiteau's Case, 10 Fed. Rep., 189, (*note*).

his reason was dethroned so as to render him incapable of knowing that he was doing wrong, or that, at the time, he was laboring under an insane delusion causing him to believe in a state of things which if real would justify or excuse his act. (34)

**Deaf and Dumb persons.**—At one time, deaf and dumb persons were presumed to be idiots; but, as the law now stands, a person who is deaf and dumb is not thereby relieved from responsibility for crime, if he is shewn to have sufficient understanding to distinguish between right and wrong. There appears, however to be a *prima facie* presumption that a person who is deaf and dumb,—especially if he has been so from his birth,—does not possess this sufficient understanding; so that the general rule of law is, in his case, reversed, and it is incumbent upon the prosecution to prove that he had capacity and reason sufficient to distinguish between right and wrong .(35)

As to KLEPTOMANIA, (a morbid propensity to steal, without regard to the value or utility of the article stolen), as to PYROMANIA, (a morbid propensity to incendiarism), and as to DIPSOMANIA, (a periodic recurrence of a violent thirst for intoxicating liquors), see 1 Whart. & S. Med. Jur. (4th Ed. ) ss. 590, *et seq.*, 606, and 639, *et seq.;* and see Fain v. Com., 39 Am. Rep., 203, as to SOMNAMBULISM, (the habit of walking in ones' sleep).

**Insanity as a defence.**—It will be seen by the above section, 11, of our Code, that the defence of insanity, in order to be of any avail, must be supported by evidence establishing that the offence was committed by the accused, either—

(1) While laboring under natural imbecility or disease of the mind to such an extent that he could not appreciate the nature and quality of his act, and could not know that it was wrong, or

(2) While laboring under specific delusions causing him, though sane in other respects, to believe in the existence of some state of things which if it existed would justify or excuse his act.

So that, if the defence be actual insanity, the mere fact of the accused being insane would not of itself be sufficient. It must be shewn also that when he committed the offence the accused was so insane, insane to so great an extent, as to render him incapable of appreciating the nature and quality of his act and to prevent him from knowing that it was wrong; and if the defence be that the accused, though sane in other respects, was when he committed the offence laboring under some delusion, it must be shewn that the specific delusion under which he was laboring caused him to believe that there then existed a state of things which if it had existed in reality would have justified or excused his act.

Taking the law, therefore, as here expressed, a man may be insane and still be convicted of an offence: in other words, notwithstanding his insanity he will be held responsible and punishable, unless his insanity was such that it rendered him incapable of knowing that what he did was wrong; and although a man may be laboring under some delusion when he commits an offence he may still be convicted of and punished for that offence, unless the delusion were such that it made him believe that something then existed which if it had been a reality would have justified or excused what he did, as for instance a delusion that he was being violently attacked and in danger of being murdered, and that he was obliged in self defence to kill his supposed antagonist.

Thus, where, on a trial for murder, the defence was insanity, and the

(34) 16 Am. & Eng. Ency. L., 2nd Ed., 564.
(35) 1 Hale, 34; Steels' Case, 1 Leach, 451; Jones' Case, 1 Leach, 102.

evidence in support of it shewed a great amount of senseless extravagance and absurd eccentricity of conduct, coupled with habits of excessive intemperance causing fits of *delirium tremens*, — the prisoner, however, not having been laboring under the effects of such a fit at the time of the act, — but shewed also sense and deliberation and a perfect understanding of the nature of the act, it was held that the evidence was not sufficient to support the defence of insanity, inasmuch as it tended rather to shew wilful excesses and extreme folly than mental incapacity; and in the course of his remarks, the Judge, — Erle, C. J., — said that the law did not say that when *some degree of insanity* existed, the party was not responsible, but that, when he was in such a state of mind as to know the distinction between right and wrong and the nature of his act, he was responsible. (36)

Medical experts assert that a knowledge of the wrongfulness of an act may co-exist with insanity, that "in all lunatics and in the most degraded idiots the feeling of right and wrong may be proved to exist," and that "the whole management of insane asylums presupposes a knowledge of right and wrong on the part of their inmates." (37)

On this account, it is contended by some that the legal rule of responsibility should include "not only the *knowledge* of good and evil but the *power* to *choose* the one and *refrain* from the other." (38), that responsibility depends upon power, not upon knowledge, still less upon feeling," — that "a man is responsible to do that which he *can* do, not that which he *feels* or *knows* it right to do; "(39), and that, therefore, it should be a good defence to establish that the accused's insanity *prevented* him from controlling his actions and rendered him unable to refrain from doing the act, although he knew it to be wrong. (40)

This is said to be the law under the French and German Codes, and the same principle has been adopted by some American Courts. (41) The late Sir James F. Stephen, has stated that it is even the law of England. For, although section 11 of our Code is identical in meaning, if not in exact wording, with section 22 of the Draft of the English Criminal Code, as revised by the four Royal Commissioners appointed to consider and report thereon, and although, in their joint report, these Commissioners declared that section 22, as so revised by them, expressed the existing law, Sir James F. Stephen, — who was one of the Commissioners, — has, in one of his own works on Criminal Law, expressed a different opinion, and, in giving his own understanding of the law of England on this subject, he there says that, "no act is a crime if the person who does it is, at the time when it is done, *prevented*, either by defective mental power or by any disease affecting his mind, *from controlling his own conduct*." And again he says, "It has been thought that the law of England is that the fact that a man is disabled from controlling his conduct by madness is not, if proved, a good defence to a charge of crime in respect of an act so done. This appears to me to be a mistake traceable in part to a misunderstanding

(36) R. v. Leigh, 4 F. & F., 915.

(37) Bucknill Cr. Lun., 59; Guy & F. For. Med., 220; Woodman & Tidy For. Med., 874, 875; Miller's Case, 3 Coup., 16-18; 1 Bish. New Cr. L. Com., 8th Ed., pp. 232-7; 1 Beck. Med. Jur., 10th Ed., 723, 724.

(38) Brown's Med. Jur. Ins., ss. 13-18; Ray Med. Jur., ss. 16-19; Whart. & Stiles' Med. Jur., s. 59.

(39) Bucknill & Tuke's Psych. Med., 269; 2 Hamilton & Godkins' Leg. Med., 245.

(40) Com. v. Mosler, 4 Pa. 264, 267; 1 Bish. New Cr. L. Com., 8th Ed., pp. 224, 239, 240.

(41) 13 Cr. L. Mag., 28; Bradley v. S., 31 Ind., 492; Parsons v. S. (Ala.), 81 Ala., 577; 9 Cr. L. Mag., 812, 828.

of the meaning and in part to an exaggeration of the authority of the answers of the Judges in Mac Naghten's Case." (42)

Mr. Justice Kay, at the trial of Joseph Gill, in 1883, took a similar view. In charging the jury, he said that, if a man's mind was in such a diseased condition that he was subject to uncontrollable impulse, they would be justified in finding him irresponsible for his actions, that what the jury had to ask themselves was: Was the prisoner's mind subject to an uncontrollable impulse over which his will had no power? If so, they must acquit him on the ground of insanity. (43)

The view thus taken by Sir James F. Stephen and by Mr. Justice Kay, has been shared by a few other judges; but it is not the one taken, as above shewn, by Chief Justice Erle, in Leigh's case, (44), and by English judges in general.

For instance, in the case of *Arnold*, who was tried for malicious shooting, it was clearly shewn that the prisoner was, to a certain extent, deranged; and yet the jury were told by Mr. Justice Tracey, that it is not every kind of idle and frantic humor of a man nor something unaccountable in his actions that will shew him to be such a madman as to be exempt from punishment. (45) And in a case of shooting and wounding in 1812. Mr. Justice Le Blanc charged the jury that, if they were of opinion that the prisoner when he committed the offence was capable of distinguishing right from wrong and was not under the influence of any illusion disabling him from discerning that he was doing a wrong act, he would be guilty in the eye of the law. (46)

In another case, where the prisoner was on trial for murder, Chief Justice Mansfield told the jury that, in order to support the defence of insanity, it ought to be proved by the most distinct and unquestionable evidence that the prisoner was incapable of judging between right and wrong. (47)

In another murder trial, at Bury, in 1831, Lord Lyndhurst expressed his complete accordance in the observations of Lord Mansfield, C. J., in the Bellingham Case. (48) And, in a case where the prisoner was charged with shooting at Queen Victoria, Lord Denman,C.J., said to the jury, "The question is whether the prisoner was laboring under that species of insanity which satisfies you that he was quite unaware of the nature, character and consequence of the act he was committing, or, in other words, whether he was under the influence of a diseased mind and was really *unconscious*, at the time he was committing the act, *that it was a crime*. (49)

In effect, the same doctrine was laid down by Mr. Justice Maule, in a murder trial, in 1843, (50), by Chief Justice Tindal, in MacNaghten's Case, (51), and Vaughan's Case, (52), by Baron Parke, in Barton's Case, (53), by Baron Bramwell, in Haynes' Case, (54), by Baron Rolfe, in Stokes'

(42) Steph. Gen. View Cr. Law, 78, 80.
(43) R. v. Gill, 2 Hamilton & Godkins' Leg. Med., 248, 249.
(44) See p. 17, *ante*.
(45) Arnolds' Case, Collis. Lun., 475.
(46) Bowler's Case, Collis. Lun., 673; 1 Ruso. Cr., 6th Ed., 122.
(47) Bellingham's Case, Collis. Addend., 636; 1 Russ. Cr., 122.
(48) R. v. Oxford, 5 C. & P., 168.
(49) R. v. Oxford, 9 C. & P., 525.
(50) R. v. Higginson, 1 C. & K., 129.
(51) R. v. MacNaghten, 10 Cl. & F., 200.
(52) R. v. Vaughan, 1 Cox, 80.
(53) R. v. Barton, 3 Cox C. C., 275.
(54) R. v. Haynes, 1 F. & F., 666.

Case, (55), and Layton's Case, (56), by Mr. Justice Wightman, in Burton's, Case, (57), and by Baron Martin, in the Townley murder case. (58)

In a still more recent case of murder at Chatham, in 1875, Mr. Justice Brett said: "The man may be mad. I assume that he is so in the medical sense of the term; but the question here is whether he is so mad as to be absolved from the consequences of what he has done? He is not so absolved, though he is mad, if he be not so mad as not to know what he was doing or not to know that he was doing wrong." (59) And, in a case tried in 1888, in which the prisoner, a lad of 21, was convicted of having murdered his sister by blowing out her brains with a discharge from a double-barrelled gun, it was proved that he had suffered for many years from epilepsy and that his mother had been, on two occasions, insane, the second occasion being shortly before the prisoner's birth; but Mr. Justice Field, after referring to the evidence of the conversations and acts of the prisoner, including a letter written by him just before the shooting, as shewing his rationality and knowledge of the nature and quality of his act and that it was wrong, charged the jury that even if they were satisfied that the prisoner was insane at the time of the crime, they could only return a verdict of guilty. (60)

On this subject of Insanity the remarks of the English Commissioners (at pp. 17 and 18 of their Report), are as follows:

"Section 22, (61), which relates to insanity expresses the existing law. The obscurity which hangs over the subject cannot be altogether dispelled until our existing ignorance as to the nature of the will and the mind, the nature of the organs by which they operate, the manner and degree in which these operations are interfered with by disease, and the nature of the diseases which interfere with them is greatly diminished. The framing of the definition has caused us much labor and anxiety; and though we cannot deem the definition to be altogether satisfactory, we consider it as satisfactory as the nature of the subject admits of. Much latitude must in any case be left to the tribunal which has to apply the law to the facts in each particular case. The principal substantial difference between section 22 of the Draft Code and the corresponding section of the Bill is that the latter recognizes as an excuse the existence of an impulse to commit a crime so violent that the offender would not be prevented from doing the act by knowing that the greatest punishment permitted by law for the offence would be instantly inflicted, the theory being that it is useless to threaten a person over whom, by the supposition, threats can exercise no influence. This provision of the Bill assumes that the accused would not be protected by the preceding part of the section, and, therefore, that he was at the time he did the act capable of appreciating its nature and quality, and knew that what he was doing was wrong. The test proposed for distinguishing between such a state of mind and a criminal motive, the offspring of revenge, hatred, or ungoverned passion, appears to us on the whole not to be practicable or safe, and we are unable to suggest one which would satisfy these requisites and obviate the risk of a Jury being

(55) R. v. Stokes, 3 C. & K., 185.
(56) R. v. Layton, 4 Cox C. C., 149.
(57) R. v. Burton, 3 F. & F., 772.
(58) R. v. Townley, 3 F. & F., 839.
(59) R. v. Blomfield, *Vide* "Lancet," July 31st, 1875; Woodman & Tidy, For. Med., 871.
(60) R. v. Hitchens, "Lancet," March 3, 1888; 2 Hamilton & Godkin's Leg. Med., 247.
(61) Sec. 22 of the English Draft Code is in the same terms as sec. 11 of our Code.

muled by considerations of so metaphysical a character. It must be borne in mind that, although insanity is a defence which is applicable to any criminal charge, it is most frequently put forward in trials for murder, and for this offence the law — and we think wisely — awards upon conviction a fixed punishment which the Judge has no power to mitigate. In the case of any other offence, if it should appear that the offender was afflicted with some unsoundness of mind, but not to such a degree as to render him irresponsible — in other words, where the criminal element predominates, though mixed in a greater or less degree with the insane element — the Judge can apportion the punishment to the degree of criminality, making allowance for the weakened or disordered intellect. But in a case of murder this can only be done by an appeal to the Executive; and we are of opinion that this difficulty cannot be successfully avoided by any definition of insanity which would be both safe and practicable, and that many cases must occur which cannot be satisfactorily dealt with otherwise than by such an appeal.'

See sec. 657, *post*, and the cases there cited, as to the course to be pursued when an accused refuses to plead or will not answer when called upon to plead; and see sections 736 and 737, *post*, and cases there cited, as to proof of the accused's insanity at the time of the commission of the offence charged and as to the trial of an accused who, on arraignment or at any time before verdict appears, on account of insanity, to be incapable of conducting his defence.

**Drunkenness.** — With regard to derangement of the mind by the use of intoxicating liquors, the rule is that if drunkenness be contracted voluntarily it will not relieve a person from responsibility for a criminal offence committed by him while in a drunken condition, whether at the time he knows what he is doing or not. (62) Still if the act be one which must in order to render it a criminal offence be done with some particular intent the fact of its being done when the offender is in a state of intoxication should be taken into account in deciding whether he has such intent or not. (63)

If the drunkenness be involuntary, as if a person be made drunk by stratagem or fraud, or by some mistake, as by a physician unskilfully administering some drug or intoxicant to a patient, or if a man become intoxicated in any other way than by his own voluntary act, he will not be responsible for an offence committed while so affected to an extent which prevents him from knowing that he is doing wrong. (64) Or, if by habitual drinking a person become affected by a fixed frenzy, delirium tremens, or other form of insanity, whether permanent or intermittent, he cannot be held responsible for an act done by him while thus affected, if he be thereby rendered incapable of knowing that the act is wrong, or if he be thereby subjected to some specific delusion causing him to believe in the existence of some state of things which if real would justify or excuse his act. (65)

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(62) Bl. Com., 26; 1 Hale, 32; 1 Russ. Cr., 143.

(63) R. v. Meakin, 7 C. & P., 297; R. v. Monkhouse, 4 Cox, C.C., 55; R. v. Cruse, 8 C. & P., 541-546; R. v. Moore, 3 C. & K., 319; R. v. Gamlen, 1 F. & F., 90; R. v. Doody, 6 Cox, 463; R. v. Doherty, 16 Cox, 306; Steph. Gen. View Cr. L., 81; King v. State (Ala.), 8 So. Rep., 856; 13 Cr. L. Mag., 654; Chatham v. State (Ala.), 9 So. Rep., 607; 13 Cr. L. Mag., 938; 1 Bish. New Cr. L. Com., 253; 1 Russ. Cr., 144.

(64) 1 Russ. Cr., 143; Co. Lit., 247; 1 Hale, 32; 1 Bish. New Cr. L. Com., 250.

(65) 1 Hale, 30; R. v. Davis, 14 Cox, C.C., 563; Burrow's Case, 1 Lew., 25; U. S. v. Drew, 5 Mason, 28.

**12. Compulsion by threats.** — Except as hereinafter provided, compulsion by threats of immediate death or grievous bodily harm from a person actually present at the commission of the offence shall be an excuse for the commission, by a person subject to such threats, and who believes such threats will be executed, and who is not a party to any association or conspiracy the being a party to which rendered him subject to compulsion, of any offence other than treason as defined in paragraphs *a*, *b*, *c*, *d*, and *e* of subsection one of section sixty-five, murder, piracy, offences deemed to be piracy, attempting to murder, assisting in rape, forcible abduction, robbery, causing grievous bodily harm and arson.

According to this section, (the provisions of which, together with those of section 13, are included in section 23 of the English Draft Code), a person is relieved from responsibility for any offence (other than the offences specially excepted by the section), when any such offence is committed under compulsion by threats, if it be proved, — 1st, that the threats were of immediate death or grievous bodily harm, made by some one actually present at the commission of the offence; 2nd, that the person so threatened believed such threats would be executed, and 3rd, that he was not a party to any association or conspiracy rendering him subject to compulsion.

On this subject, the Royal Commissioners have in Note A at p. 43 of their Report, the following remarks:

"There can be no doubt that a man is entitled to preserve his own life and limb; and, on this ground, he may justify much which would otherwise be punishable. The case of a person setting up as a defence that he was compelled to commit a crime is one of every day. There is no doubt on the authorities that compulsion is a defence when the crime is not one of a heinous character. But killing an innocent person, according to Lord Hale, can NEVER be justified. He lays down the stern rule: "If a man be desperately assaulted and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact: for he *ought rather to die himself than kill an innocent*."

"On the trials for high treason in 1746, the defence of the prisoners was in many cases that they were *compelled* to serve the rebel army. The law was laid down somewhat more favorably for the prisoners than it had been before, as the defence of compulsion was stated to apply not merely to furnishing provisions to the rebel army, but even to joining and serving in that army. It was laid down, (see Foster, 14), that, "The only force that doth excuse is a force upon the person and present fear of death; and this force and fear of death must continue all the time the party remains with the rebels. It is incumbent upon every man, who makes force his defence, to show an actual force, and that he quitted the service as soon as he could." It is noticeable that though most of those who set up this defence must have fought in actual battle, and must have killed, or at least have assisted in killing the loyalists and so brought themselves within the stern rule laid down by Hale, it was never suggested that this made a difference. The Indian Commissioners proposed in the first draft of the Indian Code to make compulsion in no case a defence, but to have it merely a ground for appealing to the mercy of the government. The Indian Code as published contains a section more lenient than that originally proposed; but more severe than that laid down in Foster. We have framed section

23 of the Draft Code, (66) to express what we think is the existing law, and what at all events we suggest ought to be the law."

ILLUSTRATIONS

A, under compulsion by threats of immediate death or grievous bodily harm from B, then actually present, sets fire to C's house, believing that B will carry out his threats. A is not excused, but is guilty; *because arson is one of the offences excepted by the above section.*

A, under compulsion by threats of immediate death or grievous bodily harm from B, then actually present, commits *a common assault* upon C, believing that B's threats will be executed. A is excused; *because the offence is one of those not excepted by the above section.*

A, under compulsion by threats of death or grievous bodily harm from B, *who is not actually present*, commits a common assault upon C, believing that B will carry out his threats. A is not excused.

A, being threatened with immediate death or grievous bodily harm from B, who is actually present, commits a common assault on C, *but A does not believe that B will carry out his threats.* A is not excused.

A, as a member of an association or conspiracy, becomes bound to act with his co-associates or co-conspirators; and, it being resolved that B shall be assaulted, A acting under compulsion by threats of immediate death or grievous bodily harm from his co-associates or co-conspirators, assaults or assists in the assault on B. A is not excused.

**Compulsion by force.** — Although the law will not excuse the commission of any of the above excepted offences, — such as murder, piracy, rape, arson, — done under compulsion by threats even of immediate death, it will be different with a person who is not a free agent physically, but who is subjected, — not to threats operating on his mental faculties, — but to actual physical force exercised without or against his consent by a third party at the time of the act being done.

ILLUSTRATION

"If A, by force take the arm of B, in which is a weapon, and thereby kill C, A is guilty of murder, not B:" (67) for B, in this instance, is as unwittingly the instrument of A, as, if he were inanimate or unconscious; and his own will has nothing at all to do with the act, which is as exclusively the act of A as if the weapon were in the latter's hand instead of in B's.

Upon an indictment for manslaughter charging that the prisoner compelled and forced two other men, who were working with him at a certain windlass, to leave the said windlass, and that, by such compulsion and force, etc., the deceased was killed, it was held that this indictment was not supported by evidence shewing that the prisoner was working at the windlass with two other men, and that, by his going away, and thus withdrawing his assistance, the other two men were not strong enough to work it, and so they had to let go; it being decided that the words "*compel*" and "*force*" must be taken to mean "*active force.*" (68)

(66) Sec. 23 of the English Draft Code is in the same terms as sections 12 and 13 of our Code.

(67) 1 Russ. Cr., 6 Ed., 145; 1 East P. C., 225.

(68) R. v. Lloyd, 1 C. & P., 301.

**Compulsion by necessity.**—The law of necessity is paramount over all other laws; and it has been well said that every law of man, common law or statutory law, has in it the implied exception, which is of the same force as if expressed, that obedience shall not be required when obedience is impossible, and that an act which is unavoidable is no crime.(69) And, as everything which is necessary for a man to do to save his life is treated as compelled, it follows that if I am attacked by a ruffian who seeks my life, I may kill him if I cannot otherwise preserve my own life.(70) And, if during an embargo a vessel is by stress of weather compelled to put into a foreign port and there sell her cargo, for the preservation of the lives and property on board, she will not be adjudged guilty of a breach of the Embargo Act. (71)

ILLUSTRATIONS

A doctor kills a child in the act of birth as the only way to save the life of the mother. The doctor is justified. (72)

Where shipwrecked sailors and passengers were escaping in a boat which would not hold all, the sailors threw some of the passengers overboard. Held that, unless the presence of the sailors was necessary for the common safety, the passengers should have been kept in the boat in preference to the sailors. (73)

A and B swimming in the sea, after being shipwrecked, get hold of a plank not large enough to support both. A pushes off B, who is drowned. It has been said that A commits no crime. (74)

But Lord Coleridge in delivering judgment in the case of R. v. Dudley and Stephens, seems to deny that this is the law. (75) And the English Royal Commissioners, by their remarks, set out below, on the subject of "Necessity," appear to confirm his view.

In the English Draft Code, as originally prepared, there was a clause on "Necessity;" but, upon the revision of the Bill by the Royal Commissioners, the clause was struck out; and, in giving their reasons for striking out the clause, the Commissioners say:

"Compulsion is only one instance of a justification on the ground that the act, otherwise criminal, was necessary to preserve life. A case of frequent occurrence is where a thief says he was starving and could not save his life unless he stole. Lord Hale, after stating the rule laid down by some casuists that this was justifiable, says, emphatically, "I do therefore take it that where persons live under the same civil government, as here in England, that rule, at least by the laws of England, is false; and, therefore, if a person, being under necessity for want of victuals or clothes, shall upon that account clandestinely and *animo furandi* steal another man's goods, it is felony." And he gives an excellent reason: "Men's properties would be under a strange insecurity, being laid open to other men's necessities, whereof no man can, possibly judge but the party himself."

"But Lord Hale admits that this general principle is subject to some exceptions. He says: "Indeed this rule, *in casu extremæ necessitatis omnia sunt communia*, does hold in some particular cases, where, by the tacit consent of nations, or of some particular countries or societies it hath

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(69) R. v. Dunnett, 1 Car. & K., 425.
(70) 4 Bl. Com., 183.
(71) The "William Gray," 1 Paine, 16; 1 Bish. New Cr. L. Com., 8th Ed., 351.
(72) Steph. Gen. View Cr. L., 2nd Ed., 77.
(73) U. S. v. Holmes, 1 Wall Jr., 1; Burb. Dig. Cr. L., 17.
(74) Bac. Max., No. 5; Burb. 38; 1 Hawk., c. 28, s. 26.
(75) See R. v. Dudley & Stephens, *cit.* at p. 24, *post.*

obtained. * * By the Rhodian Law and the common maritime custom, if the common provision for the ship's company fail, the master may under certain temperaments break open the private chests of the mariners or passengers and make a distribution of that particular and private provision for the preservation of the ships company."(76)

"Such cases have frequently happened, and the law has been settled as to them. But ingenious men may suggest cases which, though possible, have not come under practical discussion in our Courts of justice. Casuists have for centuries amused themselves, and may amuse themselves for centuries to come, by speculating *as to the moral duty of two persons in the water struggling for the possession of a plank capable of supporting only one.* If ever such a case should come up for decision before a court of justice, (which is improbable), it may be found that the particular circumstances render it easy of solution. We are certainly not prepared to suggest that necessity should, *in every case*, be a justification. We are equally unprepared to suggest that necessity should, *in no case*, be a defence: we judge it better to leave such questions to be dealt with, when, if ever, they arise in practice by applying the principles of law to the circumstances of the particular case."

In the case of R. v. Dudley & Stephens it was held that a man, who, in order to escape death from hunger, kills another, for the purpose of eating his flesh, is guilty of murder, although, at the time of the act, he is in such circumstances that he believes and has reasonable grounds for believing that it affords the only chance of preserving his own life. It appeared, upon a special verdict rendered at the trial, that the prisoners Dudley and Stephens, two seamen, were, with a boy, of 17 or 18, cast away in a storm on the high seas, and compelled to put out in an open boat, that the boat was drifting on the ocean and was probably more than a thousand miles from land, that, on the eighteenth day, when they had been seven days without food and five days without water, Dudley proposed to Stephens that lots should be cast who should be put to death to save the rest, and that they afterwards thought it would be better to kill the boy so that their own lives should be saved, that, on the twentieth day, Dudley, with the assent of Stephens, killed the boy, and both prisoners fed on the flesh for four days, that, at the time of the act, there was no sail in sight nor any reasonable prospect of relief, that under these circumstances there appeared, to the prisoners, every prospect that, unless they, then or very soon, fed upon the boy or one of themselves, they would die of starvation.

Upon these facts, it was held that there was no proof of any such necessity as could justify the prisoners in killing the boy, and that they were guilty of murder; and Chief Justice Coleridge, in delivering the judgment of the Court said: "It is not correct to say that there is an absolute or unqualified necessity to preserve one's life, and, if Lord Bacon, in saying that if one of two shipwrecked persons holding on to a plank push the other off to save his own life, meant to lay down the broad proposition that a man may save his own life by killing, if necessary, an innocent and unoffending neighbour, it is certainly not law at the present day."(77)

**13. Compulsion of wife.** — No presumption shall be made that a married woman committing an offence does so under compulsion because she commits it in the presence of her husband.

This section very properly abrogates the common law doctrine by which a wife who committed any crime, other than treason or murder, in her

(76) 1 Hale, 54, 55.
(77) R. v. Dudley and Stephens, 14 Q. B. D., 273, 285-287.

husband's presence or company was *prima facie* presumed to act under his coercion. (78)

Blackstone says that in his day this rule was at least a thousand years old in England, and that among the northern nations of Europe the privilege extended to every women transgressing in company with a man, the indemnity being similar to that accorded to every slave who committed a joint offence with a freeman. Its origin is thus clearly derivable from the old barbaric notions of the abject position of the wife in the matrimonial relation.

Under this old rule it was held in one case where a wife went from house to house uttering base coin, her husband accompanying her but remaining outside, that her act must be presumed to have proceeded from his coercion. (79)

While, however, the common law protected a wife from punishment for any ordinary crime committed by her under the coercion of her husband, which coercion was presumed if she committed the offence in his presence or in his company, (80), still, as the husband's presence merely raised a *prima facie* presumption that she acted under his coercion, if the evidence clearly rebutted such presumption and shewed that she was not drawn to the offence by the husband, or if she were the principal inciter of it, she was punishable as well as her husband.(81) And if she committed an offence voluntarily, or by the bare command of the husband without him being actually present at the time of the committing of the offence, she was punishable.(82) Thus, where a woman was tried for altering a forged order, and her husband was tried for procuring her to commit the offence, and it appeared that, although her husband had ordered her to do it, he was not present when she did it, the judges, upon a case reserved, held that the presumption of coercion did not arise, as the husband was absent at the time of the uttering, and that the wife was properly convicted of the uttering and the husband of the procuring. (83)

This old presumption of the common law was a strained one. In many cases the wife commits a criminal act in spite of her husband; and the above section 13, by abrogating the common law rule, makes it a matter of evidence to be proved whether she acted under the compulsion of her husband or in spite of or independently of him.

By the terms of sections 12 and 13, one rule in regard to compulsion or coercion is laid down for all persons alike, whether married women or not.

**14. Ignorance of the law.** — The fact that an offender is ignorant of the law is not an excuse for any offence committed by him.

The doctrine embodied in this section is founded upon the general principle that every one is presumed to know the law. (84) If a man knowingly

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(78) 1 Hale, 45; 1 Hawk. P. C., c. 1, s. 9; 4 Bl. Com., 28.

(79) Connolly's Case, 2 Lew., 229; 1 Bish New Cr. L. Com., 8th Ed., pp. 214, 215.

(80) 1 Russ. Cr., 6th Ed., 146; 1 Hale, 45; 4 Bl. Com., 28.

(81) 1 Hale, 516; R. v. Torpey, 12 Cox. C. C., 45; Warb. L. Cas., 2nd Ed., 25.

(82) 1 Russ. Cr., 6th Ed., 146; 1 Hawk. P. C., c. 1, s. 11.

(83) R. v. Morris, R. & R., 270.

(84) Broom's Leg. Max., 6th Ed., 247 *et seq.*; 4 Bl. Com., 27; 1 Hale, 42; R. v. Crawshaw, Bell, 303.

does an act which is unlawful according to law, he is presumed to know of its unlawfulness. His ignorance of the law will not excuse him. (85)

The presumption is so strong that it has been held to be no defence for a foreigner, charged with a crime committed in England, to shew that the act was no offence in his own country and that he did not know he was doing wrong in doing it in England. (86) And a foreigner while on board a British ship, which he has entered voluntarily, is as amenable to English law as if he were on British land. (87)

Where a defendant was convicted of malicious shooting on the high seas upon an indictment laid under a special statute passed only a few weeks before the offence was committed and of which statute no notice could have reached the place where the shooting happened, the conviction was nevertheless considered perfectly legal: although the judges recommended a pardon. (88)

In section 21, *post*, there is an exception to the general rule that ignorance of the law shall be no excuse; for it is there enacted that "everyone, acting under a warrant or process which is bad in law on account of some defect in substance or in form apparent on the face of it, if he in good faith, and, without culpable ignorance and negligence, believes that the warrant or process is good in law, shall be protected from criminal responsibility to the same extent and subject to the same provisions as if the warrant or process were good in law; and *ignorance of the law shall in such case be an excuse.*"

**Ignorance or mistake of fact.**—Although ignorance of the law is no excuse, it is otherwise with regard to ignorance or mistake in point of fact, which as a general rule will be a good and sufficient excuse; (89) for a mistake of fact may negative the existence of an evil intent, which is the essence of a crime; so that whenever any one, without fault or carelessness, is, while pursuing a lawful object, misled concerning facts, and acts upon them as he would be justified in doing were they what he believes them to be, he is legally as well as morally innocent. But the rule will not apply if the mistake be made in the course of doing any unlawful act, and therefore if some unintended or unforeseen consequence ensue from an act which in itself is wrongful and unlawful, the actor will be as criminally responsible as if the consequence were intended and foreseen; (90) nor will the rule apply if the mistake be due to any negligence or want of due diligence; at least it will not apply so as to exonerate a person entirely; and the rule will not apply when a statute makes an act criminal irrespective of guilty knowledge of some fact connected with it.

ILLUSTRATIONS

A, in his own house strikes a blow under the mistaken though *bona fide* belief that he is striking at a concealed burglar, but by this blow he kills B, a member of his own family. A is guilty of no offence. (91)

B, pretending by way of a practical joke to be a robber, presents an

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(85) R. v. Mailloux, 3 Pugs. (N. B.), 493.

(86) R. v. Esop, 7 C. & P., 456; Barronet's Case, 1 E. & B., 1; 1 Dears. C. C., 51.

(87) R. v. Sattler, R. v. Lopez, D. & B., C. C., 525.

(88) R. v. Bailey, R. & R., 1.

(89) 4 Bl. Com., 27; 1 Hawk. P. C., Curw. Ed., p. 5, s. 14 (*note*); 1 Bish. New Cr. L. Com., 8th Ed., 171.

(90) Arch. Cr. Pl., 24; Clarke's Cr. L., 70.

(91) R. v. Levitt, Cro. Car., 558; 1 Hale, 474; Burb. Dig. Cr. L., 40.

empty pistol at A and demands his money. A, believing that B really is a robber, kills B. A is justified. (92)

A kills B, a friendly visitor through *negligently* mistaking him for a burglar. Although A cannot be convicted of murder he may be convicted of manslaughter by reason of his having *negligently* failed to acquaint himself with the true state of affairs. (93)

Where a physician was indicted for malpractice, it was no defence that he was ignorant of facts with which it was his duty to become acquainted. (94)

When a statute makes an act indictable, irrespective of guilty knowledge of some fact connected with it, ignorance of the fact will be no defence. (95) Take the following illustration given by Sir James F. Stephen: "A abducts B, a girl of 15 years of age, from her father's house believing in good faith and on reasonable grounds that B is 18 years of age. A commits an offence, although if B had been 18 years of age she would not have been within the statute." (96)

It has been held that, where a municipal bylaw provided that no person should let occupy or suffer to be occupied as a dwelling house or lodging any room not containing at least 384 cubic feet of space for each person occupying the same, it is necessary, in order to support a conviction for a contravention of such bylaw, that there should be some evidence of guilty knowledge actual or constructive on the part of the person charged. (97)

**15. Execution of lawful sentence.** — Every ministerial officer of any court authorized to execute a lawful sentence, and every gaoler, and every person lawfully assisting such ministerial officer or gaoler, is *justified* in executing such sentence.

**16. Execution of lawful process.** — Every ministerial officer of any court duly authorized to execute any lawful process of such court, whether of a civil or criminal nature, and every person lawfully assisting him, is *justified* in executing the same; and every gaoler who is required under such process to receive and detain any person is justified in receiving and detaining him.

**17. Execution of lawful warrants.** — Every one duly authorized to execute a lawful warrant issued by any court or justice of the peace or other person having jurisdiction to issue such warrant, and every person lawfully assisting him, is *justified* in executing such warrant; and every gaoler who is required under such warrant to receive and detain any person is *justified* in receiving and retaining him.

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(92) 1 Hale P. C., 474; Burb. Dig. Cr. L., 41.
(93) Hudson v. MacRae, 4 B. & S., 585; Whart. Cr. L., 8th Ed., s. 89.
(94) R. v. Macleod, 12 Cox. C. C., 534. See also sec. 212, *post*.
(95) 1 Stark, C. P., 196; Sedg. Stat. L., 2nd Ed., 80; R. v. Myddleton, 6 T. R., 739; R. v. Jukes, 8 T. R., 536; Whart. Cr. L., s. 88.
(96) Steph. Dig. Cr. L., *Art.* 34; R. v. Prince, L. R., 2 C. C. R., 154.
(97) Re Wing Ke, 2 B. C. L., Rep., 321.

In commenting upon the principle embodied in these sections, the Royal Commissioners make (at p. 11 of their Report), the following remarks:

"It is a principle of the common law that what the law requires it justifies.—*Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud.*" *(5 Rep.,* 115 *b.)*

See section 31 and sections 33-36, *post*, as to the right to use necessary force in making an arrest or to prevent an escape or rescue; and see section 58, *post*, as to EXCESS.

Upon an indictment for assaulting a County Court bailiff in the execution of his duty, the production of the County Court Judge's warrant was, upon a case reserved, held to be a sufficient justification of the bailiff's act in making the arrest of the accused, without proof of previous proceedings authorizing the warrant, although the judgment upon which the warrant was issued was one obtained in one county and the warrant issued thereon was sent for execution into another county.

It was contended, on behalf of the accused, that the proceedings authorising the issue of the warrant should have been proved, so that it might be known whether or not the warrant was lawfully issued, that is, having a lawful basis, the judgment being a foreign one, that is, obtained in the County Court of one county,—Cardiganshire,—and ordered to be executed in another county,—Carmarthenshire,—and that, assuming that a *good* warrant to arrest would, in an action of trespass against the officer acting under it, be a justification,(98) yet he would be liable for executing a warrant which was *objectionable*.

Blackburn, J., said that, in Machalley's case,(99), it was held to be murder to kill an officer acting under a process that was erroneous; and, after quoting, from Foster's Crown Law, the following: "And in the case of arrests upon process, whether by writ or warrant, if the officer named in the process give notice of his authority and be resisted and killed, it will be murder, if such notification was true, and the process legal,"—the Judge(Blackburn)continued as follows: "Foster, J., goes on to say that he could not be understood to mean more than '*provided the process be not defective in the frame of it and issue in the ordinary course of justice.*' There may have been irregularity previous to the issuing of the warrant; but, if the sheriff or other minister of justice be killed in the execution of it, it will be murder; for the officer to whom it is directed must, at his peril, pay obedience to it: and it is sufficient, upon an indictment for this murder, to produce the writ or warrant without shewing the judgment or decree; (Roger's Case)." (100) And Pollock, C. B., following Judge Blackburn, added: "The process of the County Court was as much a justification to the officer as a writ of execution out of a Superior Court to the sheriff; and it is clear that the production of such a writ would be sufficient in a proceeding of this description for assaulting the sheriff or his bailiff, without proof of the judgment." (101)

**18. Execution of erroneous sentence or process.** — If a sentence is passed or process issued by a court having jurisdiction under any circumstances to pass such a sentence or issue such process, or if a warrant is issued by a court or person having jurisdiction under any circumstances to issue such a warrant, the

(98) Andrews v. Marris, 1 Q. B., 1.
(99) Machalley's Case, 9 Co., 65.
(100) Roger's Case, Fost., p. 311, c. 8, s.s. 7, 8.
(101) R. v. Davies, 8 Cox, 486.

sentence passed or process or warrant issued shall be sufficient to *justify* the officer or person authorized to execute the same, and every gaoler and person lawfully assisting in executing or carrying out such sentence, process or warrant, although the court passing the sentence or issuing the process had not in the particular case authority to pass the sentence or to issue the process, or although the court, justice or other person in the particular case had no jurisdiction to issue, or exceeded its or his jurisdiction in issuing the warrant, or was, at the time when such sentence was passed or process or warrant issued, out of the district in or for which such court, justice or person was entitled to act.

In their comments upon sections of the English Draft Code of the same import as the foregoing, the Royal Commissioners (in a marginal note opposite to section 28 of the English Draft Code, said, "The result of the authorities justifies us in saying that wherever a ministerial officer, who is bound to obey the orders of a court or magistrate, (as, for instance, in executing a sentence or effecting an arrest under warrant), and is punishable by indictment for disobedience, merely obeys the order which he has received, he is *justified*, if that order was within the jurisdiction of the person giving it. And we think that the authorities shew that a ministerial officer obeying an order of a court or the warrant of a magistrate, is *justified* if the order or warrant was one which the court or magistrate could under any circumstances lawfully issue, though the order or warrant was in fact obtained improperly, or though there was a defect of jurisdiction in the particular case which might make the magistrate issuing the warrant civilly responsible; on the plain principle that the ministerial officer is not bound to enquire what were the grounds on which the order or warrant was issued and is not to blame for acting on the supposition that the court or magistrate had jurisdiction."

Where a magistrate received a complaint in a matter over which he had a general jurisdiction and granted his warrant, upon which the person complained of was arrested, it was held, in an action of damages taken by the latter, that the complainant was not liable as a trespasser, although the particular case was one in which it turned out that the magistrate had no authority to act.

The facts were these. The plaintiff, a builder, was employed by the defendant to build some houses under a specific contract. In the course of the work a dispute arose, the plaintiff stopped his building operations, and the defendant laid before a magistrate the complaint, in question, under the *Master and Servant's Act*. On the warrant being issued, the defendant went with the constable to point out the plaintiff to him. On the complaint being heard it was dismissed, the subject matter thereof being found not to be one in which the relation of master and servant existed. Hence, the action of damages, which was non-suited, Lord Abinger, C. B., holding that the defendant's interference in the arrest, by pointing out to the constable, the plaintiff as the person to be arrested, was too slight to make him a trespasser. On motion for a new trial, it was argued that, when a magistrate is put in motion by a complainant, in a matter over which the magistrate has no jurisdiction, he is a trespasser, and all who act under him are trespassers. Lord Abinger, C. B., said, — "Where a magistrate has a general jurisdiction over the subject matter, and a party comes before him and prefers a complaint, upon which the magistrate makes a mistake in thinking it a case within his authority, and grants a warrant which is not justified in point of law, the party complaining is not liable as a trespasser, but the only remedy against him is by an action upon the case, if he acted maliciously. A magistrate acting without any jurisdiction

at all is liable as a trespasser, in many cases, but this liability does not extend to the constable who acts under a warrant." (102)

In a case tried in Manitoba, before the coming into force of the Code, it had already been held that where a writ of *fieri facias* contained a statement merely erroneous as to date and which could have been amended, a person was not justified in resisting the sheriffs' officer in executing it. The prisoner had been convicted under an indictment charging him with having unlawfully and wilfully obstructed a sheriffs' officer in the execution of three writs of *fieri facias*. It was stated in each of the writs that the judgment upon which it was issued was entered up on the 25th of February 1892, the real dates of the entering up of the judgments being the 3rd of February 1887. On a case reserved by the trial Judge, the Court of Queen's Bench held that the writs being in proper form and regular on their face, apart from the error in the dates of the judgments, the sheriff was bound to execute them, that the error was merely an amendable irregularity, and that the prisoner was rightly convicted. (103)

Where, on the conviction of J. D., of an offence under the Indian Act, a warrant of commitment, issued by justices, — for non-payment of a fine and costs, — directed the constables of the county of B to take and deliver J. D. to the keeper of the common goal of the county to be kept there for two months unless the fine and costs, including costs of conveyance to gaol, should be sooner paid, it was held that, as the justices had jurisdiction over the offence and as the warrant was valid on its face, it afforded a complete protection to the constable executing it and that the defendant was rightly convicted of assaulting the constable while attempting to execute the warrant, notwithstanding that the awarding of the punishment, — in directing imprisonment for non-payment of the fine and costs, including costs of conveyance to gaol, — may have been erroneous, as not being authorized by the Act. (104)

**19. Sentence or process without jurisdiction.** — Every officer, gaoler or person executing any sentence, process or warrant, and every person lawfully assisting such officer, gaoler or person shall be *protected from criminal responsibility* if he acts in good faith under the belief that the sentence or process was that of a court having jurisdiction or that the warrant was that of a court, justice of the peace or other person having authority to issue warrants, and if it be proved that the person passing the sentence or issuing the process acted as such a court under colour of having some appointment or commission lawfully authorizing him to act as such a court, or that the person issuing the warrant acted as a justice of the peace or other person having such authority, although in fact such appointment or commission did not exist or had expired, or although in fact the court or the person passing the sentence or issuing the process was not the court or the person authorized by the commission to act, or the person issuing the warrant was not duly authorized so to act.

It will be seen that section 18 protects an officer who executes the sentence or warrant of a court or person having jurisdiction, generally

(102) West v. Smallwood, 3 M. & W., 418.
(103) R. v. Monkman, 8 Man. L. R., 509; 13 C. L. T., 16.
(104) R. v. King, 18 Ont. Rep., 566.

speaking, but acting, in the particular case in hand, either without or in excess of such jurisdiction or outside of his or its district; and that section 19 protects an officer in executing in good faith a sentence or warrant which he believes has been passed or issued by a duly authorized court or person, if it be proved that it was passed or issued by such court or person under some color of lawful authority.

In commenting upon the latter clause, the English Commissioners said, "Though cases of this sort have rarely arisen in practice, we think we are justified by the opinion of Lord Hale (1 Hale, 498), in saying that the order of a court, having a color of jurisdiction, though acting erroneously is enough to justify the ministerial officer."

**20. Arresting the wrong person.** — Every one duly authorized to execute a warrant to arrest who thereupon arrests a person, believing in good faith and on reasonable and probable grounds that he is the person named in the warrant, shall be *protected from criminal responsibility* to the same extent and subject to the same provision as if the person arrested had been the person named in the warrant.

2. Every one called on to assist the person making such arrest, and believing that the person in whose arrest he is called on to assist is the person for whose arrest the warrant is issued, and every gaoler who is required to receive and detain such person, shall be protected to the same extent and subject to the same provisions as if the arrested person had been the person named in the warrant.

This section makes an important change. By the common law, if an officer having a warrant for one person, arrested another, the arrest was illegal and unjustifiable. For instance, in one case a magistrate issued a warrant upon a criminal charge against a man who was described in the warrant by the name of John H. Under this warrant the constable arrested Richard H.; and, although the man so arrested was in reality the person against whom the warrant was intended, and was pointed out, as such, to the constable, by the prosecutor who supposed the man's name to be John H., Mr. Justice Coltman directed the jury, and his ruling was afterwards upheld, that a person could not be lawfully taken under a warrant describing him by a name that did not belong to him, unless he had assumed or called himself by the wrong name. (105)

Of course, as a constable could always apprehend, without warrant, any one suspected on reasonable grounds of having committed a felony, he was able to justify an arrest, on that ground, although he had a warrant which happened to be illegal. (106)

The remarks of the English Commissioners in support of a similar clause in their draft code are as follows: "This is new. As an officer arresting for felony without warrant is by the common law justified even if he, by mistake, arrests the wrong person, we think that the one who arrests any person with a warrant for any offence shall at least be protected from criminal responsibility. The right of action is not affected by it."

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(105) Hoye v. Bush, 1 M. & Gr., 775, 780; 3 Russ. Cr., 6th Ed., 100; R. v. Hood, R. & M., 281.

(106) 3 Russ. Cr., 100, *note* (*q*).

**21. Irregular warrant or process.** — Every one acting under a warrant or process which is bad in law on account of some defect in substance or in form apparent on the face of it, if he in good faith and without culpable ignorance and negligence believes that the warrant or process is good in law, shall be *protected from criminal responsibility* to the same extent and subject to the same provisions as if the warrant or process were good in law, and ignorance of the law shall in such case be an excuse : (107) Provided, that it shall be a question of law whether the facts of which there is evidence may or may not constitute culpable ignorance or negligence in his so believing the warrant or process to be good in law.

In reference to this clause in the English Draft Code, the Commissioners said, "It is at least doubtful on the existing authorities whether a person honestly acting under a bad warrant, defective on the face of it, has any defence, though doing only what would have been his duty if the warrant was good. The section as framed protects him. The proviso is new, but seems to be reasonable. It does not touch the question of civil responsibility."

**Execution of warrant or process by persons to whom it is not directed.** — Where bankruptcy commissioners had issued a warrant to apprehend a bankrupt, the warrant being directed "to J. A. and W. S., our messengers, and their assistants, etc.," it was held that this warrant did not justify the bankrupt's apprehension by any one who was not in the presence, actual or constructive, of J. A. and W. S., and that, therefore, B., an assistant of W. S., in his business of a Sheriffs' officer, was not justified in apprehending the bankrupt in the absence of W. S. and J. A., although B. had the warrant in his possession, that the term "*assistants*" would only extend to such persons as J. A. and W. S., or either of them, might take with them to aid them in making the arrest, and that where B., in attempting, in the absence of J. A. and W. S., to take the bankrupt, was struck down with a stone and, in an ensuing struggle, had his nose bitten off by the bankrupt, this, in case death had ensued to B., would have been a case of manslaughter only. (108)

Where a warrant of distress for sewer rates was issued under an Imperial statute, it was held that it could only be lawfully executed by the person to whom it was directed, that, if the warrant be handed over by such authorized person to any other person, the latter has no right to execute it, that, in executing it, such other person commits a trespass, and that, if in its execution, he commits an assault, he may be convicted thereof. In this case, Field, J., quoted the legal maxim, — *Delegatus non potest delegare*, and said that the person to whom the warrant was directed was the *delegatus* and had no power to delegate his authority. "It is a general principle," he continued, "that every person whose house is entered and whose property is seized is entitled to know the authority under which it is done and to be able to see whether that authority has been followed. It would be a shocking thing to say that an authorized man can give the warrant to any person he pleases and allow that person to commit a trespass." (109)

(107) See section 14, *ante*.
(108) R. v. Whalley, 7 C. & P., 245.
(109) Symonds v. Kurtz, 16 Cox C. C., 726.

## ARRESTS WITHOUT WARRANT.

**22. Arrest, by peace officer, without warrant, of suspected offender.** — Every peace officer who, on reasonable and probable grounds, believes that an offence for which the offender may be arrested without warrant has been committed, whether it has been committed or not, and who, on reasonable and probable grounds, believes that any person has committed that offence, is *justified* in arresting such person without warrant, whether such person is guilty or not.

**23. Persons assisting peace officer to arrest suspect.** — Every one called upon to assist a peace officer in the arrest of a person suspected of having committed such offence as last aforesaid is *justified* in assisting, if he knows that the person calling on him for assistance is a peace officer, and does not know that there is no reasonable grounds for the suspicion.

As the common law justified a constable in making an arrest without warrant, upon a reasonable ground of suspicion of a felony having been committed, although no felony had in fact been committed,(110) it was, in so far as felonies were concerned, identical with the law as now made applicable by the above section 22 to the particular offences (enumerated in section 552, *post*, as amended by 58-59 Vic., c. 40), for which offenders may be arrested without warrant.

Of course, the grounds of belief upon which a peace officer acts under this provision of the law must, as shewn by all the authorities in point, be such as would lead any reasonable person, acting without bias or prejudice, to believe the arrested party guilty of the offence. (111)

Section 22 is intended to provide for the exoneration of an officer who has made an arrest in a case where it turns out that an offence has not been committed, — not for the case of arresting the wrong person. It is intended to apply to a class of cases in which an offence has been attempted but not completed. As, for example, the case of a man arrested for picking or attempting to pick a pocket, when it turns out there was nothing in the pocket. (112) Again, an officer may have reason to believe from what he hears and sees that a rape has been committed, but it may turn out that the offender has only been guilty of an indecent assault, or the offence of rape, although attempted, may not have been completed. Under this section the officer would be exonerated. Again, an officer going along a highway finds a homicide has been committed, and he makes an arrest. It may turn out that the homicide was excusable. In all these cases the officer has acted promptly on information that would satisfy any reasonable man, and he does so at the peril of justification which he can obtain when a judge decides that he has had reasonable and probable grounds on which to make the arrest.

A justice of the peace is liable in trespass where, without an informa-

(110) Beckwith v. Philby, 6 B. & C., 635; Davies v. Russell, 5 Bing., 354; Hogg v. Ward, 27 L. J. Ex., 443; 2 Hale 79-93; 3 Russ. Cr., 83.

(111) Allen v. Wright, 8 C. & P., 522; Leete v. Hart, 37 L. J. C. P., 157; L. R. C. P. 322; Greenw. & M's. Mag. Guide, 2nd Ed. 117.

(112) See R. v. Collins, L. & C., 477; and R. v. Brown, 24 Q. B. D., 157, *cit.* under sec. 64, *post*.

tion therefor being first duly sworn, he issues his warrant for the arrest of a person charged with a criminal offence for which, under sections 22 and 552, an arrest may be made without warrant. Sections 22 and 23 are a codification of the common law with respect to the right of a peace officer whether a justice of the peace, or a constable, to personally arrest on view or on suspicion or by calling some person on the spot to assist him; but they do not authorize a justice, acting without an information laid before him, to direct a constable to make an arrest elsewhere without warrant. (113)

**24. Arrest, by any person, without warrant, of any one found committing an offence.** — Every one is *justified* in arresting without warrant any person whom he finds committing any offence for which the offender may be arrested without warrant, or may be arrested when found committing.

**25. Arrest, by any person, of any one reasonably believed guilty of an offence actually committed.** — If any offence, for which the offender may be arrested without warrant, has been committed, any one who, on reasonable and probable grounds, believes that any person is guilty of that offence is *justified* in arresting him without warrant, whether such person is guilty or not.

This section applies to a case in which an offence, for which an arrest may be made without warrant, has been actually committed by some one; while section 22, relating to the power of a peace officer, is, as already mentioned, for cases in which it turns out that the offence has not been committed at all, or in which the offence has been attempted or commenced but not completed.

**Offences for which an arrest may be made without warrant.** — The offences, for which an offender *found committing* any of them may be arrested, without warrant, by ANY ONE, — whether a peace officer or not, and for which an offender who is *found committing* or who *has committed* any of them may be arrested, without warrant, by a PEACE OFFICER, are enumerated in the first, second, third and fouth subsections of section 552, *post*, as amended by 58-59 Vic., c. 40.

See also subsections 5 and 6 of section 552, *post*, for other provisions as to the right to arrest without warrant.

**26. Arrest, by any person, of any one reasonably believed to be committing an offence by night.** — Every one is protected from criminal responsibility for arresting without warrant any person whom he, on reasonable grounds, believes he finds committing by night any offence for which the offender may be arrested without warrant.

**27. Arrest by peace officer of person whom he finds committing offence.** — Every peace officer is *justified* in arresting without warrant any person whom he finds committing any offence.

See sub-sec. 3 of sec 552, *post*.

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(113) McGuinness v. Dafoe, 27 O. R., 117; 23 Ont. A. R., 704.

**28. Arrest of person found committing any offence at night.** — Every one is *justified* in arresting without warrant any person whom he finds by night committing any offence. (114)

2. Every peace officer is *justified* in arresting without warrant any person whom he finds lying or loitering in any highway, yard or other place by night, and whom he has good cause to suspect of having committed or being about to commit any offence for which an offender may be arrested without warrant. (115)

Under section 3 (*q.*) *night* or *night time* is the interval between nine o'clock in the afternoon and six o'clock in the forenoon of the following day.

"FOUND COMMITTING" has been held to mean either seeing the party actually committing the offence or pursuing him immediately or continuously after he has been seen committing it; so that to justify the arrest, without warrant, of an offender on the ground of his being *found committing* an offence, he must be taken in the very act of committing it, or there must be such fresh and continuous pursuit of him from his being seen and surprised in the act until his actual capture that the finding him in the act and his subsequent pursuit and capture may be considered to constitute one transaction. (116) Immediately means immediately after the *commission* of the offence, and not immediately after the *discovery* of its commission. Pursuit after an interval of three hours would not be a fresh pursuit. (117) It seems that if the offender be seen in the commission of the offence by one person he may be apprehended by another who did not see him committing it. (118)

**29. Arrest during flight.** — Every one is *protected from criminal responsibility* for arresting without warrant any person whom he, on reasonable and probable grounds, believes to have committed an offence and to be escaping from and to be freshly pursued by those whom he, on reasonable and probable grounds, believes to have lawful authority to arrest that person for such offence.

This section is identical with section 39 of the English Draft Code, opposite to which the Royal Commissioners have the following note: — "This is believed to extend the common law, which applies only to the arrest of persons actually guilty. It does not affect the question of civil liability."

It will be noticed that in some of the foregoing sections the word "*justified*" is used, while in others the words used are "*protected from criminal responsibility.*" The different meanings intended to be conveyed by these two expressions are explained in the following extract, bearing on the sub-

(114) See sub-sec. 3 of section 552, *post*.

(115) See sub-sec. 7 of sec. 552, *post*, and paragraph (*a*) thereof which provides that a person apprehended by night while lying or loitering in any highway, etc., must be brought before a justice of the peace by noon of the following day.

(116) R. v. Curran, 3 C. & P., 397; 3 Russ. Cr., 6th Ed., 78; Hanway v. Boultbee, 1 M. & R., 15; R. v. Phelps, C. & M., 180.

(117) Downing v. Capel, L. R., 2 C. P., 461; Leete v. Hart, 37 L. J., C. P., 157.

(118) R. v. Howarth, R. & M., C. C. R., 207; 3 Russ. Cr., 80.

ject, taken from p. 11 of the report of the English Commissioners: "There is a difference in the language used in the sections in this part which probably requires explanation. Sometimes it is said that the person doing an act is '*justified*' in so doing under particular circumstances. The effect of an enactment using that word would be not only to relieve him from punishment, but also to afford him a statutable defence against a civil action for what he had done. Sometimes it is said that the person doing an act is '*protected from criminal responsibility*' under particular circumstances. The effect of an enactment using this language is to relieve him from punishment, but to leave his liability to an action for damages to be determined on other grounds, the enactment neither giving a defence to such an action where it does not exist, nor taking it away where it does. This difference is rendered necessary by the proposed abolition of the distinction between felony and misdemeanor. We think that in all cases where it is the duty of a peace officer to arrest, (as it is in cases of felony), it is proper that he should be protected, as he is now, from civil as well as from criminal responsibility. And as it is proposed to abolish the distinction between felony and misdemeanor on which most of the existing law as to arresting without a warrant depends, we think it is necessary to give a new protection from all liability (both civil and criminal) for arrest in those cases which by the scheme of the Draft Code are (so far as the power of arrest is concerned) substituted for felonies. In those cases therefore which are provided for in sections 32, 33, 34, 37, 38, (119), the word '*justified*' is used. A private person is by the existing law protected from *civil* responsibility for arresting without warrant a person who is on reasonable grounds believed to have committed a felony, provided a felony has actually been committed, but not otherwise. In section 35, (120) providing an equivalent for this law, the word used is '*justified*.' On the other hand where we suggest an enactment which extends the existing law for the purpose of protecting the person from *criminal* proceedings, we have not thought it right that it should deprive the person injured of his right to damages. And in cases in which it is doubtful whether the enactment extends the existing law or not, we have thought it better not to prejudice the decision of the civil courts by the language used. In cases therefore such as those dealt with by sections 29, 30, 31, 36, 39, 46, 47, (121), we have used the words '*protected from criminal responsibility*.'"

## POWERS OF ARREST BY PEACE OFFICER AND BY PRIVATE PERSON CONTRASTED.

With regard to a peace officer's powers, the effect of sections 22, 27 and 28 and of section 552 *post*, (as amended by 58-59 Vic., c. 40), seems to be that he will be *justified* (that is relieved from civil as well as criminal responsibility), in making an arrest without warrant in any of the following cases:

1. When he believes, on reasonable and probable grounds, that an offence for which an arrest without warrant may be made has been committed, and when he believes, on reasonable and probable grounds, that the person whom he arrests has committed it, whether it turns out that such offence has been actually committed or not, and whether the person so arrested be guilty or not.

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(119) Sections 32, 33, 34, 37 and 38 of the English Draft Code are identical with sections 22, 23, 24, 27 and 28 of our Code.

(120) Section 35 of the English Draft Code is identical with section 25 of our Code.

(121) Sections 29, 30, 31, 36, 39, 46 and 47 of the English Draft Code are identical with sections 19, 20, 21, 26, 29, 36 and 37 of our Code.

2. When the person whom he arrests is found in the act of committing any criminal offence whatever.

3. When the person whom he arrests is found by the peace officer lying or loitering in any highway, yard or other place, by night, and such peace officer has good cause to suspect the person, so found by him, of having committed or being about to commit any offence for which an offender may be arrested without warrant.

4. When the person whom he arrests has *committed* or is by any one *found committing* any offence enumerated in subsections 1 and 2 of section 552, *post*.

With regard to the powers of a private individual, the effect of sections 23, 24, 25 and 28 and of section 552, *post*, (as amended by 58-59 Vic., c. 40), is that he will be *justified*, that is relieved from civil and criminal responsibility, in any of the following cases:

1. In assisting, — when called upon, — a peace officer in arresting any person suspected of having committed an offence for which an offender may be arrested without warrant, provided he knows that the person calling for his assistance is a peace officer, and provided also that he is not aware of there being no reasonable grounds for suspecting the person sought to be arrested.

2. In arresting, without warrant, any one whom he himself *finds* at any time (day or night) *committing* any offence for which an offender may be arrested without warrant, or may be arrested when found committing.

3. In making an arrest, without warrant, of any one whom on reasonable and probable grounds he believes guilty of any offence for which an offender may be arrested without warrant, whether such person is guilty or not; provided, however, that such offence has been actually committed by some one.

4. In arresting without warrant any one whom he himself actually finds, *by night*, committing *any offence whatever*.

Under sections 26 and 29 a private individual is *protected from criminal responsibility*, but not from civil liability in any of the following cases:

1. In making an arrest without warrant of any one whom, on reasonable and probable grounds, *he believes* he finds committing *by night* any offence for which an offender may be arrested without warrant.

2. In arresting, without warrant, any ont whom, on reasonable and probable grounds, he believes to have committed an offence and to be escaping from and to be freshly pursued by those whom he, on reasonable and probable grounds, believes to be lawfully authorized to arrest that person for that offence.

It will be seen that, on the one hand, a peace officer arresting, without warrant, a person whom he reasonably suspects to have committed one of the offences enumerated in sub-sections 1 and 2 of section 552, *post*, will be *justified* not only if the person arrested be innocent, but even if the suspected offence has not been committed at all, (sec. 22); while, on the other hand, a private individual making an arrest, without warrant, of a person whom he has reasonable and probable grounds for believing to be guilty of an offence, must, in order to be *justified*, shew that the suspected offence has been actually committed by some one. (Sec. 25.) And while a peace officer will be *justified* in arresting any person whom he finds, *at any time*, (day or night), committing *any offence* whatever, (sec. 27 and subsec. 3 of sec. 552, *post*), it is different with regard to a private individual; it is only when the private individual finds the offender committing an offence in the *night time*, (sec. 28 and subsec. 3 of sec. 552, *post*), that he is *justified* in arresting him without warrant for any offence not enumerated in subsec. 1 of sec. 552, *post*. If it be in the *day* time, the offence in order to justify a private individual in making the arrest without warrant, (sec. 24), must be one of the offences enumerated in subsec. 1 of

sec. 552, or an offence which is being committed against property of which such private individual is the owner or of which the person under whose authority he acts is the owner. (See sub-sec. 5 of sec. 552, *post*).

ILLUSTRATIONS.

A, a peace officer believes, on reasonable and probable grounds, that a burglary has been committed and that B has committed it. A arrests B without warrant. It turns out that no burglary has been committed at all. A is justified.

A, a peace officer, believes, on reasonable and probable grounds, that a rape has been committed on B, ant that C has committed it. A arrests C, without warrant. It turns out that C committed no rape but only a common assault. A is justified.

A, who is not a peace officer, believes, on reasonable and probable grounds, that a burglary has been committed, and that B has committed it. A arrests B, without warrant. It turns out that although there was a burglary B did not commit it. A is justified. In this case if there were no burglary committed A would not be justified.

A, who is not a peace officer, believes, on reasonable and probable grounds, that a rape has been committed on B by C. A arrests C, without warrant. It turns out that C committed no rape, but only a common assault. A is not justified.

A, a peace officer, finds B in the act of committing an offence, in the day time. A is justified in arresting B, without warrant, whatever the offence may be.

A, who is not a peace officer, finds B in the act of committing a common assault, in the day time. A is not justified in arresting B, without warrant; but if he were to find B in the day time committing a robbery he would be justified in arresting him without warrant; or if A were to find B committing a common assault or any other offence *at night*, he would be justified in arresting B, without warrant, or if the offence were one which B was committing against A's property, A would be justified in arresting B without warrant.

A, a peace officer, finds B loitering in a yard by night, and has good cause to suspect B of being about to commit arson. A is justified in arresting B without warrant.

A, who is not a peace officer, *believes*, on reasonable and probable grounds, that he finds B committing mischief on a railway *by night*. A is *protected from criminal responsibility* in arresting B, without warrant.

A, who is not a peace officer, finds B in the act of defiling C, a child under fourteen. A at once informs D, a peace officer, who has not seen the act. D (accompanied by A) immediately pursues and overtakes B, and D then arrests him without warrant. D is justified.

A, as a private individual, finds B in the act of stealing and carrying away some of A's clothing or other effects or some of the effects of A's master or of a person for whom A has authority to act. A is justified in arresting B without warrant.

**30. Statutory power of arrest.** — Nothing in this Act shall take away or diminish any authority given by any Act in force for the time being to arrest, detain or put any restraint on any person.

**31. Force used in arrests, etc.** — Every one *justified* or *protected from criminal responsibility* in executing any sentence, warrant or process, or in making any arrest, and every one lawfully assisting him, is *justified* or *protected from criminal responsibility*, as the case may be, in using such force as may be necessary to overcome any force used in resisting such execution or arrest, unless the sentence, process or warrant can be executed or the arrest effected by reasonable means in a less violent manner.

This section is copied from section 41 of the English Draft Code, and is based upon the principle that, as in making an arrest or in executing any sentence, warrant, order, or process, a peace officer or other person legally authorized acts under legal command or compulsion he may, if resisted, repel force with force; and if, in using reasonable and necessary force to overcome resistance, the officer should happen, in the struggle, to kill the person resisting or any of his accomplices, he will be exonerated; while, on the other hand, if death should ensue to the officer or any one assisting him, the persons so resisting will be guilty of murder. (122)

**32. Duty of persons arresting.** — It is the duty of every one executing any process or warrant to have it with him, and to produce it, if required.

2. It is the duty of every one arresting another, whether with or without warrant, to give notice, where practicable of the process or warrant under which he acts, or of the cause of the arrest.

3. A failure to fulfil either of the two duties last mentioned shall not of itself deprive the person executing the process or warrant, or his assistants, or the person arresting, of protection from criminal responsibility, but shall be relevant to the inquiry whether the process or warrant might not have been executed or the arrest effected by reasonable means in a less violent manner.

The third clause of this section is believed to alter the common law; but the first and second clauses are declaratory of the common law as held in several cases.

For instance, where a warrant was issued to apprehend a person for an offence in respect of which an arrest could not be made without warrant, it was held that the police officer who executed it must have the warrant with him when making the arrest, and that, otherwise, the arrest would be illegal and there could not be a conviction for assaulting the police officer in the execution of his duty.(123) In one of the cases,(124), it was held not to be murder, but only manslaughter, where the arrest of a poacher was attempted by an officer who had seen the warrant but did not have it with him, at the time, and the poacher killed the officer. But Lindley, J., said, in another case, that "cases may be imagined where the absence of a warrant might be no defence, — as where the murder was premeditated." (125)

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(122) Fost. 270, 271, 318; 1 Hale, 494; R. v. Porter, 12 Cox, C. C., 444; 3 Russ. Cr., 6th Ed., 73.

(123) Codd v. Cabe, 1 Ex. D., 352; 13 Cox, C. C., 202; Galliard v. Laxton, 2 B. & S., 363; R. v. Cumpton, 5 Q. B. D., 341; and R. v. Chapman, 12 Cox C. C., 4.

(124) R. v. Chapman, 12 Cox, C. C., 4.

(125) R. v. Carey, 14 Cox, C. C., 214.

**33. Peace officer preventing escape by flight from arrest.** — Every peace officer proceeding lawfully to arrest, with or without warrant, any person for any offence for which the offender may be arrested without warrant, and every one lawfully assisting in such arrest, is *justified*, if the person to be arrested takes to flight to avoid arrest, in using such force as may be necessary to prevent his escape by such flight, unless such escape can be prevented by reasonable means in a less violent manner.

**34. Private person preventing escape.** — Every private person proceeding lawfully to arrest without warrant any person for any offence for which the offender may be arrested without warrant is *justified*, if the person to be arrested takes to flight to avoid arrest, in using such force as may be necessary to prevent his escape by flight, unless such escape can be prevented by reasonable means in a less violent manner; Provided, that such force is neither intended nor likely to cause death or grievous bodily harm.

**35.** Every one proceeding lawfully to arrest any person for any cause other than such offence as in the last section mentioned is *justified*, if the person to be arrested takes to flight to avoid arrest, in using such force as may be necessary to prevent his escape by flight, unless such escape can be prevented by reasonable means in a less violent manner; Provided such force is neither intended nor likely to cause death or grievous bodily harm.

**36. Preventing escape or rescue after arrest.** — Every one who has lawfully arrested any person for any offence for which the offender may be arrested without warrant is *protected from criminal responsibility* in using such force in order to prevent the rescue or escape of the person arrested as he believes, on reasonable grounds, to be necessary for that purpose.

This seems to extend the common law so far as regards private persons. (126)

**37.** Every one who has lawfully arrested any person for any cause other than an offence for which the offender may be arrested without warrant is *protected from criminal responsibility* in using such force in order to prevent his escape or rescue as he believes, on reasonable grounds, to be necessary for that purpose: Provided that such force is neither intended nor likely to cause death or grievous bodily harm.

**38. Preventing breach of the peace.** — Every one who witnessess a breach of the peace is *justified* in interfering to prevent

(126) 2 Hale, 83.

its continuance or renewal and may detain any person committing or about to join in or renew such breach of the peace, in order to give him into the custody of a peace officer: provided that the person interfering uses no more force than is reasonably necessary for preventing the continuance or renewal of such breach of the peace, or than is reasonably proportioned to the danger to be apprehended from the continuance or renewal of such breach of the peace.

**39. Peace officer preventing breach of the peace.** — Every peace officer who witnesses a breach of the peace, and every person lawfully assisting him, is *justified* in arresting any one whom he finds committing such breach of the peace, or whom he, on reasonable and probable grounds, believes to be about to join in or renew such breach of the peace.

2. Every peace officer is *justified* in receiving into custody any person given into his charge as having been a party to a breach of the peace by one who has, or whom such peace officer, upon reasonable and probable grounds, believes to have, witnessed such breach of the peace.

It appears to have always been competent for a peace officer and even for a private individual to suppress or prevent the continuance of a breach of the peace, committed in his presence, as well as to arrest the persons committing it. (127) "The Common law right and duty of conservators of the peace and of all persons (according to their power) to keep the peace and to disperse, and, if necessary, to arrest those who break it, is obvious and well settled." (128) In the case of an affray, peace officers have even been justified in breaking doors open, in order to suppress it, or in order to apprehend the affrayers, and either to carry them before a justice, or by their own authority, imprison them for a convenient time, until the heat was over. (129)

But, what is a breach of the peace? It is said, in regard to the criminal law of England, that, "the foundation of the whole system of criminal procedure was the prerogative of keeping the peace, which is as old as the monarchy itself, and which was, as it still is, embodied in the expression, 'The King's Peace,' the legal name of *the normal state of society*." (130) It may, therefore, be safely asserted that, as all crimes, being public wrongs, tend more or less to affect or disturb, directly or indirectly, the good order and tranquility so essential to the general welfare of a community, the commission of an offence will nearly always include or involve a breach or the peace. But there are some offences which are directed more particularly against the public peace; or in which the breach of the peace is the prominent feature, such, for example, as an affray, an unlawful assembly, a riot, and the like. (131) An affray, (from *affraier*, to terrify), was by the common law the act of two or more persons fighting in some

(127) Timothy v. Simpson, 1 C. M. & R., 757, 760; Ingle v. Bell, 1 M. & W. 516; Grant v. Moser, 5 M. & G., 123; 1 Russ. Cr., 6th Ed., 590, 591; 3 Russ. Cr., 76; 1 Hawk. P. C., c. 63, s. 13.

(128) 1 Steph. Hist. Cr. L., 201.

(129) 4 Steph. Comm., 7th Ed., 252.

(130) 1 Steph. Hist. Cr. L., 184.

(131) 4 Steph. Comm., 7th Ed., 238; Harris Cr. L., 4th Ed., 108.

public place to the alarm of the public. If the fight were in private, it was no affray, but an assault; (132) and mere quarrelsome or threatening words would not amount to an affray; although a person, even when he uses no actual force himself, may nevertheless be guilty or an affray by, for example, assisting at a prize fight. (133) An unlawful assembly was the meeting together, — in a manner likely to endanger the peace, — of three or more persons for the carrying out of some common purpose of a private nature, there being no aggressive act actually done.(134) When the persons thus unlawfully assembled proceeded or moved forward to the execution of their purpose, but did not get to the point of actually executing it, it was called a rout; (135) and if they went on to the actual execution of their purpose, in a violent and alarming manner, it was a riot. (136)

These differences are illustrated thus:

A hundred men armed with sticks meet together at night to consult as to destroying a fence erected by their landlord. Thus far, they are an *unlawful assembly*.

After thus meeting and consulting together, they march in a body in the direction of the fence. Up to this point there is a *rout*.

Subsequently, they arrive at the fence, and, amid great confusion and tumult, they violently pull it down. There is now a *riot*.

The gist of these offences has always been, not the lawfulness or the unlawfulness of the object in view, but the unlawful manner of proceeding, that is, with circumstances of force or violence calculated to inspire terror. And therefore it appears that, assembling for an unlawful object and actually executing it would not be a riot, if done peaceably. (137)

Under chapter 147 R. S. C. (repealed by the Code) these offences were defined as follows:

"Three or more persons who, having assembled, continue together with intent unlawfully to execute any common purpose, with force and violence, or in a manner calculated to create terror and alarm, are guilty of an *unlawful assembly*."

"Three or more persons who, having assembled, continue together with intent unlawfully to execute any common purpose, with force and violence, or in any manner calculated to create terror and alarm, and who endeavor to execute such purpose, are, although such purpose is not executed, guilty of a *rout*."

"Three or more persons who, having assembled, continue together with intent unlawfully to execute any common purpose, with force and violence, and who wholly or in part, execute such purpose in a manner calculated to create terror and alarm, are guilty of a *riot*."

"Two or more persons who fight together in a public place in a manner calculated to create terror and alarm, are guilty of an *affray*."

The present definitions of riots, unlawful assemblies, affrays and other similar offences against the public peace, are to be found in sections 79 to 98, *post*.

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(132) 4 Steph. Comm., 251-2.
(133) Harris Cr. L., 4th Ed., 111.
(134) R. v. Vincent, 9 C. & P., 91; 1 Russ. Cr., 6th Ed., 570.
(135) 1 Hawk., P. C., c. 65, s. 8.
(136) 1 Hawk., P. C., c. 66, s. 1.
(137) Hawk., c. 65, s. 9; Harris Cr. L., 4th Ed., 110.

## SUPPRESSION OF RIOT.

**40. Suppression of riots by magistrates, etc.** — Every sheriff, deputy sheriff, mayor or other head officer or acting head officer of any county, city, town or district, and every magistrate and justice of the peace, is *justified* in using, and ordering to be used, and every peace officer is *justified* in using, such force as he, in good faith, and on reasonable and probable grounds, believes to be necessary to suppress a riot, and as is not disproportioned to the danger which he, on reasonable and probable grounds, believes to be apprehended from the continuance of the riot.

It was held, before the Code, that where a magistrate, charged with the preservation of the peace in a city, caused the military to fire upon a person who was thereby wounded, the magistrate was not liable to an action of damages at the suit of the party injured, it being made to appear that, although there was no real necessity for firing, the circumstances were such that a person might have been reasonably mistaken in his judgment as to the necessity for such firing. (138)

By section 140, *post*, sheriffs, magistrates and other peace officers are punishable for omitting to do their duty in suppressing a riot, when they have notice that there is one in progress within their jurisdiction.

**41. Suppression of riots by persons acting under lawful orders.** — Every one, whether subject to military law or not, acting in good faith in obedience to orders given by any sheriff, deputy sheriff, mayor or other head officer or acting head officer of any county, city, town or district or by any magistrate or justice of the peace, for the suppression of a riot, is justified in obeying the orders so given *unless such orders are manifestly unlawful*, and is *protected from criminal responsibility* in using such force as he; on reasonable and probable grounds, believes to be necessary for carrying into effect such orders.

2. It shall be a question of law whether any particular order is manifestly unlawful or not.

Opposite to a section identical with this one, the English Commissioners make in their draft code the following marginal note:

"The protection given by this and the following sections to persons obeying the orders of magistrates and military officers is perhaps carried to an extent not yet expressly decided; but see the language of Tindal, C. J., in R. v. Pinney, 5 C. & P. (139) and Willes, J., in Keighley v. Bell, 4 F. & F., 763." (140) And at p. 18, of their report upon the Draft Code the Commissioners have the following general remarks in reference to the suppression of riots: "We would direct special attention to the sections relating to the suppression of riots, particularly to their suppression by the use of military force. We do not think that these sections differ from

(138) Stevenson v. Wilson, 2 L. C. J., 254.
(139) R. v. Pinney, 5 C. & P., 254. The remarks of Chief Justice Tyndal in this case are quoted at p. 45, *post*.
(140) Keighley v. Bell, 4 F. & F., 763.

what would probably be held to be the law if cases should ever occur to raise the questions which they determine, but we cannot say that every proposition has been expressly held to be the law. We must observe in regard to all these provisions that the law upon the different matters to which they relate has never before, so far as we know, been reduced to an explicit or systematic form."

In the case of R. v. Pinney, it was held that the general rules of law require of magistrates, at the time of a riot, that they should keep the peace and restrain the rioters and pursue and arrest them, that, to enable magistrates to do this, they have the right to call upon all subjects to assist them, that all subjects are bound, upon reasonable warning, to render assistance, and that a magistrate would be justified in giving fire-arms to those who thus come to assist him, although it might not always be prudent for him to do so. It was also held that mere good feeling and upright intention in a magistrate is no defence, if he has been guilty of a neglect of his duty, and that the fact of his having acted under the advice of others is no defence, if in reality he acted contrary to law, but that the real question is whether he did all that he knew was in his power and all that could be expected from a man of ordinary prudence firmness and activity to suppress the riot, and, further, that, on trial of a magistrate for neglect of duty, he ought not to be found guilty unless *all* the jury are satisfied that he was guilty of the *same* act of neglect, and that if, for instance, four of the jurors think him guilty of one act of neglect and eight of them think him guilty of some other act of neglect, this is not sufficient.

The case of Keighley v. Bell was one in which the plaintiff, a captain in the 49th Madras Native Infantry, sued his commander, — Major-General Bell, — for false imprisonment, malicious prosecution, and libel; and it was there held that a military man cannot maintain, against his commander, an action for acts done by such commander under orders from his (the commander's) superiors, — (which orders such superiors have a right to give and which such commander would be bound, by military law, to obey.) — unless the commander himself procure the giving of such orders by means of malicious representations or from some sinister or improper motive and without reasonable and probable cause. Willes, J., in the course of his remarks, saying: — "The question is whether the acts done by the defendant were acts done, not in the ordinary discharge of his military duty but acts done without any reasonable or probable cause and merely for the purpose of injuring the plaintiff; and, in my opinion, there is no evidence of the affirmative of that question. If it were a question merely on the *weight* or *effect* of the evidence, I should have left it to the jury; but I think there is no evidence upon which a conclusion could be drawn that there was such an absence of probable cause or such sinister motive and abuse of the office and power of the defendant as could sustain the action. This opinion of mine is formed upon a careful review of the undisputed facts of the case."

In this case, Mr. Justice Willes, evidently following the principle laid down in the second paragraph of the above section, 41, decided, as a matter of law, that the superior military orders under which the defendant Bell had done the acts complained of by the plaintiff were not manifestly unlawful, because they were orders which the defendant Bell was bound, in the ordinary discharge of his military duty, to obey.

**42. Suppression of riot by persons without orders.** — Every one, whether subject to military law or not, who in good faith and on reasonable and probable grounds, believes that serious mischief will arise from a riot before there is time to procure the intervention of any of the authorities aforesaid, is *justified* in

using such force as he, in good faith and on reasonable and probable grounds, believes to be necessary for the suppression of such riot, and as is not disproportioned to the danger which he, on reasonable grounds, believes to be apprehended from the continuance of the riot.

Under this section any person, — acting in good faith and having reasonable grounds to believe that there is not time to wait for the intervention of the authorities, — may use such force as he reasonably believes to be necessary for the suppression of a riot which has actually commenced at the time of his interference. The section means that acts of violence thus done by him in endeavoring to suppress a riot are justified, if such acts do not exceed the danger to be apprehended from a continuance of the riot.

It has been argued that such a provision as this may be abused; but the same argument may be used against other provisions of the law. For instance, with regard to the principle of law which justifies a man who commits homicide in defence of his own life, it may be said that all a person has to do in order to take another's life is to imagine that his own is in danger, whether it is or not. But the man's imagination alone is not the test. The test lies with the Court, and depends upon the facts established by the proof; and, in case of a riot, it is for the Court, after a proper examination of the facts proved in evidence, to decide whether or not the force used in aiding or endeavoring to suppress a riot was greater than was necessary.

The section appears to be a fair statement of the common law on the subject, (141), with the addition of the limitation which provides that the force used must not be disproportioned to the danger to be apprehended from a continuance of the riot.

Lord Chief Justice Tyndall, in his charge to the Grand Jury on the occasion of the Special Commission for trial of the Bristol rioters, said: "The law of England hath, in proportion to the danger which it attaches to riotous and disorderly meetings, made ample provision for preventing such offences and for the prompt and effectual suppression of them whenever they arise. * * * * By the common law, every private person may lawfully endeavor, of his own authority, and without any warrant or sanction of the magistrate, to suppress a riot by every means in his power. He may disperse or assist in dispersing those who are assembled; he may stay those who are engaged in it from executing their purpose; he may stop and prevent others whom he shall see coming up from joining the rest; and not only has he the authority but it is his bounden duty, as a good subject, to perform this to the utmost of his ability. If the riot be general and dangerous, he may, in order to keep the peace, arm himself against the evil doers; * * * * although it would be more discreet for every one in such a case to attend and be assistant to the justices, sheriffs or other ministers in doing this; for the presence and authority of the magistrate would restrain proceeding to such extremities until the danger was sufficiently immediate or until some felony was either committed or could not be prevented without recourse to arms; and at all events the assistance given by men who act in subordination and concert with the civil magistrate will be more effectual to attain the object proposed than any efforts, how-

(141) See the case of R. v. Pinney, 5 C. & P., 254-261, already cited, *ante*, and the case of Philips v. Eyre, L. R., 6 Q. B., 1-31, in which Chief Justice Tyndall's charge to the Grand Jury at Bristol was, at page 15 of the report, quoted and approved by Willes, J.

ever well intended, of separate and disunited individuals. But if the occasion demands immediate action and no opportunity is given for procuring the advice or sanction of the magistrate, it is the duty of every subject to act for himself and upon his own responsibility in suppressing a riotous and tumultuous assembly; and whatever is honestly done by him in the execution of that object will be supported and justified by the common law. **** The law acknowledges no distinction in this respect between the soldier and the private individual. The soldier is still a citizen lying under the same obligation and invested with the same authority to preserve the peace as any other subject. **** Where the danger is pressing and immediate, where a felony has been committed or cannot otherwise be prevented, and from the circumstances of the case, no opportunity is offered of obtaining a requisition from the proper authorities, military subjects, like civil subjects, not only *may* but *are bound* to do their utmost of their own authority to prevent the perpetration of outrage, to put down riot and tumult, and to preserve the lives and property of the people." (142)

**43. Protection of persons obeying military superiors.** — Every one who is bound by military law to obey the lawful command of his superior officer is *justified* in obeying any command given him by his superior officer for the suppression of a riot, *unless such order is manifestly unlawful;*

2. It shall be a question of law whether any particular order is manifestly unlawful or not.

See sections 83 and 84, *post*, and comments there made, as to the reading of the Riot Act and the dispersion of rioters; and see, also, sections 140 and 141, *post*, as to the punishment of magistrates and others for neglecting to suppress or to aid in the suppression of a riot.

**44. Preventing commission of certain offences by force.** — Every one is *justified* in using such force as may be reasonably necessary in order to prevent the commission of any offence for which if committed, the offender might be arrested without warrant, (143) and the commission of which would be likely to cause immediate and serious injury to the person or property of any one; or in order to prevent any act being done which he, on reasonable grounds, believes would, if committed, amount to any of such offences.

It was always lawful for any one to use necessary force to prevent the commission of serious crimes; and resistance to the commission of an attempted felony accompanied with force or violence, might be carried to the extent of killing the would be felon, if his purpose could not be otherwise frustrated. (144) So, that, where under circumstances which may have induced the belief that a man was cutting the throat of his wife, their son shot and killed his father, it was held, on the trial of the son for murder, that if the accused had reasonable grounds for believing and honestly

(142) See note at p. 261, of 5 C. & P.

(143) See Alphabetical List of these offences under section 552, *post*.

(144) Handcock v. Baker, 2 B. & P., 265; 1 Russ. Cr., 6th Ed., 582; 3 Russ. Cr., 216; 1 Hale, 481-8, 547; R. v. Bull, 9 C. & P., 22; 4 Bl. Com., 180; 1 Bish. New Cr. L. Com., (8th Ed.), ss. 849, 851.

believed that his aid was necessary for the defence of his mother, the homicide was justifiable. (145)

By the above section, 44, the general rule allowing the use of necessary force in the case of the preservation of the peace and the prevention of crime are very closely connected with each other; and the prevention of crime is also closely connected with self-defence. For example, if a highway robber attack a peaceable citizen with murderous violence, the person so attacked has three different grounds upon which he may be justified in making resistance, even with deadly weapons; namely, First, — self-defence; Second, — the right of preventing an offence for which an arrest may be made without warrant; and, Third, — the right to arrest the offender in the act of committing such offence and on the ground that it is also an offence against the public peace. (146)

When homicide is committed in the prevention of a criminal act accompanied with violence, the ground upon which it is justifiable is that of necessity; and therefore the necessity must continue to the time of the killing, or it will not justify it. For, although the person upon whom a criminal attack with violence is made need not retreat, but may at once resist and even pursue his antagonist until he finds himself out of danger, still, the killing of the offender after he is properly secured and after the apprehension of danger has ceased would not be justifiable, but would be murder, unless the blood were still hot from the contest or pursuit, and then on account of the high provocation it might be held to be only manslaughter. (147)

**45. Self defence against unprovoked assaults.** — Every one unlawfully assaulted, not having provoked such assault, is *justified* in repelling force by force, if the force he uses is not meant to cause death or grievous bodily harm, and is no more than is necessary for the purpose of self-defence; and every one so assaulted is *justified*, though he causes death or grievous bodily harm, if he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purpose, and if he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

**46. Self defence against provoked assaults.** — Every one who has without justification assaulted another, or has provoked an assault from that other, may nevertheless *justify* force subsequent to such assault, if he uses such force under reasonable apprehension of death or grievous bodily harm from the violence of the person first assaulted or provoked, and in the belief, on reasonable grounds, that it is necessary for his own preservation from death or grievous bodily harm: Provided, that he did not commence the assault with intent to kill or do grievous bodily harm, and

(145) R. v. Rose, 15 Cox, C. C., 540.
(146) Steph. Hist. Cr. L., 14.
(147) 1 East P. C., c. 5, s. 60, p. 293; 4 Bl. Com., 185; 1 Hale, 485; 3 Russ. Cr., 6th Ed., 217.

did not endeavour at any time before the necessity for preserving himself arose, to kill or do grievous bodily harm: Provided also, that before such necessity arose he declined further conflict, and quitted or retreated from it as far as was practicable.

2. Provocation, within the meaning of this and the last preceding section, may be given by blows, words or gestures.

ILLUSTRATIONS.

A strikes B, who defends himself agaisnt A's attack, and tries to avoid further conflict; but A continues his attack with such violence that B, in reasonable fear of being seriously injured or killed, injures or slays A, in order to save himself. B is justified.

A calls B a liar or a thief, or slaps his face, or provokes him by gestures such as by distorting his mouth or laughing at him. B thereupon strikes at A with a heavy walking stick; A repels the attack, struggles with him and wrests the stick from B's grasp, and, after throwing it on the ground. A turns to go away; but B, picking up the stick rushes at A, and tries to kill him with it; when A, to save himself from being injured or killed by B's blows with the stick, strikes B with his fist and thus causes his death. A is justified.

A, with the object of obtaining a show of excuse for beating and seriously injuring B, uses towards the latter some very insulting language and gestures, which provoke B to strike A, who thereupon knocks B down, jumps upon him, and having heavy boots on, kicks him to death. A is not justified, but is guilty of murder.

The force used by way of self-defence should be proportioned to and should not exceed what is necessary to avoid the attack which is being defended; and in order to justify the use of a weapon in self-defence, a person must, if he thereby kill or seriously injure his antagonist, shew conclusively that that mode of defending himself was really necessary to preserve his own life or avoid serious bodily harm, and that, before using it, he retreated as far as he could and had no other means left of successfully resisting or escaping. (148) In fact all force used by way of self-defence must in order to be justified or excused, as such, proceed from necessity; that is to say, it can only be justified when it is necessary for the avoidance or prevention of an offered injury; (149) and in no case can the force used be justified if the circumstances shew that the offered injury could be avoided without it, or if the force used be not for actual self-defence, but by way of retaliation, no matter what the provocation for such retaliation may be. For no provocation will, for example, render homicide justifiable or excuseable. The most that any provocation can do is to reduce homicide to manslaughter. If one man kill another suddenly, without any or indeed without considerable provocation, the law implies malice, and the homicide is murder. Thus if A in passing B's shop distort his mouth and laugh at B, and B kill him, it is murder.(150) Or, if A be passing along the street, and B, meeting him, (there being a convenient space between A and the wall), take the wall of him, and thereupon A, upon this slight provocation, kill B, this is murder. (151) But if there be provocation such as tends to greatly excite a person's passion, the killing

(148) R. v. Smith, 8 C. & P., 160; 3 Russ. Cr., 53.
(149) Fost. 273, 275; 4 Bl. Com., 184.
(150) Brain's case, 1 Hale, 455.
(151) 1 Hale, 455.

in the heat of such passion will be *manslaughter* only. (152) For instance, during a street row, a soldier ran hastily towards the combatants, when a woman cried out: "You will not murder the man, will you?" The soldier replied: "What is that to you, you bitch?" Upon this the woman struck the soldier with an iron patten in the face, inflicting a severe wound and drawing much blood; and as she ran away the soldier pursuing her, stabbed her in the back and killed her. This was held to be only manslaughter, the smart of the man's wound and the effusion of blood being considered likely to keep his indignation boiling to the moment of the stabbing. (153) And, if a man find another in the act of adultery with his wife, and kill him or her, on the spot, this is only manslaughter, on account of a provocation so great that the law reasonably concludes it to be unbearable in the first transport of passion. (154) So, if a father see another in the act of committing an unnatural offence with his son, and smarting under this provocation instantly kill him, it is but manslaughter. (155)

There are authorities to the effect that mere words or gestures, — no matter how insulting or how expressive of contempt or reproach, — will not, without an actual assault, be sufficient to reduce homicide to manslaughter. (156) But Mr. Justice Blackburn, in referring to this doctrine, treated it as a *general rule*, which, under special circumstances, may have exceptions, as shewn by the following extract from his remarks in Rothwell's case: — "As a general rule of law no provocation of words will reduce the crime of murder to that of manslaughter; but under special circumstances there may be such a provocation of words as will have that effect; for instance, if the husband suddenly hearing from his wife that she had committed adultery, and, he having no idea of such a thing before, were thereupon to kill her, it might be manslaughter." (157) And in commenting on this, Russell expressly agrees with Mr. Justice Blackburn's view of the law as here stated. (158) There seems to be no doubt that, where the words which provoked a killing were threats to do seriously bodily harm and were accompanied by some act shewing an evident intention of immediately following them up by actual physical force and violence, they were, under the common law, such a provocation as would reduce the killing to manslaughter. (159)

Whether a person acting under provocation and killing the provoker of his wrath, will be guilty of murder or manslaughter, will depend of course not only upon the nature of the provocation, but upon the nature and violence of the retaliation, and the weapon, if any, used.

For although an assault with violence may reduce the offence of killing to manslaughter, when the party assailed, immediately and in the heat of blood, resents the assault by killing his assailant, (160), and although an assault too slight in itself to be a sufficient provocation to reduce murder to manslaughter may become sufficient for that purpose when coupled with words of great insult, (161) it is not to be understood that the offence will be extenuated by every trifling provocation which, in point of law, may

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(152) Kel, 135; 1 Hale, 466; Fost., 290; Arch. Cr. Pl. & Ev., 20th Ed., 721. See also section 229 of the Code, *post*.

(153) Stedman's Case, Fost., 292.

(154) 1 Hale, 486; Pearson's Case, 2 Lew., 216; Manning's Case, T. Raym., 212; 3 Russ. Cr., 6th Ed., 49.

(155) R. v. Fisher, 8 C. & P., 182. See section 229, *post*.

(156) Fost., 290.

(157) R. v. Rothwell, 12 Cox, 145; 3 Russ. Cr., 38, 39.

(158) 3 Russ. Cr., 39, note (*a*). See par. 2, section 229, *ante*.

(159) Lord Morley's Case, 1 Hale 455; 1 East P. C., c. 5, s. 20, p. 233.

(160) 4 Bl. Com., 191.

(161) R. v. Smith, 4 F. & F., 1066.

amount to an assault, nor even by an actual blow, in all cases; (162) nor that the retaliation may consist of violent acts of resentment bearing no proportion to the provocation or insult given and proceeding rather from brutal malignity than from human frailty. All such acts of retaliation are simply barbarous; and barbarity will often make malice. (163)

For instance, A & B quarrelled about some money that A had won from B, and which B wanted back. A would not give up the money; so B struck him, and A knocked B down; B got up, and A knocked him down again, and kicked him. A then put a rope round B's neck and after strangling him dragged his dead body into a ditch. A's acts amounted to murder and were so wilful and deliberate that nothing could justify them. (164) And where a wife scolded and chided her husband till he struck her with a pestle, so that she died, the husband was held guilty of murder, the pestle being a weapon likely to endanger life and the chiding being no provocation to extenuate the act to manslaughter. (165)

In order to reduce a homicide, upon provocation from murder to manslaughter it is essential in all cases that the killing should appear to have been done immediately upon the provocation being given; for if there be sufficient cooling time for passion to subside and reason to interpose before the killing, it will be deliberate revenge, not heat of blood, and will amount to murder; (166) it being presumed, in that case, that the offender meant (in the terms of section 227, *post*) to cause death, and was actuated by what, under the old law, was known as express malice. (167)

**47. Prevention of assault with insult.** — Every one is justified in using force in defence of his own person, or that of any one under his protection, from an assault accompanied with insult: Provided, that he uses no more force than is necessary to prevent such assault, or the repetition of it: Provided also, that this section shall not justify the wilful infliction of any hurt or mischief disproportionate to the insult which the force used was intended to prevent.

**48. Defence of moveable property against trespasser.** — Every one who is in peaceable possession of any moveable property or thing, and every one lawfully assisting him, is *justified* in resisting the taking of such thing by any trespasser, or in retaking it from such trespasser, if in either case he does not strike or do bodily harm to such trespasser; and if, after any one, being in peaceable possession as aforesaid, has laid hands upon any such thing, such trespasser persists in attempting to keep it or to take it from the possessor, or from any one lawfully assisting him, the trespasser shall be deemed to commit an assault without justification or provocation.

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(162) R. v. Lynch, 5 C. & P., 324; 4 Bl. Com., 199; 3 Russ. Cr., 6th Ed., 40, 55.

(163) Keate's Case, Comb., 408.

(164) R. v. Shaw, 6 C. & P., 372; 3 Russ. Cr., 41.

(165) Kel., 64; 1 Hale, 456; 3 Russ. Cr., 39, 43.

(166) Fost., 296; R. v. Thomas, 7 C. & P., 817; Arch. Cr. Pl. & Ev., 20th Ed., 723; R. v. Hayward, 6 C. & P., 157.

(167) R. v. Mason, Fost., 132; R. v. Kirkham, 8 C. & P., 115; Arch. Cr. Pl. & Ev., 723.

Under this section, the fact of a trespasser persisting in attempting to take or keep the thing after the possessor has laid hands upon it, places the latter in the position of a person acting in self-defence, as contemplated by section 45.

**49. Defence of moveable property with claim of right.** — Every one who is in peaceable possession of any moveable property or thing under a claim of right, and every one acting under his authority, is *protected from criminal responsibility* for defending such possession, even against a person entitled by law to the possession of such property or thing, if he uses no more force than is necessary.

**50. Defence of moveable property without claim of right.** — Every one who is in peaceable possession of any moveable property or thing, but neither claims right thereto nor acts under the authority of a person claiming right thereto, is neither *justified* nor *protected from criminal responsibility* for defending his possession against a person entitled by law to the possession of such property or thing.

**51. Defence of dwelling-house.** — Every one who is in peaceable possession of a dwelling-house, and every one lawfully assisting him or acting by his authority, is *justified* in using such force as is necessary to prevent the forcible breaking and entering of such dwelling-house, either by night or day, by any person with the intent to commit any indictable offence therein.

This section provides that, in order to justify the use of necessary force to prevent the breaking and entering of a dwelling-house, there must be an intent on the part of the person breaking and entering to commit an indictable offence. This proviso will, for instance, protect an officer who breaks and enters a house for the purpose of saving life or of making an arrest.

**52. Defence of dwelling-house at night.** — Every one who is in peaceable possession of a dwelling-house, and every one lawfully assisting him or acting by his authority, is *justified* in using such force as is necessary to prevent the forcible breaking and entering of such dwelling-house *by night* by any person, if he believes, on reasonable and probable grounds, that such breaking and entering is attempted with the intent to commit any indictable offence therein.

The distinctions made by sections 51 and 52, appear to be that, where there is an *actual intent* to commit an indictable offence, necessary force to prevent the breaking and entering may be used whether it is attempted by night or by day; but if there be merely a *reasonable belief* that the breaking and entering is attempted with intent to commit an indictable offence, the attempted breaking and entering must occur *in the night time*, to justify the use of force to prevent it.

*Breaking* means *to break* any part of a building, or *to open*, by any

means, any door, window, shutter, cellar-flap, or other thing intended to cover openings to the building or to give passage from one part of it to another; and an *entrance* is made as soon as any part of the body of the person entering or any part of any instrument used by him is within the building. (168)

Where, in an action of damages for shooting at and wounding the plaintiff, the defendant pleaded that the plaintiff and thirty others *threatened* to break into his dwelling-house and to assault tar and feather him and ride him on a rail, and that they were armed in front of his house and *apparently* in the act of breaking into it to accomplish their threats, where-upon he, *believing*, on good grounds, that they were breaking into the house, opposed such entrance, and, in doing so, committed the alleged trespass, it was held, on demurrer, that the plea did not shew a sufficient defence, but that it was necessary, for the defendant, before firing, to have warned the plaintiff and his associates to desist and depart, or that he would fire; and it was also held that such request to desist and depart would not, perhaps, have been necessary, if the persons had been actually advancing upon the defendant in the attitude of assaulting him, and still less if any of them had actually struck him, but that firing upon another could not be justified upon the ground merely of *threats* of personal violence or by the fact of the defendant *believing* and *having reason to believe* that they would execute their threats or by their being *apparently* in the act of breaking into the house; in other words, if a man sees another, *as he supposes*, breaking into his house, and if, without notice, he fires at him and wounds him, it will not be a legal justification for him to allege that the man was *apparently* breaking into his house. (169)

**53. Defence of real property.** — Every one who is in peaceable possession of any house or land, or other real property, and every one lawfully assisting him or acting by his authority, is *justified* in using force to prevent any person from trespassing on such property, or to remove him therefrom, if he uses no more force than is necessary; and if such trespasser resists such attempt to prevent his entry or to remove him, such trespasser shall be deemed to commit an assault without justification or provocation.

Here, again, the fact of a trespasser resisting the possessor's lawful efforts to prevent his entry or to effect his removal from the property places the possessor in the position of a person acting in self-defence as contemplated by section 45, *ante*.

While sections 51 and 52, *ante*, have reference to a breaking and entering with intent to commit an indictable offence, this section, 53, deals with the case of a mere trespasser.

Although, when a person refuses to leave the house of another, the latter may take hold of and use reasonable and necessary force for the purpose of removing him from the house, he has no right to beat him for some other purpose, — for the purpose, for instance, of punishing him for not going. The force used must be with a view to make the person leave the house, and not for a different purpose. (170)

(168) See section 407, *post*.

(169) Spires v. Barrick, 14 U. C. Q. B., 420-425.

(170) Davis v. Lennon and others, 8 U. C. Q. B., 599. See also Glass v. O'Grady, 17 U. C. C. P., 233.

A trespasser upon land of which another is in peaceable possession is not guilty of an assault under the above sec. 53, merely because he refuses to leave upon the order or demand of the other. Nor does the latter part of the section apply unless there is an overt act on the part of the person in possession towards prevention or removal and an overt act of resistance on the part of the trespasser. (171)

ILLUSTRATIONS.

A, a trespasser, enters B's house, and refuses to leave it. B is entitled to use all necessary force to remove A, but not to strike him. If, on B applying such necessary force, A resists, which is equivalent to an unprovoked assault, or if he otherwise actually assault B, B may defend himself, overcome A's resistance, and persist in using the necessary force to remove A from the house. (172)

A, on entering his own house, found B there and desired him to withdraw, but B refused to go. Upon this, words ensued between them, and A becoming excited proceeded to use force, and, by a kick which he gave B, caused his death. A was not justified in turning B out of the house by means of a kick, and was held guilty of manslaughter. (173)

A and his servant B insisted on placing corn in C's barn, which she refused to allow. A and B insisted and used force; a scuffle ensued, in which C received a blow on the breast, upon which she threw at A, a stone which killed him. It was held that, as A received the blow in an attempt to invade C's barn against her will, and as C had a right, in defending her barn, to employ such force as was reasonably necessary for that purpose, she was not responsible for the unforeseen occurrence which happened in so doing. (174)

**54. Asserting right to house or land.** — Every one is *justified* in peaceably entering in the day-time to take possession of any house or land to the possession of which he, or some person under whose authority he acts, is lawfully entitled.

2. If any person, not having or acting under the authority of one having peaceable possession of any such house or land with a claim of right, assaults any one peaceably entering as aforesaid, for the purpose of making him desist from such entry, such assault shall be deemed to be without justification or provocation.

3. If any person having peaceable possession of such house or land with a claim of right, or any person acting by his authority, assaults any one entering as aforesaid, for the purpose of making him desist from such entry, such assault shall be deemed to be provoked by the person entering.

**55. Discipline of minors.** — It is lawful for every parent, or person in the place of a parent, schoolmaster or master, to use force by way of correction towards any child, pupil or apprentice

(171) Pockett v. Poole, 11 Man. R., 275.
(172) 1 Hale, 486; Burb. Dig. Cr. L., 195; 3 Steph. Hist. Cr. L., 15.
(173) Wild's Case, 2 Lew., 214.
(174) Hincheliffe's Case, 1 Lew., 161; 3 Russ. Cr., 49.

under his care, provided that such force is reasonable under the circumstances.

The doctrine embodied in this section is that a parent, guardian, schoolmaster or master may inflict upon a minor child, ward, pupil, or apprentice, under his care, such force by way of correction as amounts to *moderate* chastisement. But he must not go beyond this; if he does, he will be liable to be indicted for assault and battery, or, — if his excessive chastisement causes the child's death, — for culpable homicide. (175)

Where a father, for some childish fault, gave an infant of two and a half years a dozen strokes with a strap, from the effects of which the child died, he was held guilty of manslaughter, Martin, B., saying, — "The law as to correction has reference only to a child capable of appreciating correction and not to a child two and a half years old. Although a slight slap may be lawfully given to an infant by its mother, more violent treatment of an infant so young by its father would not be justifiable." (176)

The right of a teacher to chastise his pupil cannot be greater than that of the parent over the child. And, so, where a schoolmaster beat a scholar for two hours and a half, with a stick, until he died, it was held that the beating was unlawfully, excessive and unreasonable, and that the schoolmaster was guilty of manslaughter. (177)

Nor can the teacher of a mere day scholar, living with his parents, usurp the parental function of chastising for faults committed at home. (178)

Where, in an action of trespass for assault and tearing the plaintiff's clothes, the defendant by his plea justified as for moderate correction of the plaintiff as the defendant's servant, it was held, on demurrer, that the plea was bad as affording no answer to the wounding of the plaintiff and the tearing of his clothes, these not being within the scope of moderate correction, and, further, that a master has no right to use force in the correction of any servant except an apprentice. (179)

In the province of Quebec, it has been held that although schoolmasters have a right of moderate chastisement of disobedient and refractory scholars, this right can only be exercised where necessary for the maintenance of school discipline and to a degree proportioned to the scholar's offence, and that any chastisement which exceeds this limit and which springs from motives of caprice, anger or bad temper is wrongful. (180)

In England, the headmaster of a school, — having inflicted corporal punishment on a scholar for an offence committed by the latter while on the way to school, — was summarily convicted of an assault upon the scholar in respect of the corporal punishment so inflicted; but, upon a case stated by the convicting magistrate, it was held, in appeal, that besides the reasonable authority of a parent or guardian which is delegated to a schoolmaster, the appellant had power to inflict upon a scholar corporal punishment for misconduct of which he was guilty on the way to or from the school and out of school hours, it appearing that, by a Code of regulations issued by the Education Department under the Elementary Education Act, 1870, a grant was given to the school in question, provided that

(175) 1 Greenl. Ev., s. 61; R. v. Cheeseman, 7 C. & P., 455; R. v. Hazel, 1 Leach, 368; 1 East P. C., 236; R. v. Conner, 7 C. & P., 438.
(176) R. v. Griffin, 11 Cox, C. C., 402.
(177) R. v. Hopley, 2 F. & F., 202.
(178) 1 Bish. New Cr. L. Com., p. 535.
(179) Mitchell v. Defries, 2 U. C., Q. B., 430.
(180) Brisson v. Lafontaine, 8 L. C. J., 173.

the teachers and managers satisfy the inspectors that all reasonable care was taken in the ordinary management of the school to bring up the scholars in habits of punctuality, of good manners, and language, etc., and also to impress upon the scholars the importance of cheerful obedience to duty, of consideration and respect for others, etc. (181)

**56. Discipline on ships.** — It is lawful for the master or officer in command of a ship on a voyage, to use force for the purpose of maintaining good order and discipline on board of his ship, provided that he believes, on reasonable grounds, that such force is necessary, and provided also that the force used is reasonable in degree.

**57. Surgical operations.** — Every one is *protected from criminal responsibility* for performing with reasonable care and skill any surgical operation upon any person for his benefit, provided that performing the operation was reasonable, having regard to the patient's state at the time, and to all the circumstances of the case.

See section 212, *post*.

**58. Excess.** — Every one authorized by law to use force is criminally responsible for any excess, according to the nature and quality of the act which constitutes the excess.

"It is a principle of the common law that all powers the exercise of which may do harm to others must be exercised in a reasonable manner, and that, if there is excess, the person guilty of such excess is liable for it, according to the nature and quality of his act.

"It may also be said to be a principle of the common law that where a person is under a legal duty, on notice of certain facts, to take certain action, he will be protected in acting on the honest belief formed without negligence and on reasonable grounds, that those facts did exist, though that belief was mistaken." (Royal Commissioners' Remarks.)

Under certain prison rules, (made in pursuance of sec. 6 of the Revised Statutes of Ontario, c. 217), it was provided that any officer or employee knowingly bringing tobacco to any prisoner should be dismissed and criminally prosecuted, and that employees of contractors must strictly conform to the prison rules; and sec. 27 of the Act subjected to a penalty any person giving or conveying tobacco to a convict. A contractor's workman employed in the prison was detected conveying tobacco to a convict, whereupon a constable, under instructions from a warden, arrested him, and, though under no apprehension of his attempting to escape, handcuffed him and led him through the public streets to the police station. The workman was indicted upon the charge preferred against him; and, in an action of damages afterwards taken by him, it was held that under section 25 of the R.S.C., c. 173, he was subject to indictment for disobedience of prison rules made in pursuance of sec. 6 of the R.S.O., c. 217, the remedy for infraction of the prison rules not being limited to that of the Provincial Act, and that therefore the arrest was legal, but that, under the circumstances, the handcuffing was not justifiable, and that the constable was liable therefor, in trespass, but that no liability attached to the warden, as the evidence failed to shew that he was a party to the handcuffing. (182)

(181) Cleary (appellant) v. Booth (respondent), 17 Cox C. C., 611.
(182) Hamilton v. Massie, 18 Ont. Rep., 585.

**59. Consent to death.** — No one has a right to consent to the infliction of death upon himself; and if such consent is given, it shall have no effect upon the criminal responsibility of any person by whom such death may be caused.

ILLUSTRATIONS.

If A and B agree to fight a duel together, with deadly weapons, and either is killed in the duel, his consent will make no difference to the criminal responsibility of the other.

If A be suffering from a tumor or other serious malady, he has a right to allow B, a surgeon, to perform a surgical operation considered reasonable and necessary for the purpose of relieving or curing him; and if he happen to die under or in consequence of the operation, B will, (under this section, 59), be free from criminal responsibility, if he has used in the operation reasonable knowledge, care and skill, as required by section 212, *post*.

**60. Obedience to "de facto" law.** — Every one is *protected from criminal responsibility* for any act done in obedience to the laws for the time being made and enforced by those in possession (*de facto*) of the sovereign power in and over the place where the act is done.

Opposite the corresponding section of the English Draft Code, the Royal Commissioners have a marginal note in the following words: "See 11 Hen. 7, c. 1, Sir Henry Vane's Case, Kelynge, 15, Foster's 4th Discourse, p. 402."

## PART III.

## PARTIES TO THE COMMISSION OF OFFENCES.

**61. Parties to offences. — Principals.** — Every one is a party to and guilty of an offence who: —

(*a.*) actually commits it; or

(*b.*) does or omits an act for the purpose of aiding any person to commit the offence; or

(*c.*) abets any person in commission of the offence; or

(*d.*) counsels or procures any person to commit the offence.

2. If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been known to be a probable consequence of the prosecution of such common purpose.

**62.** Every one who counsels or procures another to be a party to an offence of which that other is afterwards guilty is a party to that offence, although it may be committed in a way different from that which was counselled or suggested.

2. Every one who counsels or procures another to be a party to an offence is a party to every offence which that other commits in consequence of such counselling or procuring, and which the person counselling or procuring knew, or ought to have known, to be likely to be committed in consequence of such counselling of procuring.

Parties to the commission of a criminal offence were formerly divided into three classes, namely: —

1. PRINCIPALS, — who were subdivided into (a) *principals in the first degree*, that is, persons who actually committed the offence with their own hands, and (b) *principals in the second degree*, that is, persons who were present aiding and abetting at the commission of the offence; —

2. ACCESSORIES BEFORE THE FACT, that is persons who procured, counselled, advised or commanded the commission of the offence, and

3. ACCESSORIES AFTER THE FACT, that is, persons who, knowing of the commission of an offence by another, received, relieved, comforted or assisted the offender in order to hinder his apprehension or his trial or punishment. (1)

It will be seen by the above section, 61, that the distinctions between principals of the first and second degrees and between principals and accessories before the fact have been done away with and that all are principal parties to and equally guilty of an offence, (*a*) who actually commit it, (*b*) who do or omit any act for the purpose of aiding any person to commit it, (*c*) who abet or assist at its commission, or (*d*) who counsel or procure its commission.

In reality and for all practical purposes, the distinctions between principals and accessories before the fact were removed long before our Criminal Code came into force, and for many years they were only nominally in existence. In England, for instance, accessories before the fact were placed on the same footing, in every respect, with principals, by the 24 and 25 Vict., c. 94; and in Canada the same thing was done by the R.S.C., c. 145, which enacted that every principal in the second degree and every accessory before the fact to any felony should be tried and punished as a principal felon; that every one aiding, abetting, counselling or procuring the commission of any misdemeanor should be tried and punished as a principal offender, and that every one aiding, abetting, counselling or procuring the commission of any offence punishable summarily should be punishable as a principal offender.

These nominal distinctions were *expressly* dropped by the Code; and there are only two classes of persons to be considered, — in regard to the degree of their guilt, — as parties to or implicated in a criminal offence, namely, PRINCIPALS and ACCESSORIES AFTER THE FACT.

## PRINCIPALS.

A principal may be, the actual perpetrator of the act, that is, the one who, with his own hands or through an innocent agent, does the act itself; he may be one who, before the act is done, does or omits something for the purpose of aiding some one to commit it; he may be one who is present aiding and abetting another in the doing of it; or he may be one who

(1) 1 Russ. Cr., 6th Ed., 161.

counsels or procures the doing of it, or who does it through the medium of a guilty agent.

**Actual perpetrator with his own hands.** — To be the actual perpetrator of the act with his own hands, the offender may or may not be present when it is consummated.

ILLUSTRATIONS.

A and B were hired to unload sacks of oats from a ship and convey them to C's warehouse, A bringing out the sacks of oats from the ship and putting them on B's carts, and B drawing the loads from the ship's side to the warehouse. B, when starting with one of his loads, called out, "It's all right," to A, who shortly afterwards, — while B was away with the load with which he had started, — went to another cart near the vessel, emptied into a nosebag some oats from two sacks on the cart, and then placed the nosebag under the cart. When B returned to the vessel a few minutes later with the empty cart he took the nosebag from under the other cart where A had placed it, put it on his cart, and drove off with it, A then being on the vessel and within a few yards of B. Held, that as these circumstances shewed one transaction in which A and B both concurred and in which both were present at some part, though not at every part of it, both were properly convicted as principals and actual perpetrators of the larceny. (2)

A purposely lays poison for B, who takes it, and dies from it. A, although absent when the poison is taken, is the actual perpetrator of the deed. (3)

**Actual perpetrator through an innocent agent.** — To be the actual perpetrator by means of an innocent agent is, for instance, where an offender, who may be absent when the act is done, uses, as an instrument to effect his purpose, a child under years of discretion, a madman or other person of defective mental capacity, or any one excused from responsibility by ignorance of fact or other cause. (4)

ILLUSTRATIONS.

Where A induced B a child of nine to take money from his father's till, and give it to A, it was left to the jury to say whether B was acting unconsciously of guilt at the dictation and as the innocent agent of A. (5)

A gives to B a note which he knows is forged, and asks him to get it cashed. If B gets it cashed, not knowing it to be forged, the innocent uttering by him is the guilty uttering of A, though A is absent when it is done. (6)

When the person employed as an instrument is aware of the nature and consequences of his act, he is guilty of the offence as a principal, and so is the person who employs him. (7) But, if a person employed as an instrument, — though aware of the nature of the act, — merely concurs in it for

(2) R. v. Kelly, 2 C. & K., 379; 1 Russ. Cr., 6th Ed., 163.
(3) Fost., 349; 1 Russ. Cr., 6th Ed., 166; Vaux's Case, 4 Co., 44 *b*; Burb. Dig. Cr. L., 42; R. v. Harley, 4 C. & P., 369.
(4) Fost., 349; 1 Bish. Cr. L. Com., s. 651; R. v. Giles, 1 Moo. C. C., 166; R. v. Michael, 9 C. & P., 356; R. v. Dowey, 11 Cox C. C., 115; R. v. Butcher, 8 Cox C. C., 77.
(5) R. v. Manley, 1 Cox C. C., 104; 1 Russ. Cr., 6th Ed., 165.
(6) R. v. Palmer & Hudson, 1 New Rep., 96; 2 Leach., 978.
(7) R. v. Soares, R. & R., 25.

the purpose of detecting and punishing the person employing him, he is, in that case, also considered and treated as an innocent agent. (8)

Where the prisoners had applied to an artist to engrave plate containing a copy of the coupons of the Netherlands Bank, and the artist, suspecting that there was an intention to defraud, communicated with the Dutch Consul, and, under the latter's direction, employed persons to engrave the plate, it was held that the artist was the innocent agent of the prisoners. (9)

**Doing or omitting something for the purpose of aiding an offender.** — A person who, before the commission of an offence, does something for the purpose of aiding any person to commit it is also a principal; and he is necessarily absent when the offence is actually committed or completed. Under the old law such a person, like one who procures or counsels the commission of an offence, was called an accessory before the fact. (10)

It has been held by the Court of Queens Bench at Montreal, upon a reserved case stated by the Recorder, that a person who leases a house to another for purposes of prostitution renders himself under the provisions of paragraph (*b*) of the above section, 61, a party to and guilty of the offence committed by his lessee, — subsequently to the leasing of the house, — of keeping a disorderly house, although he was not himself the keeper, and that he can be prosecuted, tried, convicted and punished for such offence in the same manner as the actual keeper. (10*a*)

ILLUSTRATIONS.

A, a servant, let B into his masters' house to steal his masters' money. B, continued inside until he committed the theft, A leaving the house before the theft was actually committed. A was held to be a party to the offence as an accessory before the fact; (11), and would now, under our Code, be held to be a principal.

A, a servant, unlocks the door of the house that B may enter and steal therein, which he does about 20 minutes after A has left the house. A is a principal offender. (12)

**Aiding and abetting at the commission of the offence.** — Every person who is present at and aids and abets a person in the commission of a criminal offence is a principal as well as the person who actually does the criminal act itself.

A person may be considered as a principal present aiding and abetting in the commission of an offence without his presence being such a strict, actual, immediate presence as would make him an eye or ear witness of what is passing; it may be a constructive presence. (13) So that if a number of persons set out together or in small parties upon one common design, be it murder or any other offence, or for any other purpose of an

(8) R. v. Bannen, 2 Moo. C. C., 309; 1 C. & K., 295; 1 Russ. Cr., 6th Ed., 166.

(9) R. v. Valler, 1 Cox C. C., 84.

(10) R. v. Manning, 6 Cox C. C., 86; Dears., 21; R. v. Quail, 4 F. & F., 1076.

(10*a*) R. v. Roy, Que. Jud. Rep., 9 Q. B., 312; 3 Com. Cr. Cas., 472.

(11) R. v. Tuckwell, C. & M., 215; 1 Russ. Cr., 6th Ed., 164.

(12) R. v. Jeffries & Bryant, 3 Cox C. C., 85. See also R. v. Jordan, 7 C. & P., 432; 1 Russ. Cr., 6th Ed., 164.

(13) 1 Russ. Cr., 6th Ed., 162; 3 Russ. Cr., 141.

unlawful nature in itself, and each takes the part assigned to him, some to commit the act, others to watch at proper distances and stations to prevent a surprise or to favor, if need be, the escape of those more immediately engaged, they are all, provided the act be committed, present at it, in the eye of the law; for the part taken by each man in his particular station tended to give countenance, encouragement and protection to the whole gang and to ensure the success of their common enterprise. (14) If, however, the original intention or purpose of persons assembling and setting out together be a lawful one and if their common purpose be prosecuted by lawful means, and opposition to them be made by others, and one of the opposing party is killed in the struggle, in that case the person actually killing may be guilty of murder or manslaughter, as circumstances may vary the case, but the persons who are with him will not be involved in the guilt, unless they actually aided and abetted him in the fact. (15)

The mere fact of being a stake holder for a prize-fight, in which one of the combatants happens to be killed, does not render such stake holder, who is not present at the fight, responsible as a party to the manslaughter. (16)

Aid rendered to the principal offender after the crime has been completely committed is not sufficient of itself to make the person rendering such aid guilty as a principal in the commission of the offence. (17) It has however been held that as, for instance, the offence of stealing, by taking and carrying away, may be incomplete until the carrying away has been concluded, a person, who, — though not present at the actual taking of the thing stolen, — knowingly assists the thief while the latter is in the act of carrying it away, thereby becomes an aider at the commission of the theft, and is thus responsible, under section 61, as a principal party to the theft. (18)

Where a person is charged in an indictment as a principal, he cannot under such indictment be convicted on evidence which fails to establish the charge thus laid but shews that he was an accessory after the fact to the offence charged. (19) But there is nothing to prevent a count charging a person as a principal being joined with a count charging the same person with being accessory after the fact to the same offence, and the accused may be found guilty of both. In other words, a man may be guilty as accessory both before and after the fact; as where he has incited another to commit theft, and, then, after the crime has been accomplished, he assists the actual thief in secreting the stolen property. (20)

**Counselling or procuring the commission of an offence.** — A person who counsels, procures or commands the commission of an offence, or who does it through the medium of a guilty agent was called, under the common law, an accessory before the fact. He is necessarily absent when the offence is actually committed; if present, he would be guilty not only of having counselled, procured or commanded the commission of the offence but also of doing or aiding at the very act itself.

It seems to be in the very nature of things that there should be no dis-

(14) Fost. 350; 2 Hawk., P. C., c. 29, s.s. 7, 8; R. v. Howell, 9 C. & P., 437; R. v. Vanderstein, 10 Cox, C. C., (Irish), 177.
(15) 1 Russ. Cr., 6th Ed., 169; 1 East P. C., 351; R. v. Luck, 3 F. & F., 483; 1 Bish. New Cr. L. Com., 8th Ed., s. 634.
(16) R. v. Taylor, 13 Cox C. C., 68; L. R., 2 C. C. R., 148.
(17) R. v. Graham, 2 Can. Cr. Cas., 388.
(18) R. v. Campbell, 2 Can. Cr. Cas., 357.
(19) R. v. Fallon, L. & C., 217; 32 L. J. M. C., 66.
(20) R. v. Blackson, 8 C. & P., 43.

tinction between the guilt of one who procures a crime to be committed and that of the agent who does it for him; or at least the distinction, if any, should not be in favor of the procurer. It is only right that the procurer or any one who commits an offence by the agency of another should be treated as a principal, whether his agent be an innocent or a guilty one; for *qui facit per alium facit per se*, — what one causes to be done by another is regarded as done by himself. (21)

The procurement may be personal, that is, personal between the procurer and the doer, or it may be through the intervention of a third party; and it will be sufficient even though the employer merely direct his agent to procure some other person without naming him. (22) In other words, it is not essential that there should be any direct communication between the procurer and the person procured to do the act. It is enough if he direct an intermediate agent to procure some other person to commit the offence, even if he do not name to the intermediate agent the person to be procured but merely direct the agent to employ some one. So that if A bid his servant to hire some body, no matter whom, to murder B, and furnish money for the purpose, and the servant procure C, a person whom A never saw nor heard of, to do it, A, who is manifestly the first mover or contriver of the murder, is a principal, he being what was known, under the common law, as an accessory before the fact. (23)

The procurement may be *direct*, — by hire, counsel or command, or by conspiracy; or it may be *indirect*, — by expressly evincing, (that is, evincing by some words or actions), a liking for, approbation of, or assent to anothers' criminal design of committing an offence. (24) But a mere silent acquiescence would not be sufficient. Nor would words that amount to a bare permission. As if A said he would kill J. S., and B then said to A, "You may do as you please;" this would not amount to a procurement. (25)

If a person order counsel or advise one crime and the person ordered, counselled or advised *intentionally* commit another, as, for instance, if he be ordered to burn a house and instead of that be commit a theft, or if his instructions are to commit a crime against A, and, instead of doing so, he *purposely* commit the crime against B, the person so ordering will not be answerable. (26) In other words, if the person ordered counselled or advised totally and substantially varies from the terms of the instigation, if being solicited to commit an offence of one kind he wilfully and knowingly commit an offence of another kind, he will stand single in that offence and the person soliciting will not be involved in the guilt. (27) Thus, if A command B to burn C's house, and B, in so doing, commits a robbery, A, thought a party to the offence of burning, is not guilty of the robbery, for that is a thing of a distinct and inconsequential nature. (28) And if A counsels B to steal goods of C, on the road, and B breaks into C's house and steals the goods there, A is not guilty as a party to the offence of breaking into the house, because that (the breaking in) is an offence of another kind. (29) But he is guilty as a party to the offence of stealing. (30)

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(21) Broom's Leg. Max., 6th Ed., 777; R. v. Higgins, 2 East, 5.
(22) McDaniels' Case, Fost., 121, 125; R. v. Cooper, 5 C. & P., 535; 1 Bish. New Cr. L. Comm., s. 677.
(23) 1 Russ. Cr., 6th Ed., 172.
(24) 2 Hawk., P. C., C. 29, s. 16; 1 Russ. Cr., 6th Ed., 170.
(25) 1 Hale, 616. See also R. v. Fretwell, L. & C., 161.
(26) 1 Hale, 617; 4 Bl. Com., 37.
(27) Fost., 369.
(28) 1 Hale, 617.
(29) Plowd., 475.
(30) 1 Hale, 617.

If, however, the person counselled ordered or advised complies in substance with the instigation of the party who has counselled ordered or advised him, varying only in circumstances of time or place or in the manner of execution, the person who has counselled ordered or advised him will be involved in his guilt. As if A command B, to murder C by poison, and B commits the murder by means of a sword or other weapon or by any other means, A is answerable for the crime; for the murder of C was the object principally in contemplation, and that has been effected. (31) And if the person employed to commit a crime goes beyond the terms of the solicitation, yet, if, in the event, the offence committed was a probable consequence of what was ordered or advised, the person giving such order or advice will be answerable for that offence. As, if A advise B to rob C, and, in robbing him, B kills him, either upon resistance made, or in order to conceal the fact, or upon any other motive operating at the time of the robbery; or if A solicit B to burn the house of C, and B does it accordingly, and the flames taking hold of the house of D, that also is burned, A is answerable both in the one case for the murder of C, and in the other case for the burning of D's house. The advice, solicitation or orders were pursued in substance, and were extremely flagitious on the part of A; and the events though possibly happening beyond A's original intention were, in the ordinary course of things, the probable consequence of what B did under the influence and at the instigation of A. (32)

A more difficult question arises where the person counselled or ordered commits, *by mistake*, a different crime from that which he was solicited to commit. It has been said that if A orders B to kill C, and B, by mistake, kills D, or, aiming a blow at C, misses him and kills D, A will not be a party to the murder, because it differs in the person; (33) and in support of this position, Saunder's case is cited.

Saunders, with the intention of destroying his wife, by the advice of one Archer, mixed poison in a roasted apple, and gave it to her to eat; and the wife, having eaten a small part of it and having given the remainder to their child, Saunders, (making only a faint effort to save the child whom he loved and would not have destroyed), stood by and saw it eat the poison, of which it soon afterwards died. It was held that, though Saunders was clearly guilty of the murder of the child, Archer was not guilty as a party to that murder. (34) But Foster J., says that this case does not support the position to the full extent; and he proposes the following case as worthy of consideration; "B is an utter stranger to the person of C; A, therefore, takes upon him to describe C by his stature, dress, age, complexion, etc., and acquaints B when and where he may probably be met with. B is punctual at the time and place, and D, another person, unhappily comes by and is murdered, upon the strong belief, on the part B, that this is the man marked out for destruction. Here is a lamentable mistake; but who is answerable for it? B undoubtedly is. The malice *egreditur personam*. And may not the same be said of A? The pit which he, with murderous intent, dug for C, D, *through his guilt*, fell into and perished. For B, not knowing the person of C, had no other guide to lead him to his prey than the description A gave of him, and B, in following this guide fell into a mistake which it is great odds any man in his circumstances might have fallen into. I, therefore, conceive that A was answerable for the consequence of the flagitious orders he gave, since that consequence appears in the ordinary course of things to have been highly probable." (35)

(31) Fost., 369, 370.
(32) Fost., 370.
(33) 1 Hale, 617; 1 Russ. Cr., 175, 176.
(34) Plowd., 475; 1 Hale, 431; 1 Russ. Cr., 6th Ed., 176.
(35) Fost., 370, 371.

So that where a person, — who is ordered counselled or advised to commit a crime against A, — commits it against B, instead of A, the person ordering counselling or advising the crime is answerable for the crime committed against B, if A has done this merely by mistake. (36)

By the above section, 62, of our Code, it is clearly laid down that he who counsels or procures the commission of any offence is a party to it, although the offence itself be committed in a way different from that which was counselled, and that he is a party to every offence which is committed in consequence of such counselling, and which he knew or ought to have known to be likely to be committed in consequence of such counselling; and, therefore, both by this section and by the common law, he is liable for everything that ensues upon the execution of the unlawful act counselled or commanded.

Foster, J., proposes the following *criteria* as explaining the grounds upon which the several cases falling under this head will be found to turn. "Did the principal, (that is the person employed), commit the felony he stands charged with under the influence of the flagitious advice? Or, did he, following the suggestions of his own wicked heart, *wilfully* and *knowingly* commit a felony of another kind, or upon a different subject. (37)

The procurement must be continuing; for if the procurer repent, and, before the offence is committed, actually countermand his order, and the person ordered, counselled or procured persists in committing the offence in spite of the countermand, it seems that the original contriver will not be held responsible as a party to the offence. (38) But, by having counselled the commission of the crime, he would surely be guilty, under section 64, *post*, of an attempt to commit it, notwithstanding his subsequent repentance and countermand; for the act of counselling constitutes the attempt to commit an offence which is not actually committed in pursuance of the counselling. (39)

ILLUSTRATIONS.

A commands B to beat C, and B beats him to such an extent that he dies. A is party to the murder. (40)

A hires B to kill C by means of poison, and, instead of poisoning him, B kills C by shooting him. A is a party to the murder. (41)

A, through his agent, hires C to murder D. C, who does not know and has no direct communication with A, murders D, accordingly. A is a party to the murder. (42)

A commands or advises B to rob C. B, who does not know C, but depends upon A's description of him, makes a mistake and robs D instead of C. A is a party to the robbery. (43)

A orders B to burn C's house, and, in the burning, the house of D is burned also. A is a party to the burning of D's house. (44)

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(36) Fost., 370, et seq; 2 Hawk., P. C., c. 29, s. 22; 1 Bish. New Cr. L. Comm., s. 640.
(37) Fost., 372; 1 Russ. Cr., 6th Ed., 176.
(38) Arch. Cr. Pl., 21st Ed., 14.
(39) See R. v. Gregory, and other cases cited at p. 64, *post*.
(40) 4 Bl. Com., 37; 1 Hale, 617.
(41) Fost., 369, 370.
(42) R. v. Cooper, 5 C. & P., 535.
(43) Fost., 370, et seq.
(44) R. v. Saunders, Plowd., 475.

A counsels B to steal something from C. B, of his own accord, makes an assault upon D. A is no party to the assault. (45)

**Counselling suicide.**— It was formerly the law that a person, who encouraged another to commit suicide and was present aiding and abetting him while he did so, was guilty of murder as a principal, and that if two persons agreed to commit suicide together and only one of them actually died, the survivor was guilty of the murder of the other. (46) But, under section 237, *post*, of the present Code, the act of counselling or procuring any person to commit suicide, and the act of aiding and abetting any person to commit suicide are made indictable offences punishable with imprisonment for life, and, under section 238, *post*, an attempt to commit suicide is an indictable offence punishable with two years' imprisonment.

**Soliciting as an attempt.**— When a person with criminal intent solicits or advises another to commit an offence which the other does not commit at all, the soliciting or advising in that case, will constitute, on the part of the would-be procurer, an attempt to commit the offence solicited or advised by him. (47)

**Execution of different parts of a criminal act by different persons.**— If several combine to commit forgery, for instance, and each separately execute a distinct part of the forgery, they are all guilty as principals, although they may not be together when the forged instrument is completed. (48)

Thus, if A counsel B to procure the paper and C to engrave the plate and D to fill up the names of a forged note, and each of them does these respective acts without knowing that the others are employed for those purposes, B, C, and D, as well as A, may all be indicted for the forgery, as principals. (49)

**Further comments.**— It has been held in England that a person who without authority, induces a servant of the Postmaster General to hand over to him and so receives letters addressed to parties other than himself and coming into the possession of such postal servant in the course of their transmission through the post is guilty of stealing the letters either at common law as a principal or, under the 24, 25 Vic., c. 94, sec. 1, as an accessory before the fact. (50)

A person who purchases intoxicating liquors sold in violation of the *Canada Temperance Act* is not liable to conviction as a party to the offence, in having, by purchasing the liquors, aided, abetted, counselled or procured the sale. (51)

Of course, such an offence may be created by express legislation, as is the case under section 126 of the *Quebec License Law*, 1900, which provides that a purchaser of intoxicating liquor in contravention of that Act is liable to a fine and to imprisonment in default of payment of the fine. (52)

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(45) 1 Hale, 617.

(46) R. v. Alison, 8 C. & P., 418; R. v. Jessop, 16 Cox C. C., 204; R. v. Dyson, R. & R., 523.

(47) R. v. Gregory, L. R., 1 C. C. R., 77; 10 Cox C. C., 459; R. v. Ransford, 13 Cox C. C., 9; R. v. Higgins, 2 East, 522; Steph. Dig. Cr. L., 5th Ed., 39; 1 Bish. New Cr. L. Com., 8th Ed., ss. 769, 772*a*. See section 64, *post*.

(48) R. v. Bingley, R. & R., 446.

(49) R. v. Dade, 1 Mood., 307; R . v. Charles, 17 Cox C. C., 449.

(50) R. v. James, 17 Cox, C. C., 24.

(51) Ex parte Armstrong, 30 N. B. Rep., 425. See, also, Ex parte Barker, 30 N. B. R., 406.

(52) 63 Vic., (Que.), c. 12.

The circumstance that an accused has counselled and procured the commission of a theft,—thus rendering him liable, under section 61, to be convicted as a principal offender,—does not prevent his conviction for the substantive offence of having, after the commission of the theft, received the stolen property from the thief knowing it to have been stolen. (53) And, as we have already seen, there is nothing to prevent a person being charged, in two separate counts with being an accessory both before and after the fact,—as where he has incited another to commit theft, and, after the theft has been committed, has assisted the actual thief in secreting the stolen property. (54)

**63. Accessory after the fact.** — An accessory after the fact to an offence is one who receives, comforts or assists any one who has been a party to such offence in order to enable him to escape, knowing him to have been a party thereto.

2. No married person whose husband or wife has been a party to an offence shall become an accessory after the fact thereto by receiving, comforting or assisting the other of them, and no married woman whose husband has been a party to an offence shall become an accessory after the fact thereto, by receiving, comforting or assisting in his presence and by his authority any other person who has been a party to such offence in order to enable her husband or such other person to escape.

The evident basis of this offence is that to assist an offender to escape punishment is, in principle, an obstruction of public justice of the same nature as resisting a peace officer in making an arrest, or rescuing a prisoner under arrest, and other like offences.

To render a person guilty of being an accessory after the fact, three conditions must co-exist; *first*, there must have been a criminal offence completely committed by the person harbored or assisted; *second*, the alleged accessory after the fact must be aware that the person he harbors or assists has committed the offence; and *third* he must harbor or assist the principal offender to conceal the crime or to prevent him being brought to justice.

With regard to the first of these conditions the rule is that until the offence has been consummated any aid or assistance rendered to a party for the purpose of enabling him to escape the consequences of his crime will not make the person affording such assistance guilty as an accessory after the fact. This is a rule recognized without exception by all the authorities. (55) Thus, where A was charged with the murder of B, and C was charged with being an accessory after the fact to the murder, and the evidence adduced on the trial shewed that the assistance given by C to enable A to effect his escape was in point of fact given after the mortal blow was dealt but before the death of the party assailed, although the death occurred within a short time thereafter, it was held that until B died the crime of murder was not consummated, and that C was not an accessory after the fact to the murder. (56)

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(53) R. v. Hodge, 18 C. L. T., 424; 12 Man. L. R., 319; 2 Can. Cr. Cas., 350.

(54) R. v. Blackson, 8 C. & P., 43.

(55) 1 Hale, 622; 4 Bl. Com., 38; 3 Greenl. Ev., 47.

(56) Harrel v. S., 39 Miss., 702; 1 Am. & Eng. Ency. L., 2nd Ed., 266.

The second condition, is that in order to establish the guilt of the alleged accessory after the fact, the latter must be shewn to have had notice express or implied of the principal offender having committed a criminal offence. (57)

The third and most important condition is that a person in order to be an accessory after the fact must be shewn to have done some act to assist the principal offender personally, (58), either to conceal the crime or to evade the pursuit of justice; so that where, for instance, a person is charged with being an accessory after the fact to murder, the question for the jury is whether such person knowing the murder to have been committed was either assisting the murderer to conceal the death or in any way enabling him to escape being brought to justice. (59)

One does not become an accessory after the fact by merely neglecting to inform the authorities that a crime has been committed or by forbearing to arrest the offender. (60)

The test of an accessory after the fact seems to be that he renders, to one known by him to have committed a criminal offence, some active personal help to enable him to conceal his offence or to hinder his apprehension trial or punishment, as by concealing him in the house or shutting the door against his pursuers until he should have an opportunity to escape, or by furnishing him with money or food to support him in hiding, or by supplying him with a horse to enable him to fly from his pursuers, or a house or other shelter to conceal him in, or by using open force or violence to protect him, or by taking money from him to allow him to escape, or by bribing his gaoler to let him escape, or by conveying instruments to the principal offender to enable him to break gaol. (61) Of course, when a person actually rescues an offender from prison or from lawful custody, the rescuer is not only guilty of being an accessory after the fact to the other's offence, if he has actually committed one, but also of the substantive offence of rescue; and he may be indicted either way at the election of the prosecution. But where the rescue is effected before the principal offender has been convicted, the prosecution would probably prefer to prosecute the rescuer on the substantive offence of rescue; for when a person is in prison or in lawful custody upon a criminal charge it is an offence to rescue him or to help him to break prison, whether the prisoner be guilty or not of the crime charged against him. (62)

It has been held that one who employed another person to harbor the principal offender may be convicted of being an accessory after the fact although personally he did no act of relieving or harboring but only through the person employed by him. (63)

Under the extradition laws in force between the United States and Canada an accessory before the fact to an extraditable offence may be extradited; but it is otherwise in the case of an accessory after the fact. (64)

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(57) 2 Hawk. P. C., c. 29, s. 32; R. v. Burridge, 3 P. Wms., 439-497; R. v. Lee, 6 C. & P., 536.

(58) R. v. Chapple, 9 C. & P., 355.

(59) R. v. Greenacre, 8 C. & P., 35. See also R. v. Hansill, 3 Cox C. C., 397.

(60) 1 Hale, 618, 619.

(61) 1 Hale, 615, 621.

(62) See sections 165, 166, 167, *post;* R. v. Allan, C. & M., 295; R. v. Haswell, R. & R., 458; 1 Bish. New Cr. L. Com., 8th Ed., 423.

(63) R. v. Jarvis, 2 M. & R., 40; Warb. L. Cas., 2nd Ed., 11.

(64) R. v. Browne, 31 U. C. C. P., 484; *In re* Counhaye, L. R., 8 Q. B., 410, 417.

Upon an indictment against an accessory after the fact or against a receiver, a confession by the thief is not admissible to prove the guilt of the accessory after the fact or of the receiver, although the thief may be called as a witness against the accessory after the fact or against the receiver. So that where a person was indicted for receiving 60 sovereigns which had been stolen by one Rich, and a confession by the latter stating various facts implicating the prisoner, was tendered in evidence, the Court refused to receive anything that was said in such confession by Rich respecting the prisoner but admitted what Rich said about herself; and the Court's decision was upheld in appeal. (65)

And where two persons were indicted together, one for stealing and the other for receiving and the principal pleaded guilty. Wood, B refused to allow the principal's plea of guilty for the purpose of establishing as against the receiver the fact of the stealing by the principal. (66)

## CRIMINAL LIABILITY OF MASTERS FOR ACTS OF THEIR SERVANTS.

The general rule of law is that a master is not criminally responsible for the acts of his servants.

We have already seen, at p. 12, *ante*, that the essence of a criminal offence is, as a general principle, the evil or wrongful intent with which the act which constitutes the offence is done.

In accordance with this general principle, there must, as an essential ingredient in a criminal offence, be some blameworthy condition of the mind in the person who does the act, — such as wilful intent, negligence or guilty knowledge; and the condition of mind of the servant is not to be imputed to the master; so that, as a general rule of the common law, the master is not criminally responsible for the acts of his servants.

A prosecution for a public nuisance appears to constitute an exception to the general common law rule that a master is not criminally responsible for the acts of his servants. Such a prosecution appears to be considered as more in the nature of a civil than a criminal proceeding; the only reason why, in the case of a public nuisance, the proceeding is by indictment and not civilly, being that it is a matter which affects the whole community and is, as such, a matter in which a civil action does not lie. (67) So, that, where the directors of a Gas Company with its superintendent and engineer were indicted for a nuisance in permitting the refuse of gas to be conveyed into a public river, and it appeared by the evidence that the directors left the management of the works to the superintendent, — the engineer being under the direction of the superintendent, and the engineer giving orders to the workmen, — the directors, superintendent and engineer were held liable for the nuisance, the jury being directed by the Court that it made no difference that the directors were ignorant of the things done by their employees and workmen. (68) And where works were carried on for the profit of an owner by his agents, such owner was held liable to an indictment for a public nuisance caused by the acts of his workmen in carrying on the works, although such acts were done without the owner's knowledge and against his general orders, the Court being of opinion that where a person maintains works by his capital and employs servants who so carry on the works as to cause a nuisance to a private right for which a civil suit would lie, then, if the same nuisance inflict an

(65) R. v. Turner, R. & M., 347; 1 Lew. 119.
(66) Anon., 1 Russ. Cr., 6th Ed., 190.
(67) R. v. Pedley, A. & E., 822.
(68) R. v. Medley, 6 C. & P., 292.

injury upon a public right, the remedy for which could only be by indictment, the evidence which would maintain the civil suit would also support the indictment. (69)

The general principle of the common law that, except in the case of a prosecution for a public nuisance, a master is not criminally responsible for the acts of his servants applies also to statutory offences, with this difference, that it is within the power of the Legislature, if it so pleases, to enact, and, in some cases it has enacted that a man may be convicted and punished for an act or omission, although there was no blameworthy condition of mind in him; but inasmuch as to do so is to create a responsibility which is contrary to the general rule of law, it is for those who assert that the legislature has so enacted to make it out, convincingly, by the language of the statute; for we ought not lightly to presume that the legislature intended that one man should be punished for the fault of another. (70)

By section 13 of the English Licensing Act 1872, (35-36 Vic., c. 94), a licensee who permits drunkenness or any violent, quarrelsome or riotous conduct to take place on his premises, or sells intoxicating liquor to any drunken person is liable to a penalty; and with reference to the meaning of the section, Stephen, J., said "I am of opinion that the words of this section amount to an absolute prohibition of the sale of liquor to a drunken person and that the existence of a *bona fide* mistake as to the condition of the person served is not an answer to the charge but only matter of mitigation of the penalties that may be imposed. (71) And where, in a prosecution, under section 16 of the same Act, for supplying liquor to a constable on duty, it was proved that the liquor was sold without the knowledge of the defendant, — a licensed innkeeper, — by his servant, in the ordinary course of business, the servant taking the chance and asking no questions as to whether the constable was on duty or not, the defendant was convicted, and the conviction was upheld, on the ground that the wilful ignorance of the servant made the master responsible. (72)

Section 17 of the English Licensing Act provides that the owner of licensed premises who "suffers" gaming or any unlawful game to be carried on therein shall be liable to a penalty. Under this section, a hotel keeper was charged with having suffered gaming in her hotel. It appeared, by the proof, that the gaming complained of had taken place after the hotel keeper had retired for the night, leaving her premises, — in which were several guests, — in charge of a hall porter, who as the evidence shewed was wilfully blind to the gaming done by the guests. Upon this evidence the hotel keeper was convicted, the justices being of opinion that she took pains not to know what her guests were doing; and the conviction was upheld on the ground that the connivance of the hall porter, in whose charge the hotel was left by the defendant, was sufficient to make her responsible as having "suffered" gaming, and that proof of her actual knowledge of the gaming was not necessary. (73)

In another case, upon the same section, against an innkeeper for having "suffered" gaming to be carried on upon his licensed premises, it was proved that in a part of the premises placed by the innkeeper in charge

(69) R. v. Stephens, L. R., 1 Q. B., 702. See, also, Reedie v. L. & N. W. Ry. Co., 4 Ex., 244, and R. v. Gt. N. of Eng. Ry. Co., 9 Q. B., 315.

(70) See Remarks of Cave, J., in Chisholm v. Doulton, 22 Q. B. D., at p. 741.

(71) Cundy v. Le Cocq., 13 Q. B. D., 207; 53 L. J. M. C., 125.

(72) Mullins v. Collins, L. R., 9 Q. B., 292; 43 L. J. M. C., 67.

(73) Redgate v. Haynes, 1 Q. B. D., 89; 45 L. J. M. C., 65.

of a manager, gaming had occurred with the knowledge of such manager but without any knowledge or connivance on the part of the innkeeper. It appeared that, connected with the inn, by passages and doors, there was a skittle alley which was in charge of the manager, to whom the innkeeper had given general instructions not to permit gaming. It was in this skittle alley that the gaming complained of had taken place, the manager being present in charge of the alley when the gaming was going on. Upon this evidence the innkeeper was convicted; and upon a case reserved it was held, maintaining the conviction, that the innkeeper was responsible for the connivance of his employee whom he had left in charge of the part of the premises where the gaming took place, and was thus guilty of having "suffered" gaming in his premises. (74)

In another case, it was shewn that the landlord knew nothing of the gaming complained of and that the only person who was aware of the gaming going on was a man employed as a potman, who however was not in charge of the premises, to whom there was no delegation of authority and who knew of the gaming merely as a fact and not as part of his business as an employee; and it was held, under these circumstances that the landlord was rightly acquitted. (75)

The president of an incorporated Company who hired the clerks and had the entire management of the company's business may be convicted for selling liquor contrary to the provisions of the *Canada Temperance Act*, where the sale had been made by a clerk who was employed under general directions received by him from the president. (76)

Where a milk dealer's servant, employed to sell milk, adulterated it with water, the master was, under section 6 of the English Food and Drugs Act (38-39 Vic., c. 63), convicted as the *seller* of the adulterated milk, and the conviction was maintained; it being held that the section imposed a positive prohibition against the sale of adulterated milk, the enactment not being that "no person shall *knowingly* sell" but that "no person shall sell," and that the law applied not only to the actual physical seller of the milk but also to the person on whose behalf the actual physical seller made the sale and that the master was bound not only not to personally sell unadulterated milk but to take care that other people employed by him to sell milk did not sell it for him in such a condition as to come within the section. (77)

A's clerk went into B's shop and asked for and was served with some lard; whereupon A took it and told the shop assistant that it was bought for the purpose of analysis. The shop assistant then noticed and told A that by mistake he had enclosed the lard in a "margarine" wrapper instead of a wrapper marked "lard compound." On the hearing of a summons under section 6 of the Imperial Food and Drugs Act, B had tendered and the justices had refused to receive evidence shewing that the lard was put in the wrong wrapper by mistake and in the hurry of business, and that this act was contrary to B's express instructions to his employees; but on appeal it was held that there was nothing in the Act making the master responsible for an employee's act not only unauthorized and unsanctioned by the master but done by mistake, that the tendered evidence was wrongly refused, inasmuch as it was admissible and material, seeing that section 8 of the Act provided that a person should not be guilty of an offence in respect of the sale of any article of food, etc., mixed with

(74) Bond v. Evans, 21 Q. B. D., 249-257.
(75) Somerset v. Hart, 12 Q. B. D., 360; 53 L. J. M. C., 77.
(76) Ex parte Baird, 34 N. B. R., 213; 3 Can. Cr. Cas., 65.
(77) Brown v. Foot, 17 Cox C. C., 509; 61 L. J. M. C., 110.

any matter not injurious to health and not intended fraudulently to increase its bulk weight or measure or conceal its inferior quality, if at the time of delivering it he supply a notice by a label on or with the article to the effect that it is mixed, and inasmuch as it appeared that the omission of B's shop assistant to furnish the correct wrapper was by mistake and contrary to the usual course of his duty. (78)

The Imperial *Merchandise Marks Act*, 1887, renders the master or principal criminally liable for the acts of his servants and agents in all cases within section 2, subsections 1 and 2, where the conduct constituting the offence is pursued by such servants or agents within the scope or in the course of their employment; and the master or principal can only be relieved from criminal responsibility where he can prove that he has acted in good faith and has done all that it was reasonably possible to do to prevent the commission by his servants or agents of offences against the Act. (79)

**64. Attempts.** — Every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object is guilty of an attempt to commit the offence intended *whether under the circumstances it was possible to commit such offence or not.*

2. The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law.

An attempt is "an abortive or frustrated effort." (80)

A bare intention to commit a criminal offence is not of itself punishable; but, in order to be so, there must be some act or acts, amounting either to an *actual* or an *attempted* carrying out of the criminal intention. Thus, if A resolves in his own mind to shoot B, and openly avows it, he thereby commits no criminal offence; (81) but when he does something in execution of his design, and, through being interrupted or through some unforeseen cause intervening, he falls short of the actual perpetration of the intended offence he is guilty of an attempt. (82)

An attempt to commit a crime may be made by soliciting another to commit it. For, as, on the one hand, a person is guilty, as a principal offender, of an offence which he solicits, advises or incites another to commit, and which the other actually *does* commit, (83) so, on the other hand, when a person solicits, advises or incites another to commit an offence which the other does *not* commit, the act of soliciting, advising or inciting amounts to an attempt to commit the offence in view (84). In other words, one who unsuccessfully solicits or advises the commission of an offence is

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(78) Kearley and another v. Tyler, 17 Cox C. C., 328; also reported, *sub. nom.* Kearley and another v. Tonge, in 60 L. J. M. C., 159.

(79) Coppen v. Moore, 67 L. J. Q. B., 689; [1898] 2 Q. B., 306.

(80) Holloway v. R., 17 Q. B., 317; Broom's Com. L., 5th Ed., 856.

(81) See sec. 959, par. 2, *post*, as to right to compel a person using threats of bodily harm, etc., to give security to keep the peace.

(82) R. v. Scofield, Cald., 397, 403; 1 Bish. New Cr. L. Com., 8th Ed., pp. 111, 113; R. v. Connolly, 26 Q. B. (Ont.), 322.

(83) See section 61, *ante*.

(84) 2 Steph. Hist. Cr. L., 230; R. v. Higgins, 2 East, 5; R. v. Daniels, 1 Salk., 380; R. v. Collingwood, 3 Salk., 42; Woolrych Cr. L., 1194.

guilty of an attempt to commit it; while one whose solicitation is successful in procuring the actual commission of an offence is a party to its commission. Thus, where one wrote to a school boy to meet him for the purpose of sodomy, but the boy, without even reading the letter, passed it to the school authorities, it was held that the offence of attempt by solicitation was complete. (85) It has been said that an act to constitute an attempt must be such as directly approximates to or is closely connected with the actual commission of the intended offence. (86) In the application of this principle some nice questions have arisen as to what acts, on the one hand, are preparation too remote to be an attempt, and what, on the other hand, are close enough to the offence to be an attempt; it being in many cases very difficult, — some say, impossible, — to distinctly define the dividing line between *mere preparation* for an offence and an *actual attempt* to commit it. (87) As an illustration the case is given of a man who, with intent to commit murder, walks to the place where he purposes to commit it. This act of walking to the place is not considered an act sufficient to constitute an attempt to murder. (88) But if besides walking to the place, the man were, on arriving there to meet and fire a pistol shot at his intended victim, and fail to kill him, either by missing his aim altogether, or through the shot, though taking effect, not being fatal, he would undoubtedly be guilty of an attempt to murder. The mere act of buying a box of matches with the intention of using them to set a corn stack on fire is too remite to constitute an attempt to set the fire.(89) But where the prisoner had knelt down before a corn stack, and had lighted a match with the intention of setting the stack on fire; and then he blew out the light on observing that he was watched; it was held that this was an attempt to burn the stack. The accused had called at the prosecutor's house, and, on first being refused work and on afterwards being refused a shilling which he asked for, he became violent and threatened to burn up the premises. He was then watched by the prosecutor and his servant and seen to go to a neighboring stack where he knelt down and struck a lucifer match, but discovering that he was watched he blew out the lighted match and went away. (90)

In another case A was charged with attempting to set fire to a dwelling-house, and B with inciting and hiring him to commit the offence. Under B's directions, A had arranged and placed pieces of blanket saturated with coal oil against the doors and sides of the house, had lighted a match, which he held in his fingers till it was burning well, and had then put the light down close to the saturated blanket with the intention of setting the house on fire; but just before the flame touched the blanket the light went out, and he threw the match away without making any further attempt. Held that the attempt was complete. (91)

If a man were to load a gun and declare his intention to shoot his neighbor with it, this would merely be a preparation of necessary means to commit the offence; in order to render him guilty of an attempt to shoot there would have to be, beyond such preparation, some act or movement on the man's part, in the nature of an endeavor to use the weapon upon the person of his intended victim.

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(85) R. v. Ransford, 13 Cox C. C., 9; R. v. Gregory, L. R., 1 C. C. R., 77.
(86) Harris Cr. L., 4th Ed., 16; R. v. Eagleton, Dears. C. C., 515.
(87) 2 Steph. Hist. Cr. L., 224, 226.
(88) Remarks of Chief Justice Jervis in R. v. Roberts, 33 Eng. L. & Eq., 552; 25 L. J. M. C., 17.
(89) Remarks of Chief Baron Pollock in R. v. Taylor, 1 F. & F., 512.
(90) R. v. Taylor, 1 F. & F., 511.
(91) R. v. Goodman, 22 U. C. C. P., 338.

There have been some decisions which have gone a long away towards treating preparation to commit a crime as an attempt to commit it. For instance, the procuring of dies for coining bad money has been treated as an attempt to coin bad money. (92)

Sec. 466, *post*, makes it a substantive offence,—indictable and punishable with imprisonment for life,—to purchase or have possession of coining instruments.

There seems to be no doubt that where a person does an act whose natural consequence,—if it ensued,—would be criminal, but which consequence happens to be prevented from ensuing by extraneous causes, he is, notwithstanding the consequence being prevented, to be taken to have intended that the natural consequence of his act should result, that is to say, he is to be considered as having intended and endeavored to commit the crime which would have resulted had he not been prevented from completing his act. So, that, where in support of a conviction for attempting to discharge a loaded firearm with intent to do grievous bodily harm, the evidence shewed that the prisoner drew from his pocket a revolver and pointed it towards his mother, but that his wrists were seized by bystanders just as he was raising the pistol, and, after a struggle, during which his finger and thumb were seen fumbling about the revolver which cocked automatically on the rigger being pulled, it was taken from him, it was held that the question as to the intent with which the prisoner presented the revolver was for the jury to decide, that the jury might reasonably infer that the prisoner intended to do that which he was prevented from doing, and that there was therefore sufficient evidence to support the conviction of the prisoner of an attempt to discharge the revolver. (93)

It was formerly considered that an act done with intent to commit an offence was not an attempt unless done under circumstances rendering it possible to accomplish the object in view; (94) and so where in an English case A put his hand into B's pocket with intent to steal what was in it, and the pocket happened to be empty, it was held that A could not be convicted of an attempt to steal. (95) But this decision was afterwards overruled by the English Court of Crown Cases Reserved, presided over by Lord Chief Justice Coleridge, who, in delivering judgment, said, in reference to the pickpocket case,—"This is a decision with which we are not satisfied. Reg. v. Dodd proceeded upon the same view, that a person could not be convicted of an attempt to commit an offence which he *could not actually commit*. We are of opinion that Reg. v. Dodd is no longer law. It was decided on the authority of Reg. v. Collins" [the pickpocket case], "and that case in our opinion is no longer law." (96)

It will be seen that section 64, *ante*, (which is similar to section 74 of the English Draft Code) coincides with the above holding of the English Court of Crown Cases Reserved, and plainly declares that an intent to commit an offence combined with an act done or omitted for the purpose of accomplishing the object in view will constitute an attempt, whether, under the circumstances, it was possible to commit the intended offence or not.

An assault with intent to commit a crime is an attempt to commit the crime intended. (97)

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(92) R. v. Roberts, Dears., 539; 2 Steph. Hist. Cr. L., 224.

(93) R. v. Duckworth, 17 Cox C. C., 495; [1892], 2 Q. B., 83.

(94) Steph. Dig. Cr. L., 3rd Ed., 37, 38; R. v. McCann, 28 Q. B., (Ont.), 514.

(95) R. v. Collins, L. & C., 471; 9 Cox, 497; 33 L. J. M. C., 17.

(96) R. v. Brown, 24 Q. B. D., 357, 359; 16 Cox C. C., 715; R. v. Ring, 17 Cox C. C., 491; Steph. Dig. Cr. L., 5th Ed., 40, 41.

(97) R. v. Dungey, 4 F. & F., 99. See R. v. John, 15 S. C. R., 384.

A defendant was indicted for a common assault upon a married woman. He had already been indicted and tried at the previous assizes on a charge of rape upon the same woman, but the jury on the first trial were not satisfied that the offence of rape had been completed although they were disposed to convict the defendant of an assault. The presiding Judge had told them, however, that they could not do this unless it was an assault with intent to commit a rape, in other words, an attempt to commit rape, —and that they could not do this unless satisfied that the defendant intended to have carnal connection with the prosecutrix against her will in spite of any resistance. The jury were told in effect that the charge being one of rape they could not convict the prisoner of a common assault or of any assault not amounting to an attempt to commit the offence charged; and the result was a general verdict of guilty; whereupon the presiding Judge had directed the defendant to be held over to answer the charge of common assault. At the trial of the latter charge the prosecutrix was not allowed to go into any of the matters relating to the rape and was stopped when she had stated that the defendant had put his hands upon her and kissed her against her will. The learned Judge said this was an assault in law. Thereupon, the defendants' counsel submitted that the jury ought to be discharged from a verdict on the charge of assault as he had been acquitted of rape and of an attempt at rape, and if there was any assault it was the attempt; so that the defendant was being tried twice for the same matter. But the learned Judge told the jury that the defendant had never been tried upon the charge of committing a common assault, which was different to an assault with intent to commit a rape, which amounted to an attempt at rape; and the jury found the defendant guilty of assault. (98)

If a woman, with intent to procure abortion, takes a thing which she believes to be noxious but which as a matter of fact is harmless, she is guilty nevertheless of an attempt to procure abortion; and it seems that if a man, who believes a thing to be a noxious drug, and incites a woman to take it, he is guilty of attempting to procure abortion by incitement, although as a matter of fact the commission of the offence by the woman in the manner proposed is impossible; but, if he knows that the thing is not capable of procuring abortion, he is not guilty of inciting the woman to commit the offence of attempting abortion, although he knows that the woman will take it in the belief that it is noxious thing. (99)

As to the crime of abortion, see sections 272-4, *post*.

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(98) R. v. Dungey, 4 F. & F., 99-103.
(99) R. v. Brown, 63 J. P., 790.

# TITLE II.

## OFFENCES AGAINST PUBLIC ORDER, INTERNAL AND EXTERNAL.

### PART IV.

### TREASON AND OTHER OFFENCES AGAINST THE QUEEN'S AUTHORITY AND PERSON.

**65. Treason.** — Treason is —

*(a.)* the act of killing Her Majesty, or doing her any bodily harm tending to death or destruction, maim or wounding, and the act of imprisoning or restraining her; or

*(b.)* the forming and manifesting by an overt act an intention to kill Her Majesty, or to do her any bodily harm tending to death or destruction, maim or wounding, or to imprison or to restrain her, or

*(c.)* the act of killing the eldest son and heir apparent of Her Majesty, or the Queen consort of any King of the United Kingdom of Great Britain and Ireland; or

*(d.)* the forming and manifesting, by an overt act, an intention to kill the eldest son and heir apparent of Her Majesty, or the Queen consort of any King of the United Kingdom of Great Britain and Ireland; or

*(e)* conspiring with any person to kill Her Majesty, or to do her any bodily harm tending to death or destruction, maim or wounding or conspiring with any person to imprison or restrain her; or

*(f.)* levying war against Her Majesty either —

(i) with intent to depose Her Majesty from the style, honour and royal name of the Imperial Crown of the United Kingdom of Great Britain and Ireland or of any other of Her Majesty's dominions or counties ; or

(ii) in order, by force or constraint, to compel Her Majesty to change her measures or counsels, or in order to intimidate or overawe both Houses or either House of Parliament of the United Kingdom or of Canada ; or

(*g.*) conspiring to levy war against Her Majesty with any such intent or for any such purpose as aforesaid; (1) or

(*h.*) instigating any foreigner with force to invade the said United Kingdom or Canada or any other of the dominions of Her Majesty; or

(*i.*) assisting any public enemy at war with Her Majesty in such war by any means whatsoever; or

(*j*) violating, whether with her consent or not, a Queen consort, or the wife of the eldest son and heir apparent, for the time being, of the King or Queen regnant.

2. Every one who commits treason is guilty of an indictable offence and liable to suffer death. *(Amended by 57-58 Vict. c. 57).*

Under the *Interpretation Act*, section 7, sub-section 6, set out at p. 9, *ante*, the expression "Her Majesty" means the late Queen and her successors; so that, since the accession of King Edward VII, the words "His Majesty" are to be substituted for the words "Her Majesty" wherever they occur in this section, 65.

The duty of allegiance is based upon the relation which subsists between him who owes it and the Crown, and upon the privileges derived by the former from that relation. Allegiance is either *natural* or *local*. Natural allegiance is that which a natural born subject owes at all times and in all places to the Crown as head of that society of which he is a member. Local allegiance is founded upon the protection which a foreigner enjoys for his person, his family and effects during his residence here; and if such foreigner while so resident here commit an offence which in the case of a natural born subject would be treason, he is dealt with as a traitor; and this is so, whether his sovereign be at peace with us or not. (2)

The ingredients set forth in the above section, 65, as constituting the crime of treason are, in effect, the same as those which constitute high treason according to section 75 of the English Draft Code, as revised by the Royal Commissioners; whose remarks thereon are as follows:

"Our definition of High Treason exactly follows the existing law with one or two exceptions which we felt warranted in making. The existing law depends upon the old statute of 25 Edward 3, St. 5, C. 2, and on the judicial construction put upon that act. It is well explained in the opinion delivered by the late Mr. Justice Willes in Mulcahy v. R., (L. R. 3 H. of L., 318). (3) It has been thought better to make the act of killing or wounding the Sovereign in itself an act of treason, instead of adopting the artificial construction by which cutting off the head of Charles the First was not treason in itself but was an overt act evidencing the compassing of his death, which was treason within the statute of Edward 3. And we have also thought it right to make conspiring to levy war against the Sovereign in itself treason, instead of evidence of compassing the Sovereign's death. It would in the present day be absurd to re-enact the provisions which make it high treason to kill the Lord Chancellor or a Judge of the Superior Courts in the discharge of his duties. The ordinary law as to murder affords sufficient protection."

(1) See sec. 68, *post*, for special provisions against levying war within Canada.

(2) Broom's Com. L., 5th Ed., 877, 878.

(3) Mulcahy v. R., L. R., 3 H. of L., 318.

The principal heads of treason as contained in the statute of Edward 3 are (*a*) imagining or compassing the king's death, (*b*) levying war against the king, and (*c*) adhering to the king's ennemies; there being no *express* provision for any act of violence, towards the king's person, which did not display an intention to kill him, and nothing about attempts to imprison or depose the king, conspiracies or attempts to levy war, or disturbances however violent which did not reach the point of levying war; although there was a proviso (afterwards repealed by 1 Hen. IV, C. 10), that Parliament in its judicial capacity might upon the conviction of any person for any political offence hold that it amounted to high treason, thought not specified in the Act. (4)

After the statute of Edward 3 many Acts were passed, from time to time, (and especially during the period between the beginning of the Reformation and the end of the Tudor line), for the purpose of adding new treasons; but nearly all these acts were either *temporary* or have in one way or another long since expired; and they exercised little or no *permanent* influence on the law of treason, as contained in the old statute, with the wide constructions placed upon its provisions by learned judges and commentators, whose interpretations have received, in later legislation, (36 Geo. 3, c. 6, and 11 and 12 Vic., c. 12), full statutory recognition and authority. (5)

The statute of Edward 3, taken literally, was too narrow to afford complete protection to the king's person, power and authority; but the judges, in their decisions, and various writers, in their comments upon the subject, held "that to imagine the king's death means to intend anything whatever which under any circumstances may possibly have a tendency, however remote, to expose the king to personal danger or to the forcible deprivation of any part of the authority incidental to his office." (6)

The mere intention of compassing the king's death seems to have constituted the substantive offence or *corpus delicti* in this particular kind of treason; thus shewing an apparent exception to the general doctrine that a person's bare intention is not punishable. But, although an overt act was not essential to the abstract crime, it was always held essential to the offender's conviction. The compassing or imagining, (that is, the mind's operation in being willing or wishful for or intending), the death was considered as the treason, and the overt acts were looked upon as the means employed for executing the offender's traitorous purpose. In other words, it was the intention itself that was looked upon as the crime; but in order to warrant a conviction, it was necessary to make proof of the manifestation of the intention by some overt act tending towards the accomplishment of the criminal object. And so it was held that, where conspirators met and consulted together how to kill the king, it was an overt act of compassing his death, even although they did not then resolve upon any scheme for that purpose. And all means made use of, either by persuation or command, to incite or encourage others to commit the fact or join in the attempt to commit it were held to be overt acts of compassing the king's death; and any person who but assented to any overtures for that purpose was involved in the same guilt. (7)

Mere words of themselves were not regarded as an overt act of treason; for in Pine's case it was held that his having spoken of Charles I as *unwise*, and as *not fit to be king*, was not treason, although very wicked; and that,

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(4) 2 Steph. Hist. Cr. L., 243, 249, 250, 253.
(5) 2 Steph. Hist. Cr. L., 255, 262, 279.
(6) 2 Steph. Hist. Cr. L., 263, 268.
(7) Broom's Com. Law, 5th Ed., 880, 881.

unless it were by some particular statute, no words alone, would be treason. (8) But words were sometimes relied on to show the meaning of an act. As, where C, being abroad, said: "I will kill the king of England if I can come at him," and the indictment, after setting forth these words, charged that C went into England for the purpose indicated by the words, it was held that C might, on proof of these facts, be convicted of treason; for the traitorous intention evinced by the words uttered converted an action innocent in itself into an overt act of treason. The deliberate act of writing treasonable words was also considered an overt act, if the writing were published; for *scribere est agere*. (9) But even in that case it was not the bare words themselves that were considered the treason and the preponderance of authority favored the rule that writings not published did not constitute an act of treason. (10)

The wide construction placed upon the language of the Statute of Treasons is shown by the words of Coke, who, in referring to the cases of Lord Cobham and the Earl of Essex, says: "He that declareth by overt act to depose the king does a sufficient overt act to prove that he compasseth and imagineth the death of the king. And so it is to imprison the king or to take the king into his power and to manifest the same by some overt act. And if a subject conspire with a foreign prince to invade the realm by open hostility, and prepare for the same by some overt act, this is a sufficient overt act for the death of the king." (11) Hale coincides with Coke and adds that, "to levy war against the king directly is an overt act of compassing the king's death, and that a conspiracy to levy such a war is an overt act to prove it." (12) Foster following in the same strain, says: "The care the law hath taken for the personal safety of the king is extended to everything not fully and deliberately done or attempted whereby his life *may* be endangered; and therefore the entering into measures for deposing or imprisoning him or to get his person into the power of conspirators, are overt acts of treason within this branch of the statute; for experience hath shewn that between the prisons and the graves of princes the distance is very small. Offences which are not so personal as those already mentioned have been with great propriety brought within the same rule, as having a tendency, though not so immediate, to the same fatal end; and therefore the entering into measures in concert with foreigners and others in order to an invasion of the kingdom, or going into a foreign country, or even purposing to go thither to that end, and taking any steps in order thereto, are overt acts of compassing the king's death." (13) Foster adds that a "treasonable correspondence with the enemy" is an act of compassing the king's death; and in support of this he refers to Lord Preston's case, (14) in which it was held that taking a boat at Surrey Stairs in Middlesex to go on board a ship in Kent, for the purpose of conveying to Louis XIV a number of papers informing him of the naval and military condition of England and to so help him to invade England and depose William and Mary, was an overt act of treason by compassing and imagining the death of William and Mary. (15) A wide construction was also put upon the expression "adhering to the king's enemies;" its mean-

(8) 2 Steph. Hist. Cr. L., 308.

(9) 3 Inst. 14; 4 Bl. Com., 80; Broom's Com. L., 5th Ed., 883.

(10) Algernon Sidney's case, 9 How. St. Tr., 818; Broom's Com. L., 5th Ed., 883.

(11) 3 Inst., 6, 12, 14; 2 Steph. Hist. Cr. L., 266.

(12) 1 Hale P. C., 110; 2 Steph. Hist. Cr. L., 266.

(13) Fost., 195; 2 Steph. Hist. Cr. L., 267-8.

(14) Fost., 197.

(15) Lord Preston's Case, 12 How. State Trials, 646; 2 Steph. Hist. Cr. L., 267; Broom's Com. L., 5th Ed., 882.

ing being held to include any assistance given to aliens in open hostility against the king, — as, by surrendering to them a castle of the king's for reward, or selling them arms, etc., or cruising in a ship with enemies to the intent to destroy the king's subjects. (16)

With regard to "levying war" Sir James F. Stephen says: "The difference between the commonest unlawful assembly and a civil war is one of degree, and no definite line can be drawn at which riot ends and war begins. There has been a double current of authority on this point from the date of the 25 Edw. 3 to our own days. On the one hand the statute declares, and the commentators have been carefui to insist on the declaration, that in order to be treason the war levied must be against the king No amount of violence, however great, and with whatever circumstances of a warlike kind it may be attended, will make an attack by one subject on another high treason. On the other hand any amount of violence, however insignificant, directed against the king will be high treason, and as soon as violence has any political object it is impossible to say that it is not directed against the king, in the sense of being armed opposition to the lawful exercise of his power." (17)

A levying of war amounting to treason appears to consist of two elements, — (*a*), the intent existing in the mind of the offender either forcibly, to overthrow the government or to compel it through fear to yield something to which it would not otherwise assent; and (*b*), some overt act in the nature of war or of preparation for or threatening it. (18)

It may perhaps be safe to say that when open force and violence, however extensive or serious, is not such as directly or indirectly attacks the sovereign or the government or their power and authority, or is not such as tends in some way to forcibly overthrow, coerce, or intimidate them or either of them, it will not be treason; and, although exceptional cases may arise in which the line of division between a riot and treason by levying war may not be distinct, it should not, as a general rule, be a difficult matter, — under the law as expressed in the present Title, — to distinguish between circumstances amounting to levying war, under sections 65 and 68, and the riotous offences dealt with, — according to their differences of extent and gravity, — under sections 80, 83, 84, 85 and 86.

Under the Imperial Treason-Felony Act, (11-12 Vic., c. 12), sending or supplying arms to be used in aid of a treasonable confederacy, having for its object the overthrow by force of arms of the English Government in any part of the United Kingdom is a sufficient overt act of a conspiracy to depose the Sovereign; and it is not the less so because the arms are sold for and the motive of the sale is pecuniary profit, provided it is known that they are to be used in aid of the insurrection; and the secret storing of arms and sending them under feigned addresses into districts where the confederacy exists with various contrivances to conceal their ultimate destination, and with the knowledge of the confederacy, is evidence of the offence. (19)

Where the prisoners were charged, under the Treason-Felony Act, sec. 3, with being in possession of certain instruments and explosive materials with intent to use them for the purpose of carrying out the objects of cer-

(16) Hawk. P. C., s.s. 23-28; 2 Bish. New Cr. L. Com,, s. 1212.
(17) 2 Steph. Hist. Cr. L., 268. For a full and interesting account of the law of treason see Stephen's History of the Crim. Law of England, 2nd vol., pp. 241-297.
(18) 2 Bish. New Cr. L. Com., s. 1229.
(19) R. v. Davitt & another, 11 Cox C. C., 676.

tain treasonable combinations existing in the United Kingdom and abroad, it was held that, for the purpose of shewing such intent, evidence might be given to shew that the only known use hitherto made of such materials and explosive compounds had been in causing destructive explosions to property and that the fact of some of these explosions having happened out of the jurisdiction of the Court did not affect the admissibility of the evidence. It was also held that for the purpose of shewing a treasonable object on the part of the prisoners and of negativing any private object on their part, evidence might be given of the existence, down to a period nearly approaching the date of the alleged acts, of a treasonable conspiracy in the country from which the explosives and instruments were brought, the object of which conspiracy was the alteration, by violent means, of the then present form of government, and this, although such evidence did not establish that the prisoners were members of or directly connected with such conspiracy. (20)

Every prosecution for treason, (except treason by killing His Majesty, or where the overt act alleged is an attempt to injure the person of His Majesty), must be commenced within three years from the time of the commission of the offence; and no person is to be prosecuted under the provisions of section 65 or of section 69 for any overt act of treason expressed in or declared by open and advised speaking, unless information of such overt act and of the words by which the same was expressed or declared is given upon oath to a justice within six days after the words are spoken and a warrant for the offender's apprehension issued within ten days after such information is given. (21)

One witness is not sufficient unless corroborated. (Section 684, *post*). See also special provisions, as to trial, in section 658, *post*.

**66. Treasonable conspiracy.** — In every case in which it is treason to conspire with any person for any purpose, the act of so conspiring, and every overt act of any such conspiracy, is an overt act of treason.

**67. Accessories after the fact to treason.** — Every one is guilty of an indictable offence and liable to two years' imprisonment who —

(*a*.) becomes an accessory after the fact to treason; or

(*b*.) knowing that any person is about to commit treason does not with all reasonable despatch, give information thereof to a justice of the peace, or use other reasonable endeavours to prevent the commission of the same.

By sec. 78 of the English Draft Code, the punishment of an accessory after the fact to high treason is penal servitude for life. (22)

**68. Levying war.** (23)— Every subject or citizen of any foreign state or country at peace with Her Majesty, who —

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(20) R. v. Deasy and others, 15 Cox C. C., 334.

(21) See section 551, *post*.

(22) As to punishments of accessories after the fact in cases not otherwise expressly provided for, see sections 531 and 532, *post*.

(23) See comments under section 65, *ante*.

(*a.*) is or continues in arms against Her Majesty within Canada; or

(*b.*) commits any act of hostility therein; or

(*c.*) enters Canada with intent to levy war against Her Majesty, or to commit any indictable offence therein for which any person would, in Canada, be liable to suffer death; and

Every subject of Her Majesty within Canada who —

(*d.*) levies war against Her Majesty in company with any of the subjects or citizens of any foreign state or country at peace with Her Majesty; or

(*e.*) enters Canada in company with any such subjects or citizens with intent to levy war against Her Majesty, or to commit any such offence therein; or

(*f.*) with intent to aid and assist, joins himself to any person who has entered Canada with intent to levy war against Her Majesty, or to commit any such offence therein — is guilty of an indictable offence and liable to suffer death. R.S.C., c. 146, ss. 6 and 7.

Since the accession of King Edward VII, the words "His Majesty" are to be substituted for the words "Her Majesty" wherever they occur in this section 68. (See section 7, subsec. 6 of the *Interpretation Act*, set out at p. 9, *ante*.

Persons offending against the provisions of this section may, in pursuance of sections 538 and 540, *post*, and of sections 6 and 7 of the R.S.C., c. 140, (unrepealed and set forth in the Appendix, *post*), be tried and punished either by any Superior Court of criminal jurisdiction or by a Militia Court Martial.

War levied against the Queen is of two kinds, namely, DIRECT, — such as open and armed rebellion against her person, — and CONSTRUCTIVE, — such as attempts to effect innovations of a public nature by force. Thus, where a mob assembled for the purpose of destroying all the Protestant dissenting meeting houses, and actually pulled down two of them, it was held to be treason, although there was no direct intention or design against the State or the person of the sovereign. (24) But where a person acted as the leader of an armed body who entered a town, not with the object of taking the town nor of attacking the military, but merely for the purpose of making a demonstration to the magistracy of the strength of their party either to procure the liberation of certain prisoners convicted of some political offence or to procure for such prisoners some mitigation of their punishment, it was held that this, though an aggravated misdemeanor, did not amount to high treason. (25)

At the Central Criminal Court in June 1883, before Lord Coleridge, C. J., the Master of the Rolls, and Grove, J., a number of persons were indicted and tried, under the treason-Felony Act, on three counts, namely, (*a*), for feloniously and unlawfully compassing, imagining and devising and intending to depose the Queen from the Imperial Crown of Great Britain and Ireland, and expressing the same by divers overt acts set out in the

(24) R. v. Dammarree, 15 How. St. Tr., 522.
(25) R. v. Frost, 9 C. & P., 129.

indictment, (*b*), for intending to levy war upon the Queen, in order by force and constraint, to compel her to change her measures and counsels, and, (*c*), for intending to levy war upon the Queen in order by force, to intimidate and overawe the Houses of Parliament, and it appeared that secret clubs, — branches of a society called the Fenian Brotherhood, — were formed in America, with the object, it was said, of procuring "the freedom of Ireland by force alone," and that the prisoners, members of these Clubs, went to England provided with funds with the intention of destroying public buildings by nitro-glycerine and other explosives. One of the prisoners appeared to be the director of the movements of the others; another was detected in manufacturing in Birmingham large quantities of nitro-glycerine; and others were employed in removing it when manufactured to London under the superintendence of the director; and there was evidence that the House of Commons and other public buildings were pointed out as places to be destroyed. For the defence, it was submitted that there was no evidence to go to the jury to support the charges of levying war, it being contended that, in order to be a levying of war, there must be numbers arrayed for the purpose of opposing the forces of the Crown and a premeditated design of conflict with the Royal military forces. But Lord Chief Justice Coleridge said, it was obvious that war might be levied in different ways and by very different means, in different ages of the world, and that if the prisoners or any of them had agreed among themselves to destroy the property of the Crown and to destroy or endanger the lives of the Queen's subjects by explosive materials, and had committed the acts alleged by the indictment, they were guilty of treason-felony; and the jury were accordingly directed as follows, — (*a*), that if they thought that one or more of the prisoners did compass, devise or intend to force the Queen to change her counsels and to overawe the Houses of Parliament by violent measures directed either against the property of the Queen, the public property, or the lives of the Queen's subjects, and not with the view of repaying any private spite or enmity against particular subjects of the Queen, it would be a levying of war against the Queen, and that it was not the less compassng, and intending the levying of war, because, by the progress of science, two or three men could now do what could not have been done years ago except by a large number of persons; that the question was, was there proof that the prisoners did what they did with the intention of deposing the Queen from the style of the Imperial Crown of the United Kingdom, or with the intention of separating Ireland from the Crown of England, and establishing an independent Republic; (*b*), that if what the prisoners did was done to compel Her Majesty or her ministers, by force, to change the Constitution and to alter the relations between England and Ireland, or even to set up a separate Parliament, it would be within the second count of the indictment; and, (*c*), that if what the prisoners did was done for the purpose of intimidating and overawing both or either Houses of Parliament so as to frighten them into doing what otherwise they would not have done, it would be within the third count. (26)

**69. Treasonable offences.** (27) — Every one is guilty of an in-

(26) R. v. Gallagher and others, 15 Cox C. C., 291; Warb. L. Cas., 2nd Ed., 37.

(27) See section 551, sub-sec. 2, *post*, which requires that, in prosecutions under sections 65 and 69 for any overt act of treason expressed in or declared by open and advised speaking, information of the words used shall be given on oath to a justice within six days after the words are spoken, and that a warrant for the offender's apprehension shall be issued within ten days after such information is given.

dictable offence and liable to imprisonment for life who forms any of the intentions hereinafter mentioned, and manifests any such intention by conspiring with any person to carry it into effect, or by any other overt act, or by publishing any printing or writing; that is to say —

(*a.*) an intention to depose Her Majesty from the style, honour and royal name of the Imperial Crown of the United Kingdom of Great Britain and Ireland, or of any other of Her Majesty's dominions or countries;

(*b.*) an intention to levy war against Her Majesty within any part of the United Kingdom, or of Canada, in order by force or constraint to compel her to change her measures or counsels, or in order to put any force or constraint upon or in order to intimidate or overawe both Houses or either House of Parliament of the United Kingdom, or of Canada;

(*c*) an intention to move or stir any foreigner or stranger with force to invade the said United Kingdom, or Canada, or any other of Her Majesty's dominions or countries under the authority of Her Majesty. R.S.C., c. 146, s. 3.

Since the accession of King Edward VII, the words "His Majesty" are to be substituted for the words "Her Majesty" wherever they occur in this section, 69, and in sections 71 to 78, *post*. (See section 7, subsec. 6 of the *Interpretation Act*, set out at p. 9, *ante*).

**70. Conspiracy to intimidate a legislature.** — Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who confederates, combines or conspires with any person to do any act of violence in order to intimidate, or to put any force or constraint upon, any Legislative Council, Legislative Assembly or House of Assembly. R. S. C., c. 146, s. 4.

**71. Assaults on the Queen.** — Every one is guilty of an indictable offence and liable to seven years' imprisonment, and to be whipped once, twice or thrice as the court directs, who —

(*a.*) wilfully produces, or has near Her Majesty, any arm or destructive or dangerous thing with intent to use the same to injure the person of, or to alarm Her Majesty; or

(*b.*) wilfully and with intent to alarm or to injure Her Majesty, or to break the public peace:

(i.) points, aims or presents at or near Her Majesty any firearm, loaded or not, or any other kind of arm ;

(ii.) discharges at or near Her Majesty any loaded arm ;

(iii.) discharges any explosive material near Her Majesty ;

(iv.) strikes, or strikes at Her Majesty in any manner whatever ;

(v.) throws anything at or upon Her Majesty ; or

(*c.*) attempts to do any of the things specified in paragraph (*b*) of this section.

**72. Inciting to mutiny.** — Every one is guilty of an indictable offence and liable to imprisonment for life who, *for any traitorous or mutinous purpose*, endeavours to seduce any person serving in Her Majesty's forces by sea or land from his duty and allegiance to Her Majesty, or to incite or stir up any such person to commit any *traitorous* or *mutinous* practice.

To render a person liable under this section for having endeavored to seduce a soldier or a sailor from his duty, the endeavor must be in pursuance of a traitorous or mutinous purpose; it must be for the purpose of forwarding some of the designs which are declared to be treasonable. If it were done for the purpose of weakening the authority of the Sovereign and of preventing and interfering with the nations defence against enemies, it would be traitorous. But if it were done, for instance, by a relative or friend of the soldier or sailor, — as by persuading or advising him to leave the service, from a solicitude for the soldier's or sailor's health, (the soldier or sailor being sick or wounded), — or if it were done by a person holding a religious opinion which made him conscientiously averse to war, he would not be acting from traitorous motives.

**73. Inciting soldiers or sailors to desert.** — Every one is guilty of an indictable offence who, not being an enlisted soldier in Her Majesty's service, or a seaman in Her Majesty's naval service —

(*a.*) by words or with money, or by any other means whatsoever, directly or indirectly persuades or procures, or goes about or endeavours to persuade, prevail on or procure, any such seaman or soldier to desert from or leave Her Majesty's military or naval service; or

(*b.*) conceals, receives or assists any deserter from Her Majesty's military or naval service, knowing him to be such deserter.

2. The offender may be prosecuted by indictment, or summarily before two justices of the peace. In the former case he is liable to fine and imprisonment in the discretion of the court, and in the latter to a penalty not exceeding two hundred dollars, and not less than eighty dollars and costs, and in default of payment to imprisonment for any term not exceeding six months. R. S. C., c. 169, ss. 1 and 4.

This section provides that an offender may be prosecuted either by indictment or summarily, and it specifies the penalty to be incurred on a summary conviction; but in the case of a conviction upon indictment, although it enacts that the offender shall be liable to fine and imprisonment in the discretion of the court, it does not specify the amount of the fine nor the length of the imprisonment. Section 951, *post*, however, provides that a person convicted of an indictable offence for which no punishment is specially provided shall be liable to five years imprisonment.

Section 9, R.S.C., chap. 169, (unrepealed), provides that one moiety of the amount of any penalty recovered under this section shall go to the prosecutor and the other moiety to the Crown. (28)

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(28) See Appendix, *post*.

Any one reasonably suspected of being a deserter from Her Majesty's service may be arrested and brought before a justice of the peace and held till claimed by the military or naval authorities. (29)

The Imperial Act relating to merchant ships is the *Merchant Shipping Act*, 1894, section 221 of which provides for the punishment of desertion by forfeiture of wages and 12 weeks' imprisonment, and section 236 of which enacts that any person who wilfully harbors or secretes a seaman who has deserted from his ship knowing the seaman to have done so, shall for every seaman so harbored or secreted be liable to a fine of £20.

The Canadian Act relating to merchant ships is the Seaman's Act, R. S. C., c. 74, section 91 of which provides for the punishment of desertion by a seaman by imprisonment with hard labor for a term not exceeding twelve weeks, besides forfeiture of the clothes and effects left by him on board and of the wages then earned by him, and section 104 of which provides for the punishment, — by imprisonment with hard labor for 6 months for a first offence and for 12 months for any subsequent offence, — of any person who incites any seaman or apprentice to neglect or refuse to join or proceed to sea or to desert his ship or who wilfully harbors or secretes any such deserting seaman or apprentice knowing or having reason to believe him to be such.

**74. Resisting execution of warrant for arrest of deserters.**— Every one who resists the execution of any warrant authorising the breaking open of any building to search for any deserter from Her Majesty's military or naval service is guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty of eighty dollars. R. S. C., c. 169, s. 7.

No one is entitled to break open any building to search for a deserter without having obtained a warrant for that purpose from a justice of the peace. (30)

**75. Enticing militiamen or mounted police to desert.** — Every one is guilty of an offence and liable on summary conviction to six month's imprisonment, *with or without hard labour,* who —

(*a.*) persuades any man who has been enlisted to serve in any corps of militia, or who is a member of or has engaged to serve in the North-West mounted police force, to desert, or attempts to procure or persuade any such man to desert; or

(*b.*) knowing that any such man is about to desert, aids or assists him in deserting; or

(*c.*) knowing any such man is a deserter, conceals such man or aids or assists in his rescue. R. S. C., c. 41, s. 109; 52 V., c. 25, s. 4.

This section would not apply to the act of persuading a militiaman not to turn out upon parade.

The mere refusal or neglect of an officer or man to attend a parade or drill is punishable, under section 102 of the *Militia Act*, (R.S.C., c. 4), by fine only.

(29) See section 561, *post.*
(30) *Ib.*

**76. Obtaining and communicating official information.** — In the two following sections, unless the context otherwise requires —

(*a.*) Any reference to a place belonging to Her Majesty includes a place belonging to any department of the Government of the United Kingdom, or of the Government of Canada, or of any province, whether the place is or is not actually vested in Her Majesty;

(*b.*) Expressions referring to communications include any communication, whether in whole or in part, and whether the document, sketch, plan, model or information itself or the substance or effect thereof only be communicated;

(*c.*) The expression "document" includes part of a document;

(*d.*) The expression "model" includes design, pattern and specimen;

(*e.*) The expression "sketch" includes any photograph or other mode of expression of any place or thing;

(*f.*) The expression "office under Her Majesty," includes any office or employment in or under any department of the Government of the United Kingdom or of the Government of Canada or of any province. 53 V., c. 10, s. 5.

**77.** Every one is guilty of an indictable offence and liable to imprisonment for one year, or to a fine not exceeding one hundred dollars, or to both imprisonment and fine, who —

(*a.*) for the purpose of wrongfully obtaining information —

(i.) enters or is in any part of a place in Canada belonging to Her Majesty, being a fortress, arsenal, factory, dockyard, camp, ship, office or other like place, in which part he is not entitled to be; or

(ii) when lawfully or unlawfully in any such place as aforesaid either obtains any document, sketch, plan, model or knowledge of anything which he is not entitled to obtain, or takes without lawful authority any sketch or plan; or

(iii.) when outside any fortress, arsenal, factory, dockyard or camp in Canada, belonging to Her Majesty, takes, or attempts to take, without authority given by or on behalf of Her Majesty, any sketch or plan of that fortress, arsenal, factory, dockyard or camp; or

(*b.*) knowingly having possession of or control over any such document, sketch, plan, model, or knowledge as has been obtained or taken by means of any act which constitutes an offence against this and the following section, at any time wilfully and without lawful authority communicates or attempts to communicate the same to any person to whom the same ought not, in the interest of the state, to be communicated at the time; or

(*c.*) after having been entrusted in confidence by some officer under Her Majesty with any document, sketch, plan, model or information relating to any such place as aforesaid, or to the naval or military affairs of Her Majesty, wilfully, and in breach of such confidence, communicates the same when, in the interests of the state it ought not to be communicated; or

(*d.*) having possession of any document relating to any fortress, arsenal, factory, dockyard, camp, ship, office or other like place belonging to Her Majesty, or to the naval or military affairs of Her Majesty, in whatever manner the same has been obtained or taken at any time wilfully communicates the same to any person to whom he knows the same ought not, in the interest of the state, to be communicated at the time:

2. Every one who commits any such offence intending to communicate to a foreign state any information, document, sketch, plan, model or knowledge obtained or taken by him, or entrusted to him as aforesaid, or communicates the same to any agent of a foreign state, is guilty of an indictable offence and liable to imprisonment for life. 53 V., c. 10, s. 1.

**78.** Every one who, by means of his holding or having held an office under Her Majesty, has lawfully or unlawfully, either obtained possession of or control over any document, sketch, plan or model, or acquired any information, and at any time corruptly, or contrary to his official duty, communicates or attempts to communicate such document, sketch, plan, model or information to any person to whom the same ought not, in the interests of the state, or otherwise in the public interest, to be communicated at that time, is guilty of an indictable offence and liable —

(*a.*) if the communication was made, or attempted to be made, to a foreign state, to imprisonment for life; and

(*b.*) in any other case to imprisonment for one year, or to a fine not exceeding one hundred dollars, or to both imprisonment and fine.

2. This section shall apply to a person holding a contract with Her Majesty, or with any department of the Government of the United Kingdom, or of the Government of Canada, or of any province, or with the holder of any office under Her Majesty as such holder, where such contract involves an obligation of secrecy, and to any person employed by any person or body of persons holding such a contract who is under a like obligation of secrecy, as if the person holding the contract, and the person so employed, were respectively holders of an office under Her Majesty. 53 V., c. 10, s. 2.

No prosecution for any offence against sections 77 and 78 can be commenced without the consent of the *Attorney-General* or of the Attorney General of Canada. (See section 543, *post*).

For the meaning of the expression "*Attorney General*" see section 3 (*b*), *ante*.

See section 614, *post*, as to requisites of indictments under this part IV.

The Imperial statute on the subject of the above sections 76, 77 and 78 is "The Official Secrets Act, 1889," (52-53 Vic., c. 52).

For the *Imperial Foreign Enlistment Act*, and comments thereon, see the EXTRA APPENDIX, *post*.

## PART V.

## UNLAWFUL ASSEMBLIES, RIOTS, BREACHES OF THE PEACE.

**79. Unlawful assembly.** — An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner or so conduct themselves when assembled as to cause persons in the neighbourhood of such assembly to fear, on reasonable grounds, that the persons so assembled will disturb the peace tumultuously, or will by such assembly needlessly and without any reasonable occasion provoke other persons to disturb the peace tumultuously.

2. Persons lawfully assembled may become an unlawful assembly if they conduct themselves with a common purpose in such a manner as would have made their assembling unlawful if they had assembled in that manner for that purpose.

3. An assembly of three or more persons for the purpose of protecting the house of any one in their number against persons threatening to break and enter such house in order to commit any indictable offence therein is not unlawful.

**80. Riot.** — A riot is an unlawful assembly which has begun to disturb the peace tumultuously.

The above definition of an unlawful assembly is a little different in its wording from that of section 11, R.S.C., chap. 147 (repealed); (1) but the two sections, (79 and 80), are in exactly the same words as sections 84 and 85 of the English Draft Code. The remarks of the Royal Commissioners upon their definition of an unlawful assembly are as follows: "The earliest definition of an unlawful assembly is in the Year Book 21 H. 7, 39. It would seem from it that the law was first adopted at a time when it was the practice for the gentry, who were on bad terms with each other, to go to market at the head of bands of armed retainers. It is obvious that no civilized government could permit this practice, the consequence of which was, at the time, that the assembled bands would probably fight, and certainly make peaceable people fear that they would fight. It was whilst the state of society was such as to render this a prevailing mischief that the earlier cases were decided; and consequently the duty of not provoking a breach of the peace has sometimes been so strongly laid down as almost to make it seem as if it was unlawful to take means

(1) See *ante*, p. 42.

to resist those who came to commit crimes. We have endeavored in section 84 to enunciate the principles of the common law, although in declaring that an assembly may be unlawful if it causes persons in the neighborhood to fear that it will needlessy and without reasonable occasion provoke others to disturb the peace tumultuously, we are declaring that which has not as yet been specifically decided in any particular case. The clause as to the defence of a man's house has been inserted because of a doubt expressed on the subject." (See p. 20 of the Report).

81. Every member of an unlawful assembly is guilty of an indictable offence and liable to one year's imprisonment. R. S. C., c. 147, s. 11.

82. Every rioter is guilty of an indictable offence and liable to two years' imprisonment with hard labour. R. S. C., c. 148, s. 13.

These sections reduce the punishments inflicted under the R.S.C., c. 147; which were two years imprisonment for unlawfully assembling and four years for rioting.

**Unlawful assemblies.**—To constitute an unlawful assembly, it is not necessary that the purpose for which the persons assembled together was an unlawful purpose; an intention to do a lawful act in a turbulent and violent manner is as much a breach of the law as if the intended act were illegal. It is the manner in which it is to be done which constitutes the offence; and, therefore, if the jury find that the assembling together was under such circumstances as were likely to produce danger to the peace and tranquility of the neighborhood, it is an unlawful assembly. (2)

Any meeting of three or more persons assembled under such circumstances as, according to the opinion of firm and rational men, are likely to produce danger to the tranquility and peace of the neighborhood is an unlawful assembly; and, in viewing this question, the jury should take into their consideration the hour at which the meeting of the parties takes place and the language used by the assembled persons and by those who address them, and then consider whether firm and rational men, having their families and property there, would have reasonable ground to fear a breach of the peace; as the alarm must be not merely such as would frighten a foolish or timid person, but such as would frighten people of reasonable firmness and courage. (3)

It has been held that an assembly of persons to witness a prize-fight is an unlawful assembly and that every one present at and countenancing the fight is guilty of an offence. (4)

An assembly which is lawful in itself does not become unlawful merely because of the unlawful intentions of others against it. So, that, where some members of a religious association, calling themselves the "Salvation Army" assembled, and,—forming a procession headed by flags, banners and music,—marched through the streets and were met by an organized and antagonistic band styled the "Skeleton Army," the result being a free fight and general disorder, it was contended for the Salvationists and held, upon an appeal from their conviction by the magistrates, that having

(2) Remarks of Allen, C. J., in R. v. Mailloux and others, 3 Pugs. (N.B.) Rep., 513.
(3) R. v. Vincent, 9 C. & P., 91.
(4) R. v. Billingham, 2 C. & P., 234; R. v. Perkins, 4 C. & P., 537; Arch. Cr. Pl. & Ev., 21st Ed., 961.

assembled for a lawful purpose and with no intention of carrying it out in an unlawful manner, they could not be convicted of an unlawful assembly, notwithstanding that they may have been aware that from their action a breach of the peace by other persons would be likely to result. "What has happened here," said Judge Field, "is that an unlawful organization has assumed to itself the right to prevent the appellants from lawfully assembling together, and the finding of the justices, by their conviction of the appellants, amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition." (5)

In another case, where nine men, carrying with them musical instruments, marched upon a Sunday through the public streets of a town, in which Sunday processions accompanied with instrumental music, (other than processions of Her Majestys naval military and volunteer forces), are prohibited, it was held that their so marching, although an illegal act, was no evidence of an unlawful assembly, if the men did not know that it was calculated to lead to a breach of the peace by others, — notwithstanding that as a matter of fact their so marching was calculated to and actually did excite others to the commission of a breach of the peace. (6)

The difference between an unlawful assembly and a riot is this. If the parties assemble in a tumultuous manner and actually execute their purpose with violence, it is a riot; but if they assemble tumultuously with the purpose of doing something which if executed would make them rioters, and, having done nothing, they separate omitting to carry out their purpose, it is an unlawful assembly. (7)

**83. Reading the riot act.** — It is the duty of every sheriff, deputy sheriff, mayor or other head officer, and justice of the peace, of any county, city or town, who has notice, that there are within his jurisdiction persons to the number of twelve or more unlawfully, riotously and tumultuously assembled together to the disturbance of the public peace, to resort to the place where such unlawful, riotous and tumultuous assembly is, and among the rioters, or as near to them as he can safely come, with a loud voice to command or cause to be commanded silence, and after that openly and with loud voice to make or cause to be made a proclamation in these words or to the like effect: —

"Our Sovereign Lady the Queen charges and commands all persons being assembled immediately to disperse and peaceably to depart to their habitations or to their lawful business, upon the pain of being guilty of an offence on conviction of which they may be sentenced to imprisonment for life.

"God Save the Queen."

2. All persons are guilty of an indictable offence and liable to imprisonment for life who —

(*a*) with force and arms wilfully oppose, hinder or hurt any person who begins or is about to make the said proclamation, whereby such proclamation is not made; or

(5) Beatty v. Gillbanks, 15 Cox C. C., 138; Warb. L. Cas., 2nd Ed., 47.
(6) R. v. Clarkson, 17 Cox C. C., 483.
(7) R. v. Birt, 5 C. & P., per Paterson, J.

(*b.*) continue together to the number of twelve for *thirty minutes* after such proclamation has been made, or if they know that its making was hindered as aforesaid, within thirty minutes after such hindrance. R.S.C., c. 147, cc. 1 and 2.

Since the accession of King Edward VII, the words "Our Sovereign Lord the King" and "God save the King" will be substituted for the words "Our Sovereign Lady the Queen," and the words "God save the Queen" in the above proclamation. (See section 7, sub-section 6, of the *Interpretation Act*, set out at p. 9, *ante*).

At the time of a riot, a magistrate may repel force by force before the reading of the proclamation from the Riot Act. (8)

84. If the persons so unlawfully, riotously and tumultuously assembled together as mentioned in the next preceding section, or twelve or more of them, continue together, and do not disperse themselves, for the space of *thirty minutes* after the proclamation is made or after such hindrance as aforesaid, it is the duty of every such sheriff, justice and other officer, and of all persons required by them to assist, to cause such persons to be apprehended and carried before a justice of the peace; and if any of the persons so assembled is killed or hurt in the appehension of such persons or in the endeavour to apprehend or disperse them, by reason of their resistance, every person ordering them to be apprehended or dispersed, and every person executing such orders, shall be indemnified against all proceedings of every kind in respect thereof: Provided that nothing herein contained shall, in any way, limit or affect any duties or powers imposed or given by this act as to the suppression of riots before or after the making of the said proclamation. R. S. C., c. 147, s. 3.

These two sections are the same in effect as sections 88 and 89 of the English Draft Code. They are also similar to sections 1, 2 and 3 of the R.S.C., chap. 147, (repealed), with this exception that the time within which the assembled persons are to disperse after the reading of the proclamation is reduced to thirty minutes; the delay fixed by the old law being one hour.

The duty of a magistrate in regard to the quelling of a riot is fully explained by Littledale, J., in Pinney's Case.

Pinney was the mayor of Bristol, and was prosecuted in 1832 on a charge of having neglected as chief magistrate of the city, to take proper measures for the suppression of some serious riots, which took place in Bristol in the previous year, in which riots many persons were killed and injured and many public buildings, including the gaol, the mansion house and the custom house, were destroyed before the mob were stopped by the military. Mr. Justice Littledale in the course of his charge to the jury said, in reference to the duties of magistrates: "A person whether a magistrate or a peace officer is in a difficult situation. If by his acts he causes death he is liable to be indicted for murder or manslaughter, and if he does not act he is liable to an indictment on an information for neglect. He is

(8) R. v. Kennett, 5 C. & P., 282.

therefore bound to hit the precise line of duty; and how difficult it is to hit that precise line will be matter for your consideration; but that, difficult as it may be, he is bound to do. Whether a man has sought a public situation, as is often the case of mayors and magistrates, or whether as a peace officer he has been compelled to take the office that he holds, the same rule applies; and if persons were not compelled to act according to law there would be an end of society; but still you must be satisfied that the defendant has been clearly guilty of neglect before you return a verdict against him." (9)

No prosecution for any offence against the above section can be commenced after the expiration of one year from its commission. (10)

For further notes and authorities on this subject, see comments under sections 39-42, *ante;* and see, also, sections 140 and 141, *post*, as to neglect of magistrates to suppress a riot, and neglect of persons when notified to aid in suppressing a riot.

**85. Riotous destruction of buildings.** — All persons are guilty of an indictable offence and liable to imprisonment for life who, being riotously and tumultuously assembled together to the disturbance of the public peace, unlawfully and with force *demolish or pull down, or begin to demolish or pull down*, any building, or any machinery, whether fixed or moveable, or any erection used in farming land, or in carrying on any trade or manufacture, or any erection or structure used in conducting the business of any mine, or any bridge, waggon-way or track for conveying minerals from any mine. R.S.C., c. 147, s. 9.

Upon an indictment under 7-8 Geo. 4, c. 30, s. 8, for feloniously beginning to demolish a house, it was held that the charge could not be supported unless the persons committing the outrage had an intention of destroying the house; and that therefore where considerable damage was done to a house by a mob who did it with the intention of seizing a person who had taken refuge in the house, their conduct was held not to be within the statute. In this case, Tyndall, C. J., said, "The persons committing the outrage must have the intention of destroying the house before they can be charged with a felonious beginning to demolish. In the present case, it is clear that they had no such intention and that they had another intention, not within the scope of the indictment, which was merely to get possession of a man who had taken refuge therein. (11)

**86. Riotous injury or damage to buildings.** — All persons are guilty of an indictable offence and liable to seven years' imprisonment who, being riotously and tumultuously assembled together to the disturbance of the public peace, unlawfully and with force *injure or damage* any of the things mentioned in the last preceding section;

2. It shall not be a defence to a charge of an offence against this or the last preceding section that the offender believed he had

(9) R. v. Pinney, 5 C. & P., 254-261; Broom's Com. L., 5th Ed., 891.
(10) See section 551 (*c*), *post.*
(11) R. v. Price and others, 5 C. & P., 510.

a right to act as he did, unless he actually had such a right. R.S. C., c. 147, s. 10.

The second paragraph of this section is an addition to the law as contained in the R.S.C., c. 147, sec. 10.

It will be seen that, under the law as declared by this section, persons who riotously destroy or damage a building cannot now reduce their offence to a mere riot, on the plea that they acted in the assertion of a right which they believed they had, unless they really had such a right. The effect of the law as it now stands seems, therefore, to be that, if the offenders or any of them actually have a right to the building, they will only be guilty of the riot; but, if they have not such right although they believe they have, they will be guilty of the higher offence of riotous destruction or riotous damage, as the case may be.

The Royal Commissioners, in a note to a similar addition made in the English Draft Code, say that it "removes what is at least a doubt;" and they make a reference to the cases of Langford and Casey.

In Langford's case, — while it was held that it was a sufficient demolishing of a house if it were so far demolished that it was no longer a house, there being only a chimney left standing, and that if any *one* of Her Majesty's subjects were terrified it was a sufficient terror and alarm to substantiate that part of the charge of riot, — it was also held that if persons riotously assembled and demolished a house really believing that it is property of one of them, and acted *bona fide* in the assertion of a supposed right it would not be a felonious demolition, although there would be a riot. (12)

In Casey's case, the prisoners were charged with having unlawfully and riotously assembled and with force demolished and pulled down a house and scattered a hay rick *contra pacem;* and it was held that, upon the hypothesis that the prisoners had demolished the house not feloniously, but in the assertion of a supposed right, the indictment could be sustained as for a misdemeanor at common law, that is, for the riot with the statement of the demolition of the house as an aggravation. (13)

**87. Unlawful drilling.**—The Governor in Council is authorized from time to time to prohibit assemblies without lawful authority of persons for the purpose of training or drilling themselves, or of being trained or drilled to the use of arms, or for the purpose of practising military exercises, movements or evolutions, and to prohibit persons when assembled for any other purpose so training or drilling themselves or being trained or drilled. Any such prohibition may be general or may apply only to a particular place or district and to assemblies of a particular character, and shall come into operation from the publication in the *Canada Gazette* of a proclamation embodying the terms of such prohibition, and shall continue in force until the like publication of a proclamation issued by the authority of the Governor in Council revoking such prohibition.

2. Every person is guilty of an indictable offence and liable to

(12) R. v. Langford and others, C. and M., 602.
(13) R. v. Casey, 8 Irish Rep. Com. Law, 408.

two years' imprisonment who, without lawful authority and in contravention of such prohibition or proclamation —

(*a.*) is present at or attends any such assembly for the purpose of training or drilling any other person to the use of arms or the practice of military exercises or evolutions; or

(*b.*) at any assembly trains or drills any other person to the use of arms or the practice of military exercises or evolutions. R.S.C., c. 147, ss. 4 and 5.

**88. Being unlawfully drilled.** — Every one is guilty of an indictable offence and liable to two years' imprisonment who, without lawful authority, attends, or is present at, any such assembly as in the last preceding section mentioned, for the purpose of being, or who at any such assembly is, without lawful authority and in contravention of such prohibition or proclamation trained or drilled to the use of arms or the practice of military exercises or evolutions. R.S.C., c. 147, s. 6.

These two sections, 87 and 88, modify the law as contained in sections 4, 5 and 6 R. S. C., chap. 147 (now repealed); so that drilling will only be unlawful during the currency of and in so far as any such drilling may contravene any proclamation which the Governor in Council may from time to time publish against drilling, either generally or specially, according to the terms of the proclamation.

No prosecution for any offence against either of these sections can be commenced after the expiration of six months from its commission. (14)

**89. Forcible entry and detainer.** — Forcible entry is where a person whether entitled or not enters in a manner likely to cause a breach of the peace, or reasonable apprehension thereof, on land then in actual and peaceable possession of another.

2. Forcible detainer is where a person in actual possession of land, without colour of right, detains it in a manner likely to cause a breach of the peace, or reasonable apprehension thereof, against a person entitled by law to the possession thereof.

3. What amounts to actual possession or colour of right is a question of law.

4. Every one who forcibly enters or forcibly detains land is guilty of an indictable offence and liable to one year's imprisonment.

In ancient times violent acts were frequently committed in taking possession of property, sometimes by those who were really the owners and sometimes by those who were not. (15) To meet the mischief, special statutes were passed, (in the reigns of Ric. II, Hen. VIII, Elizabeth and James I), giving extraordinary powers to magistrates by authorising any justice of the peace upon the happening of any forcible entry into or any forcible detainer of lands to take sufficient force of the county to the place where the offence was committed and there record it upon his own view, as in the case of a riot, and to thereupon commit the offender to gaol till he

(14) See section 551 (*d*), *post*.
(15) Rem. of Lord Denman, in R. v. Harland, 8 Ad. & E., 828.

should "make fine and ransom to the king." The justice, moreover, was empowered to summon a jury to try the forcible entry or detainer complained of, and if the fact of the forcible entry or detainer were found by the jury, restitution of possession might be made without any enquiry being instituted into the merits of the right of ownership. The same object could likewise be effected by means of indictment at the assizes; in which case it was discretionary with the judge of assize, — upon the finding of the bill by the grand jury, — to grant, upon grounds shewn by affidavit, a warrant of restitution. The proceedings under these statutes regarding forcible entry and detainer have thus been said to furnish "the only instance known to the law of England in which a party may be turned out of possession by *ex parte* steps taken." (16)

Some of the statutes in the later of these reigns provided also that a forcible entry or detainer should be an indictable offence; and it appears that, independently of such enactments, a forcible entry and a forcible detainer were always indictable at common law. (17)

So, that, the above section, 89, created no new offence; and, as it is in exactly the same terms as section 95 of the English Draft Code, — which the Royal Commissioners, in their Report, say is a correct statement of the existing law, — it made no change in our former law as to forcible entry and detainer.

The third paragraph of the section declares that what amounts to *actual possession* or what amounts to *color of right* is a question of law.

This does not refer to any disputed question of fact. For instance, with regard to *actual possession*, the fact may be that a person was physically absent from but that his servant or agent was in physical possession for him of a house or land. The fact of whether the servant or agent was or was not in possession of the house or land would be a question of fact to be found by the jury, but the effect of such servant's or agent's possession would under the above section, be a question of law.

For example, the owner of a house may be resident abroad, and, therefore, personally absent from it, but his servant or agent may be in possession of it for him. It is the province of the jury to find, according to the evidence, if as a matter of fact the servant or agent of the absent owner was in possession of the house, or if other given circumstances existed which are contended to be equivalent to actual possession by the absent owner; but after the fact of the servant or agent being in physical possession of the property or the fact of the existence of other given circumstances has been found by the jury, it is for the judge to decide, as a question of law, whether the owner, although personally absent, was in actual possession of the property by reason of his servant or agent being in physical possession of it, or by reason of the existence of the other given circumstances.

Actual residence in the premises is not necessary to constitute actual possession, nor is continuous presence upon the premises either in person or by an agent. (18)

It has been held that a person has actual possession of a lot of land upon which he has a stable, which is fenced in. (19)

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(16) Broom's Com. L., 5th Ed., 892-894.
(17) R. v. Bake, 3 Burr., 1731; R. v. Dyer, 6 Mod., 96; R. v. Newlands, 4 Jur., 322; R. v. Conner, 2 Ont. Pr. R., 139.
(18) 13 Am. & Eng. Ency. L., 2nd Ed., 750.
(19) Valencia v . Couch, 32 Cal., 340; 91 Am., 989.

Generally any overt acts indicating dominion and a purpose to occupy and not to abandon the premises will satisfy the requirement as to possession. One claiming a vacant lot enclosed the lot by building a fence adjoining another fence and a brick wall sufficient to keep domestic animals and notified all persons that the premises were appropriated. It was held that this was a sufficient actual possession to maintain forcible entry and detainer against persons breaking down and destroying the fence in a forcible manner under a claim of ownership. (20)

A mere scrambling possession, — the possession of a momentary trespasser or intruder, — as distinguished from a complete possession which has ripened into a peaceable occupancy, is insufficient. So, that, one who in the morning entered upon a portion of a tract of land in the possession of another and enclosed it with a fence and put a house on it before sundown did not acquire such a peaceable possession as to enable him to maintain forcible entry and detainer against the possessor who at sundown of the same day destroyed the house and fence and drove him away. (21)

In proceedings for forcible entry and detainer the question of title is not involved. The gist of the offence is the taking away or invading, — in a manner likely to cause a breach of the peace or reasonable apprehension thereof, — of another's actual peaceable possession of real property; and the reason is that if a party have a paramount title to the property in the actual peaceable possession of another who persists, without a valid right, in retaining that possession, he shall not do himself justice, *by force*, or in a manner likely to cause a breach of the peace, but he must apply to the Courts of justice provided for such purposes. (22)

It is sufficient, in proceedings for forcible entry and detainer, to allege the fact of the prosecutor being in the actual peaceable possession of the property at the time of the alleged forcible entry; and it is for the jury to say whether the prosecutor was in actual peaceable possession thereof, and, if so, did the defendant, forcibly, or in a manner likely to cause a breach of the peace, or reasonable apprehension thereof, deprive him of such possession. (23)

Where the prosecutor occupied with his family a house belonging to the defendant upon the latter's plantation, under a contract by which for his services as a laborer he was to have the house as a dwelling-place and a monthly allowance of food, with the privilege of cultivating a small strip of land for his own benefit, and the defendant, by threats and demonstrations of deadly weapons and an array of numbers against which resistance would have been useless, drove the prosecutor out of the house, it was held that the relation of lessor and lessee existed between the defendant and the prosecutor and that the possession of the latter was sufficient to support a prosecution against the defendant for forcible entry. (24)

The intention to take possession of the land and tenements entered upon is an essential element in the offence of forcible entry. And, therefore, where a defendant was indicted for having entered a house in another man's possession in a manner likely to cause a breach of the peace, and the evidence shewed that the defendant, with four men acting under his direc-

(20) Allen v. Tobins, 77 Ill., 169.

(21) House v. Kelser, 8 Cal., 500.

(22) R. v. Cokely, 13 U. C. Q. B., 521; R. v. Conner, 2 Ont. Pr. R., 139; Gates v. Winslow, 1 Wis., 650.

(23) R. v. Child, 2 Cox C. C., 102; Milner v. Maclean, 2 C. & P., 17; R. v. Smyth, 5 C. & P., 201; Brundige v. Thompson, 3 N. S. R., 356.

(24) S. v. Smith, 100 N. Car., 466; 13 Am. & Eng. Ency. L., 2nd Ed., 749.

tion, went into the house, — with no intent to take possession of it nor to oust the man in possession thereof nor to interfere with the latter's occupation thereof, — but for the sole purpose of seizing and taking away from the house some articles of furniture which the defendant *bona fide* claimed and believed to be his own property and to the possession of which he believed himself entitled, it was held that the entry was a mere trespass and did not constitute a forcible entry; and the prisoner was acquitted, the Judge, however, reserving the question for the Court of Appeal, by which the Judge's ruling was confirmed. (25)

**90. Affray.** — An affray is the act of fighting in any public street or highway, or fighting to the alarm of the public in any other place to which the public have access.

2. Every one who takes part in an affray is guilty of an indictable offence and liable to one year's imprisonment *with hard labour*. R.S.C., c. 147, s. 14.

This section effects a change by making an affray an indictable offence punishable by one year's imprisonment with hard labor, instead of being a summary offence punishable by three months' imprisonment, as it was under section 14, R.S.C., c. 147.

The essence of this offence is its tendency to alarm people at or near the scene of the fight. It is not necessary that actual terror should exist; but it will be inferred by the law from the fact of the fighting taking place in a public street or highway or in any other place accessible to the public.

Like an assault, an affray may be aggravated in its circumstances and become an element in some higher crime, as by developing into a riot, or by serious bodily injuries being inflicted or actual loss of life occasioned in the course of the fight.

**91. Challenging to fight a duel.** — Every one is guilty of an indictable offence and liable to three years' imprisonment who challenges or endeavours by any means to provoke any person to fight a duel, or endeavours to provoke any person to challenge any other person so to do.

A duel is where two persons fight with deadly weapons and by previous mutual agreement. If in such a fight one of the combatants kill the other he will be guilty of murder; and the seconds of both combatants and all present giving countenance to the transaction (including even the surgeon), will also be equally guilty of that offence. (26)

**92. Prize fights.** — In sections ninety-three to ninety-seven inclusive the expression "prize-fight" means an encounter or fight with fists or hands, between two persons who have met for such purpose by previous arrangement made by or for them. R. S. C., c. 153, s. 1.

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(25) R. v. Pike, 19 C. L. T., 43; 12 Man. L. R., 314; 2 Can. Cr. Cas., 314.

(26) R. v. Young, 8 C. & P., 644; R. v. Barronet, Dears., 53; R. v. Cuddy, 1 C. & K., 210; R. v. Taylor, L. R., 2 C. C. R., 147; 2 Bish. New Cr. L. Com., s. 311.

**93. Challenge to fight a prize-fight.** — Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding one thousand dollars and not less than one hundred dollars, or to imprisonment for a term not exceeding six months, *with or without hard labour* or to both, who sends or publishes, or causes to be sent or published or otherwise made known, any challenge to fight a prize-fight, or accepts any such challenge, or causes the same to be accepted, or goes into training preparatory to such fight, or acts as trainer or second to any person who intends to engage in a prize-fight. R.S.C., c. 153, s. 2.

**94. Principal in a prize-fight.** — Every one is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding twelve months and not less than three months, *with or without hard labour* who engages as a principal in a prize-fight. R.S.C., c. 153, s. 3.

**95. Attending a prize-fight as an aid, etc.**— Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding five hundred dollars and not less than fifty dollars, or to imprisonment for a term not exceeding twelve months, *with or without hard labour* or to both, who is present at a prize-fight as an aid, second, surgeon, umpire, backer, assistant or reporter, or who advises, encourages or promotes such fight. R.S.C., c. 153, s. 4.

**96. Leaving Canada to engage in a prize-fight.** — Every inhabitant or resident of Canada is guilty of an offence and liable, on summary conviction to a penalty not exceeding four hundred dollars and not less than fifty dollars, or to imprisonment for a term not exceeding six months, *with or without hard labour* or to both, who leaves Canada with intent to engage in a prize-fight without the limits thereof. R.S.C., c. 153, s. 5.

**97. Consequence if fight found not to be for a prize.** — If, after hearing evidence of the circumstances connected with the origin of the fight or intended fight, the person before whom the complaint is made is satisfied that such fight or intended fight was *bonâ fide* the consequence or result of a quarrel or dispute between the principals engaged or intended to engage therein, and that the same was not an encounter or fight for a prize, or on the result of which the handing over or transfer of money or property depended, such person may, in his discretion, discharge the accused or impose upon him a penalty not exceeding fifty dollars. R.S.C., c. 153, s. 9.

**The only alteration made, by sections 93, 94, 95 and 96, in the law as contained in sections 2, 3, 4 and 5, R.S.C., chap. 153, is the addition of "with or without hard labor" in regard to imprisonment.**

As already mentioned at p. 88, *ante*, it has been held that an assembly of persons to witness a prize-fight is an unlawful assembly, and that every one present at and encouraging the fight is guilty of an offence. (27)

A mere voluntary presence at a prize-fight does not of itself necessarily render persons so present guilty of aiding and abetting such fight; although a person's presence at a prize-fight, when such presence is unexplained, is some evidence for the jury of an aiding and abetting in such fight. (28) And, if it were shewn that the defendants took a walk in the direction of the scene of the intended fight for the purpose of seeing it and were afterwards present at it, or if it were shewn that they went there by train in company with a large party for the purpose of being present at the fight and were afterwards present at it accordingly, or if it were shewn that they were present at the fight by virtue of having paid entrance money or for tickets to admit them to the building or other place set apart for the fight, there would undoubtedly be such evidence of aiding and abetting or promoting the fight as would render them guilty of being parties to the offence.

A mere exhibition of skill in sparring has been held not to be illegal; but if parties meet together to fight till one gives in from exhaustion or from injury received, it is a prize-fight, and it is illegal whether the combatants fight in gloves or not; (29) and all persons engaged in such a fight are punishable. (30)

If one of the combatants in a prize-fight is killed, not only is his antagonist guilty of manslaughter but also the seconds, promoters and every body present and approving. (31)

A mere stakeholder not present at the fight is not a party to the manslaughter where one of the pugilists is killed in the course of the fight.(32)

ARREST OF PERSONS ABOUT TO ENGAGE IN A PRIZE-FIGHT.

Whenever any sheriff, police officer, constable, or other peace officer has reason to believe that any person within his district is about to engage in any prize fight within Canada it is his duty to forthwith arrest such person and make complaint against him before any one having authority to try offences under the above sections, and if the complaint is made out the accused shall be required to furnish security, in a sum not exceeding $5,000 and not less than $1,000, not to engage in any such fight within one year from his arrest; and whenever any sheriff has reason to believe that a prize fight is taking place or about to take place within his district or that any persons from outside of Canada are about to come into Canada at a point within his district to engage in, be concerned in or attend any prize fight in Canada, he shall, with force, suppress and prevent such fight, and arrest all persons present at it or who come into Canada as aforesaid, and prosecute and have them punished or placed under recognizances according to the nature of the case.

Within the limits of their respective jurisdiction every judge of a Superior Court or of a county court, and all judges of the sessions of the peace,

(27) R. v. Billingham, 2 C. & P., 234; R. v. Perkins, 4 C. & P., 537; 1 Russ. Cr., 6th Ed., 570, 571.
(28) R. v. Coney and others, 51 L. J. M. C., 66; 15 Cox C. C., 46.
(29) R. v. Orton, 14 Cox C. C., 226.
(30) R. v. Brown, C. & M., 314.
(31) R. v. Murphy, 6 C. & P., 103.
(32) R. v. Taylor, L. R., 2 C. C. R., 147.

stipendiary magistrates, police magistrates and commissioners of police of Canada are — by sections 6, 7 and 10 of the R.S.C., c. 153, (set forth in the Appendix, *post*), — vested with all the powers of a justice of the peace with respect to offences against the above sections relating to prize fights.

**98. Inciting Indians to riotous acts.** — Every one is guilty of an indictable offence and liable to two years' imprisonment who induces, incites or stirs up any three or more Indians, non treaty Inlians, or half-breeds, apparently acting in concert —

(*a.*) to make any request or demand of any agent or servant of the Government in a riotous, routous, disorderly or threatening manner, or in a manner calculated to cause a breach of the peace; or

(*b.*) to do any act calculated to cause a breach of the peace. R. S.C., c. 43, s. 111.

## PART VI.

## UNLAWFUL USE AND POSSESSION OF EXPLOSIVE SUBSTANCES AND OFFENSIVE WEAPONS. SALE OF LIQUORS.

**99. Causing dangerous explosions.** — Every one is guilty of an indictable offence and liable to imprisonment for life who wilfully causes, by any explosive substance, (1) an explosion of a nature likely to endanger life or to cause serious injury to property, whether any injury to person or property is actually caused or not. R.S.C., c. 150, s. 3.

**100. Doing any act or possessing explosives with intent to cause explosions.** — Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who wilfully —

(*a.*) does any act with intent to cause by an explosive substance, or conspires to cause by an explosive substance an explosion of a nature likely to endanger life, or to cause serious injury to property;

(*b.*) makes or has in his possession or under his control any explosive substance with intent by means thereof to endanger life or to cause serious injury to property, or to enable any other person by means thereof to endanger life or to cause serious injury to property — whether any explosion takes place or not and whether any injury to person or property is actually caused or not. R.S. C., c. 150, s. 4.

**101. Unlawfully making or possessing explosives.**— Every one is guilty of an indictable offence and liable to seven years' impri-

(1) For the meaning of Explosive substance, see section 3 (*i*).

sonment who makes, or knowingly has in his possession or under his control, any explosive substance under such circumstances as to give rise to a reasonable suspicion that he is not making it, or has it not in his possession or under his control, for a lawful object, unless he can show that he made it or had it in his possession or under his control for a lawful object. R.S.C., c. 150, s. 5.

Under the Imperial Act respecting explosive substances, which gives to the expression "explosive substance" the same meaning as our own Code, (see section 3, subsection *i*, *ante*), it has been held that ANY PART of a vessel which when filled with an explosive substance is adapted for causing an explosion, (*i*, *e*., for causing it to explode so as to be dangerous to life, limb or property), is an explosive substance within the Act; (2) and it was also held in a prosecution under section 4 of the Imperial Act, which is similar in its terms to section 101 of our Code, that where several persons are connected in a common design to have articles amounting to an explosive substance made for an unlawful purpose, each member of the confederacy is responsible in respect of such articles as are in the possession of others connected in carrying out their common design. (3)

When any person is charged before a justice of the peace with the offence of making or having explosive substances no further proceeding is to be taken against him, without the consent of the Attorney-General, except such as the justice thinks necessary, by remand or otherwise to secure the person's safe custody. (4)

**102. Having offensive weapons for dangerous purposes.** — Every one is guilty of an indictable offence and liable to five years' imprisonment who has in his custody or possession, or carries, any offensive weapons for any purpose dangerous to the public peace. R.S.C., c. 149, s. 4.

No prosecution for any offence against this section can be commenced after the expiration of six months from its commission. (5)

**103. Openly carrying offensive weapons so as to cause alarm.**— If two or more persons openly carry offensive weapons in a public place in such a manner and under such circumstances as are calculated to create terror and alarm, each of such persons is liable, on summary conviction before two justices of the peace, to a penalty not exceeding forty dollars and not less than ten dollars, and in default of payment to imprisonment for any term not exceeding thirty days. R.S.C., c. 148, s. 8.

No prosecution for any offence against this section or against sections 105 to 111 inclusive, can be commenced after the expiration of one month from its commission. (6)

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(2) R. v. Charles and others, 17 Cox C. C., 499.
(3) *Ibid.*
(4) See section 545, *post.*
(5) See section 551 (*d*), *post.*
(6) See section 551 (*f*), *post.*

**104. Smugglers carrying offensive weapons.** — Every one is guilty of an indictable offence and liable to imprisonment for ten years who is found with any goods liable to seizure or forfeiture under any law relating to inland revenue, the customs, trade or navigation *and knowing them to be so liable*, and carrying offensive weapons. R.S.C., c. 32, s. 213.

This section changes the law, as contained in section 213 R.S.C., c. 32, by the insertion of the words "and knowing them to be so liable."

"Offensive weapon" includes any gun or other firearm, or air-gun, or any part thereof, or any sword, sword blade, bayonet, pike, pike-head, spear, spear-head, dirk, dagger, knife or other instrument intended for cutting or stabbing, or any metal knuckles, or other deadly or dangerous weapon and any instrument or thing intended to be used as a weapon, and all ammunition which may be used with or for any weapon. (7)

## THE CUSTOMS ACT.

The *Customs Act* is chapter 32 of the Revised Statutes of Canada, — as amended by the 50-51 Vic., c. 11, the 51 Vic., c. 14, the 52 Vic., c. 14, the 54-55 Vic., c. 44, the 58-59 Vic., c. 22, the 60-61 Vic., c. 18, the 61 Vic., c. c. 36 and 38, and the 62-63 Vic., c. 22.

The following are some of the clauses of the Customs Act imposing penalties, inflicting punishments and providing for forfeitures.

**Forfeiture of goods unlawfully imported.** — Section 21 provides that no goods shall be unladen from any vessel arriving at any port or place in Canada, from any place out of Canada, or be unladen from any vessel having dutiable goods on board brought coastwise, until the entry has been made of such goods and warrant granted for the unlading of the same, and that all goods unladen contrary to the Act shall be SEIZED and FORFEITED.

Section 33 (as amended by the 52 Vic., c. 14, s. 3), provides that no goods shall be imported into Canada in any vehicle otherwise than in a railway carriage, nor on the person between sunset and sunrise on any day, nor at any time on a Sunday or a statutory holiday, except under a written permit from a customs collector and under the supervision of a customs officer; and it is thereby declared that all goods imported contrary to the provisions of this section and the vehicle, etc., in or with which the same are imported shall be SEIZED and FORFEITED; and section 117 (as amended by the 51 Vic., c. 14, section 23), provides that "If any goods are unlawfully imported on the person on the person or as luggage or among the luggage of any one arriving in Canada on foot or otherwise, such goods shall be SEIZED and FORFEITED."

Sections 192, 197, 198, 207, 210 and 211 of the *Customs Act* are in the following terms : —

Sec. 192. (*as amended by 51 Vic., c. 14, s. 35*). — **Smuggling. — Passing forged invoices, etc.** — "If any person smuggles or clandestinely introduces into Canada, any goods subject to duty, or makes out or passes or attempts to pass through the Custom house any false, forged or fraudulent invoice, or in any way attempts to

(7) See section 3 (*r*), *ante*.

defraud the revenue by evading the payment of the duty, or of any part of the duty on any goods, such goods, if found, may be *seized* and *forfeited;* or if not found, but the value thereof has been ascertained, the person so offending shall forfeit the value thereof as so ascertained; and every such person, his aiders and abettors shall, in addition to any other penalty to which he and they are subject for such offence, forfeit a sum equal to the value of such goods, — which sum may be recovered in any court of competent jurisdiction, — and shall further be liable on summary conviction before two justices of the peace, or any other magistrate having the powers of two justices of the peace, to a penalty not exceeding two hundred dollars, and not less than fifty dollars, or to imprisonment for a term not exceeding one year, and not less than one month, or to fine and imprisonment." (Sec. 192 of the *Customs Act*, as amended by 51 Vic., c. 14, sec. 35).

Sec. 197. (*as amended by 51 Vic., c. 14, s. 38*). — **Dealing in goods unlawfully imported.** — "If any person knowingly harbors, keeps, conceals, purchases, sells or exchanges any goods unlawfully imported into Canada, (whether such goods are dutiable or not,) or whereon the duties lawfully payable have not been paid, — such goods, if found, shall be *forfeited* and may be *seized*. If such goods are not found, the person so offending shall forfeit the value thereof; and every such person, his aiders and abettors shall, *in addition to any other penalty*, forfeit a sum equal to the value of such goods, which may be recovered in any court of competent jurisdiction, and shall further be liable, on summary conviction before two justices of the peace or any magistrate having the powers of two justices of the peace, to a penalty not exceeding two hundred dollars and not less than fifty dollars, or to imprisonment for a term not exceeding one year and not less than one month, or to both fine and imprisonment." (Sec. 197 of the *Customs Act*, as amended by 51 V., c. 14, s. 38).

The punishment imposed by this section, 197, of the *Customs Act*, applies not only to the case where the goods are not found in the possession and keeping of the offender, but also to the case where they are so found; it being apparent that the object of the enactment is to make the person liable to punishment who illegally imports goods without paying duty, whether the goods are found or are not found in his possession or keeping. (8)

Sec. 198. **Possessing goods liable to forfeiture.** — "If any two or more persons in company are found together, and they or any of them have any goods liable to forfeiture under this Act, — every such person having knowledge of the fact, is guilty of a misdemeanor, and punishable accordingly." (Sec. 198 of the *Customs Act*.)

(8) O'Grady v. Wiseman, Que. Off. Rep., 9 Q. B., 169; 3 Can. Cr. Cas., 332.

Sec. 207. — **Gaining access, without permission, to bonded goods.** — "Every person who, by any contrivance gains access to bonded goods in a railway car, or to goods in a railway car — upon which goods the Customs duties have not been paid, or delivers such bonded or other goods without the express permission of the proper officer of Customs, shall, for every such offence, be liable to imprisonment for a term not exceeding one year and not less than one month." (Sec. 207 of the *Customs Act*).

Sec. 210. — **Forged marks or brands.** — "If any person at any time forges or counterfeits any mark or brand to resemble any mark or brand provided or used for the purposes of this Act, or forges or counterfeits the impression of any such mark or brand, or sells or exposes to sale, or has in his custody or possession, any goods with a counterfeit mark or brand, knowing the same to be counterfeit, or uses or affixes any such mark or brand to any other goods required to be stamped as aforesaid, other than those to which the same was originally affixed, — such goods so falsely marked or branded shall be seized and forfeited, and every such offender, and his aiders, abettors and assistants, shall, for every such offence, be liable, on summary conviction before two justices of the peace, to a penalty of two hundred dollars, — and in default of payment to imprisonment for a term not exceeding twelve months and not less than two months." (Sec. 210 of the *Customs Act*).

Sec. 211. **Falsifying documents and using documents falsified.** — "Every person who counterfeits, falsifies, or uses when so counterfeited or falsified, any paper or document required under this Act, or for any purpose therein mentioned, — whether written, printed or otherwise, or by any false statement procures such document, knowing the same to be so forged or counterfeited, or forges or counterfeits any certificate relating to any oath or declaration or affirmation hereby required or authorized, is guilty of a misdemeanor." (Section 211 of the *Customs Act*).

See sections 214 and 215 of the *Customs Act* for the respective penalties, punishments and FORFEITURES incurred by (*a*), any master or person in charge of any vessel and by every driver or person conducting or having charge of any vehicle who refuses to stop such vessel or vehicle when required by a Custom's officer, or (*b*), by any person who offers for sale any goods under pretence of the same having been smuggled.

Although sections 198 and 211 (above quoted) of the *Customs Act* declare that the offences thereby prohibited are misdemeanors, they provide no punishment. But section 951 of the Criminal Code, *post*, provides that every person convicted of any indictable offence, for which no punishment is specially provided, shall be liable to imprisonment for five years.

## THE INLAND REVENUE ACT.

The *Inland Revenue Act* is chapter 34 of the Revised Statutes of Canada, as amended by the 50-51 Vic., c. 11, the 51 Vic., c. 16, the 52 Vic.,

c. 15, the 53 Vic., c. 23, the 54-55 Vic., c. 46, the 55-56 Vic., c. 22, the 57-58 Vic., c. 35, the 58-59 Vic., c. 25, the 60-61 Vic., chapters 18 and 19, the 61 Vic., cc. 27, 28, and the 62-63 Vic., c. 24.

The following are some of the clauses which impose penalties and forfeitures.

Sec. 47. **Removal of excisable goods.** — "No goods subject to a duty of excise under this Act shall be removed from any distillery, malt-house, brewery, tobacco manufactory, cigar manufactory, bonded manufactory or other premises subject to excise, licensed as herein provided, or from any warehouse in which they have been bonded or stored, until the duty on such goods has been paid or secured by bond in the manner by law required; and any goods removed from such distillery, malt-house, brewery, tobacco manufactory, cigar manufactory, bonded manufactory or other premises subject to excise, or from a warehouse, before the duty thereon has been so paid or secured, shall be *seized* and detained by any officer of excise having a knowledge of the fact, and shall be and remain *forfeited* to the Crown." (Sec. 47 of the *In. Rev. Act*).

Sec. 48. **Removal of dutiable goods in the night.** — "Except under departmental authority in each case specially obtained, no goods subject to a duty of excise under this Act, shall be removed from any distillery, malt-house, brewery, tobacco manufactory, cigar manufactory, bonded manufactory, or from a bonding warehouse or other premises licensed as herein provided, between the hours of six o'clock in the afternoon and seven o'clock on the following forenoon; and any goods removed in violation of this section shall be *forfeited* to the Crown, and shall be *seized* by any officer of Inland Revenue having knowledge of the fact, and dealt with accordingly." (Sec. 48 of the *In. Rev. Act*).

Sec. 83. **Forfeiture of goods and apparatus of an unlicensed distillery, etc.** — "All grain, malt, raw tobacco and all other materials in stock, and —

(2.) All engines, machinery, utensils, worms, stills, mashtubs, fermenting-tuns, tobacco-presses or knives, and —

(3.) All tools or materials suitable for the making of stills, worms, rectifying or similar apparatus and —

(4.) All spirits, malt, beer, tobacco, cigars and other manufactured articles,

Which are at any time found in any distillery, malt-house, brewery, tobacco manufactory, cigar manufactory, bonded manufactory, or other premises or place where anything is being done or any working carried on which is subject to excise, and for which a license is required under this Act, but in respect of which no such license has been taken out; and —

(5.) All horses, vehicles and other appliances which have been or are being used for the purpose of removing any spirits, malt, beer,

tobacco, cigars, materials or apparatus used or to be used in the production of any article subject to excise, in violation of this Act, —

Shall be liable to be *seized* by any officer of Inland Revenue having a knowledge thereof, and to be *forfeited* to the Crown and may either be destroyed when and where found, or removed to some place for safe keeping in the discretion of the seizing officer." (Sec. 83 of the *In. Rev. Act*).

Sec. 84. **Forfeiture of engines, etc., in case of fraud.** — Every steam-engine, boiler, mill, still, worm, rectifying apparatus, fermenting-tun, mash-tub, cistern, couch-frame, machine, vessel, tub, cask, pipe or cock, with the contents thereof, and all stores or stocks of grain, spirits, malt, beer, tobacco, cigars, drugs or other materials or commodities which are in any premises or place subject to excise, when any fraud against the revenue is committed in any such place or premises, or when the owner of any such place, premises, apparatus, goods or commodities, his agent or any person employed by him, or any person having lawful possession or control of such premises, apparatus, goods or commodities is discovered in the act of committing or is convicted of committing any act in or about such place or premises which is declared by this Act to be a misdemeanor or felony shall be *forfeited* to the Crown, and be dealt with accordingly." (Sec. 84 of the *In. Rev. Act*).

Sec. 85. **Forfeiture of goods for nonpayment of duty.** — " Every article or thing subject to duty under this Act, and on which the duty hereby imposed has not been paid at the proper time for paying the same, shall be *seized* by any officer of Inland Revenue and shall be *forfeited* to the Crown and be dealt with accordingly." (Sec. 85 of the *In. Rev. Act*).

**Offences with respect to excise stamps, etc.** — See sections 86, 87 and 88 of the Inland Revenue Act, for the respective penalties punishments and FORFEITURES incurred by any person, (*a*) who *unlawfully* uses any stamped, marked or branded packages, or (*b*) who, being a vendor of any label led, branded, marked or sealed package, etc., fails, so soon as the contents have been removed, to obliterate such label, mark, brand or seal, or (*c*) who, except as permitted by the Act, brings into or has in his licensed premises any stamped packages, etc.

**Forfeiture of stills, etc.** — See section 90 as to the FORFEITURE of all stills, worms, apparatus, etc., in respect of which any penalty is incurred.

**Unapproved weights or measures.** — See section 93 for the penalty and FORFEITURE incurred by any one using or permitting the use, except as by the Act otherwise provided, of any unapproved weights or measures.

**Breaking Crown's Lock — Abstracting bonded goods, etc.** — See secs. 94 and 95 for the respective penalties, punishments and FORFEITURES incurred by any person (*a*) who opens or breaks the Crown's Lock attached to any apparatus, etc., or unlawfully abstracts goods in bond, or (*b*) who unlawfully removes bonded goods.

**Distilling, Brewing, Malting or Manufacturing Tobacco or Cigars, without license.**—Section 159 (as amended by the 61 Vic., c. 27, sec. 3), sec. 183 (as amended by the 60-61 Vic., c. 19, sec. 9), and secs. 221 and 317, (the latter as amended by 60-61 Vic., c. 19, sec. 19), make every person guilty of a misdemeanor and subject to certain punishments and FORFEITURES, who, *without license*, (*a*) distils or rectifies or assists in distilling or rectifying any spirits, etc., or sets up, possesses or conceals any still, etc., or (*b*) brews any beer, etc., except for the use of himself or his family as by the Act provided, or (*c*) makes any malt or steeps any grain, etc., for malting, or (*d*) manufactures any tobacco or cigars, etc., (except as directed by sec. 317 as amended).

**Compounding without license.**—Section 168 of the Act impose a penalty on every person who *without license* carries on business as a compounder of wines, spirits, etc., and provides for the forfeiture of all goods compounded or in course of being compounded or on an unlicensed compounder's premises.

**Opening Tobacco or Cigar packages, boxes, etc., without breaking excise stamps, etc.**—See sections 319, 320, 321 and 325, for the respective penalties, punishments and FORFEITURES incurred by any person (*a*) who opens any package of tobacco or cigars without breaking the excise stamp thereon, or (*b*) who, except as permitted by the Act, puts up or has possession of tobacco or cigars in previously used packages, etc., or (*c*) who sells or offers for sale, except in a licensed tobacco or cigar manufactory, any loose or unpacked foreign raw leaf tobacco, or (*d*) who neglects or refuses to destroy the stamps on emptied cigar boxes, wrappers, etc., or buys or accepts from another any such empty stamped boxes, etc., or the stamps taken therefrom, or (*e*) who puts tobacco or cigars in any emptied or partially emptied packages, etc., or has possession of or sells any box, etc., stamped with any fraudulent stamp or any stamp previously used.

**Affixing forged or previously used stamps.**—Section 326, makes every person guilty of a felony who affixes to any package of tobacco or cigars any forged stamp or any stamp previously used.

**Removing tobacco or cigars not properly put up and stamped, etc.—Purchasing such.**—See sections 327, 329, 330 and 334 (as amended by the 60-61 Vic., c. 19, sec. 20), 335 and 336 for the respective penalties, punishments and FORFEITURES incurred by any person (*a*) who removes from any tobacco or cigar manufactory or uses sells or possesses any tobacco or cigars without the same being put up in proper packages and stamped, or without the stamps being properly cancelled, or (*b*) who knowingly purchases or receives for sale any manufactured tobacco or cigars from any manufacturer not duly licensed, or (*c*) who purchases or receives for sale any manufactured tobacco or cigars not legally packed, branded or stamped, or (*d*) who sells or offers for sale or not being a licensed tobacco or cigar manufacturer has in his possession any kind of manufactured tobacco or cigars not put up in packages and stamped according to the provisions of the Act, or (*e*) who sells or offers for sale any imported tobacco or cigars or tobacco or cigars purporting to be imported not put up in packages and stamped as provided by the Act, or (*f*) who sells or offers for sale any cigars in any other form than in new boxes as provided by the Act, or who packs in any box any cigars in excess of the number required by law to be put in each box, or affixes a stamp on any box denoting a less amount of duty than required by law.

**Forfeiture of cigars improperly removed from manufactory.**—See sec. 337 as to FORFEITURE of cigars removed from any manufactory without being legally packed or properly stamped.

**Acetic Acid.**—See sections 339 to 344 (added to the Inland Revenue Act by the 60-61 Vic., c. 19, sec. 21), as to conditions upon which a license may be obtained to carry on the business of manufacturing acetic acid.

In the case of a conviction under the *Inland Revenue Act* and of a money penalty being imposed, and, in default of payment, imprisonment for a fixed term, unless the penalty and costs and charges of conveying the accused to gaol are sooner paid, it is necessary that the amount of the latter should be stated in the warrant of commitment, and where not so stated the prisoner is entitled to be discharged on *habeas corpus*. (9)

**105. Carrying a pistol or air gun without justification.** — Every one is guilty of an offence and liable on summary conviction to a penalty not exceeding twenty-five dollars and not less than five dollars, or to imprisonment for one month, who not being a justice or a public officer, or a soldier, sailor or volunteer in Her Majesty's service, on duty, or a constable or other peace officer, and not having a certificate of exemption from the operation of this section as hereinafter provided for, and not having at the time reasonable cause to fear an assault or other injury to his person, family or property, has upon his person a pistol or air-gun *elsewhere than in his own dwelling-house, shop, warehouse, or counting-house.*

2. If sufficient cause be shown upon oath to the satisfaction of any justice, he may grant to any applicant therefor not under the age of sixteen years and as to whose discretion and good character he is satisfied by evidence upon oath, a certificate of exemption from the operation of this section, for such period, not exceeding twelve months, as he deems fit.

3. Such certificate, upon the trial of any offence, shall be *primâ facie* evidence of its contents and of the signature and official character of the person by whom it purports to be granted.

4. When any such certificate is granted under the preceding provisions of this section, the justice granting it shall forthwith make a return thereof to the proper officer in the county, district or place in which such certificate has been granted for receiving returns under section nine hundred and two; and in default of making such return within ninety days after a certificate is granted, the justice shall be liable, on summary conviction, to a penalty of not more than ten dollars.

5. Whenever the Governor in Council deems it expedient in the public interest, he may by proclamation suspend the operation of the provisions of the first and second sub-sections of this section respecting certificates of exemption, or exempt from such operation any particular part of Canada, and in either case for such period, and with such exceptions as to the persons hereby affected, as he deems fit.

**106. Selling pistol or air-gun to minor.** — Every one is guilty of an offence and liable on summary conviction to a penalty not exceeding fifty dollars, who sells or gives any pistol or air-gun, or

(9) R. v. Corbett, 2 Can. Cr. Cas., 499.

any ammunition therefor, to a minor under the age of sixteen years, unless he establishes to the satisfaction of the justice before whom he is charged that he used reasonable diligence in endeavouring to ascertain the age of the minor before making such sale or gift, and that he had good reason to believe that such minor was not under the age of sixteen :

2. Every one is guilty of an offence and liable on summary conviction to a penalty not exceeding twenty-five dollars who sells any pistol or air-gun without keeping a record of such sale, the date thereof, and the name of the purchaser and of the maker's name, or other mark by which such arm may be identified.

**107. Having weapon when arrested.** — Every one who when arrested, either on a warrant issued against him for an offence or while committing an offence, has upon his person a pistol or air-gun is guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty not exceeding fifty dollars and not less than twenty dollars, or to imprisonment for any term not exceeding three months, *with or without hard labour*. R. S.C., c. 148, s. 2.

**108. Having weapon with intent to injure any one.** — Every one who has upon his person a pistol or air-gun, with intent therewith unlawfully to do injury to any other person, is guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty not exceeding two hundred dollars and not less than fifty dollars, or to imprisonment for any term not exceeding six months, *with or without hard labour*. R. S. C., c. 148, s. 3.

A defendant was charged, upon an information laid before justices, with the indictable offence of shooting with intent to murder. The justices, not finding sufficient evidence against him to warrant them in committing him for trial, took the following course. At the close of the case they, of their own motion, summarily convicted the defendant for that he did procure a revolver with intent therewith unlawfully to do injury to one J. S. The evidence shewed that the revolver was bought and carried and used by the defendant. The return to a writ of *habeas corpus* shewed that the defendant's detention was under a warrant of commitment based on the above conviction; and, on motion for the defendant's discharge, the motion was granted, it being held that the detention was by the terms of the warrant for an offence unknown to the law, and that although the evidence itself shewed an offence against section 108, the motion should not be enlarged to allow the justices to substitute a proper conviction, for it was unwarrantable to convict on a charge not formulated, as to which the evidence was not addressed, and upon which the defendant was not called upon for his defence. (10)

**109. Pointing any fire-arm at anyone.** — Every one who, without lawful excuse, points at another person any fire-arm or air-gun,

(10) R. v. Mines, 14 C. L. T., 458; 25 O. R., 577.

*whether loaded or unloaded*, is guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty not exceeding one hundred dollars and not less than ten dollars, or to imprisonment for any term not exceeding thirty days, *with or without hard labour*. R.S.C., c. 148, s. 4.

This section is intended for the punishment of a person who, playfully and without wrongful intent, points any fire-arm or air-gun at another, whether the weapon be loaded or not.

**110. Carrying offensive weapons.** — Every one who carries about his person any bowieknife, dagger, dirk, metal knuckles, skull cracker, slung shot, or other offensive weapon of a like character, or secretly carries about his person any instrument loaded at the end, or sells or exposes for sale, publicly or privately, any such weapon, or being masked or disguised carries or has in his possession any firearm or air-gun, is guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty not exceeding fifty dollars and not less than ten dollars, and in default of payment thereof to imprisonment for any term not exceeding thirty days, *with or without hard labour*. R.S.C., c. 148, s. 5.

**111. Carrying sheath-knives.** — Every one, not being thereto required by his lawful trade or calling, who is found in any town or city carrying about his person any sheath-knife is liable, on summary conviction before two justices of the peace, to a penalty not exceeding forty dollars and not less than ten dollars, and in default of payment thereof to imprisonment for any term not exceeding thirty days, *with or without hard labour*. R.S.C., c. 148, s. 6.

**112. Exception as to soldiers, &c.** — It is not an offence for any soldier, public officer, peace officer, sailor or volunteer in Her Majesty's service, constable or other policeman, to carry loaded pistols or other usual arms or offensive weapons in the discharge of his duty. R.S.C., c. 148, s. 10.

**113. Refusing to deliver offensive weapon to a justice.** — Everyone attending any public meeting or being on his way to attend the same who, upon demand made by any justice of the peace within whose jurisdiction such public meeting is appointed to be held, declines or refuses to deliver up, peaceably and quietly, to such justice of the peace, any offensive weapon with which he is armed or which he has in his possession, is guilty of an indictable offence.

2. The justice of the peace may record the refusal and adjudge the offender to pay a penalty not exceeding eight dollars, or the offender may be proceeded against by indictment as in other cases of indictable offences. R.S.C., c. 152, s. 1.

**114. Coming armed near public meeting.** — Every one, except the sheriff, deputy sheriff and justices of the peace for the district or county, or the mayor, justices of the peace or other peace officer for the city or town respectively, in which any public meeting is held, and the constables and special constables employed by them, or any of them, for the preservation of the public peace at such meeting is guilty of an indictable offence, and liable to a penalty not exceeding one hundred dollars, or to imprissonment for a term not exceeding three months, or to both, who, during any part of the day upon which such meeting is appointed to be held, comes within one mile of the place appointed for such meeting armed with any offensive weapon. R.S.C., c. 152, s. 5.

**115. Lying in wait for persons returning from Public Meeting.** — Every one is guilty of an indictable offence and liable to a penalty not exceeding two hundred dollars, or to imprisonment for a term not exceeding six months, or to both, who lies in wait for any person returning, or expected to return, from any such public meeting, with intent to commit an assault upon such person, or with intent, by abusive language, opprobrious epithets or other offensive demeanour, directed to, at or against such person, to provoke such person, or those who accompany him, to a breach of the peace. R.S.C., c. 152, s. 6.

No prosecution for any offence against sections 113, 114 and 115 can be commenced after the expiration of one year from its commission. (11)

**116. Sale of Arms in North-West Territories.** — Every one is guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty of two hundred dollars or to six months' imprisonment, or to both, who, during any time when and within any place in the North-West Territories where section one hundred and one of the *North-West Territories Act* is in force —

(*a.*) without the permission in writing (the proof of which shall be on him) of the Lieutenant Governor, or of a commissioner appointed by him to give such permission, has in his possession or sells, exchanges, trades, barters or gives to or with any person, any improved arm or ammunition; or

(*b.*) having such permission sells, exchanges, trades, barters or gives any such arm or ammunition to any person not lawfully authorized to possess the same.

2. The expression "improved arm" in this section means and includes all arms except smoôth-bore shot-guns; and the expression "ammunition" means fixed ammunition or ball cartridge. R.S.C., c. 50, s. 101.

(11) See section 551 (*c*), *post*.

**117. Possessing Weapons near Public Works.** — Every one employed upon or about any public work, within any place in which the *Act respecting the Preservation of Peace in the vicinity of Public Works* is then in force, is liable, on summary conviction, to a penalty not exceeding four dollars and not less than two dollars for every such weapon found in his possession who, upon or after the day named in the proclamation by which such Act is brought into force, keeps or has in his possession, or under his care or control, within any such place, any weapon.

2. Every one is liable, on summary conviction, to a penalty not exceeding one hundred dollars and not less than forty dollars who, for the purpose of defeating the said Act, receives or conceals, or aids in receiving or concealing, or procures to be received or concealed within any place in which the said Act is at the time in force, any weapon belonging to or in custody of any person employed on or about any public work. R.S.C., c. 151, ss. 1, 5 and 6.

**118. Sale &c., of liquors near public works.** — Upon and after the day named in any proclamation putting in force in any place *An Act respecting the Preservation of Peace in the vicinity of Public Works*, and during such period as such proclamation remains in force, no person shall, at any place within the limits specified in such proclamation, sell, barter, or directly or indirectly, for any matter, thing, profit or reward, exchange, supply or dispose of any intoxicating liquor, nor expose, keep or have in possession any intoxicating liquor intended to be dealt with in any such way.

2. The provisions of this section do not extend to any person selling intoxicating liquor by wholesale and not retailling the same, if such person is a licensed distiller or brewer.

3. Every one is liable, on summary conviction, for a first offence to a penalty of forty dollars and costs, and, in default of payment, to imprisonment for a term not exceeding three months, *with or without hard labour*, — and on every subsequent conviction to the said penalty and the said imprisonment in default of payment, and also to further imprisonment for a term not exceeding six months, *with or without hard labour*, who, by himself, his clerk, servant, agent or other person, violates any of the provisions of this or of the preceding section.

4. Every clerk, servant, agent or other person who, being in the employment of, or on the premises of, another person, violates or assists in violating any of the provisions of this or of the preceding section for the person in whose employment or on whose premises he is, is equally guilty with the principal offender and liable to the same punishment. R.S.C., c. 151, ss. 1, 13,14 and 15.

**119. Intoxicating liquors on board Her Majesty's ships.** — Everyone is guilty of an offence and liable, on summary conviction before two justices of the peace, to a fine not exceeding fifty

dollars for each offence, and in default of payment to imprisonment for a term not exceeding one month, *with or without hard labour*, who, without the previous consent of the officer commanding the ship or vessel —

(*a.*) conveys any intoxicating liquor on board any of Her Majesty's ships or vessels; or

(*b*) approaches or hovers about any of Her Majesty's ships or vessels for the purpose of conveying any such liquor on board thereof; or

(*c.*) gives or sells to any man in Her Majesty's service, on board any such ship or vessel, any intoxicating liquor. 50-51 Vic., c. 46, s. 1.

Since the accession of King Edward VII, the words "His Majesty's ships or vessels," and "His Majesty's service," are to be substituted for the words "Her Majesty's ships or vessels," and "Her Majesty's service." (See section 7, sub-section 6, of the *Interpretation Act*, set out at p. 9, *ante*).

## PART VII.

## SEDITIOUS OFFENCES.

**120. Unlawful oaths.** — Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who —

(*a.*) administers, or is present at and consenting to the administration of, any oath or any engagement purporting to bind the person taking the same to commit any crime punishable by death or imprisonment for more than five years; or

(*b.*) attempts to induce or compel any person to take any such oath or engagement; or

(*c.*) takes any such oath or engagement.

**121.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who —

(*a.*) administers or is present at and consenting to the administration of any oath or engagement purporting to bind the person taking the same:

(i.) to engage in any mutinous or seditious purpose;

(ii.) to disturb the public peace or commit or endeavour to commit any offence;

(iii.) not to inform and give evidence against any associate, confederate or other person;

(iv.) not to reveal or discover any unlawful combination or confederacy, or any illegal act done or to be done or any illegal oath or obligation or engagement which may have been administered or tendered to or taken by any person, or the import of any such oath or obligation or engagement; or

(*b.*) attempts to induce or compel any person to take any such oath or engagement; or

(*c.*) takes any such oath or engagement. C.S.L.C., c. 10, s. 1.

**122.** Any one who, under such compulsion as would otherwise excuse him, offends against either of the last two preceding sections shall not be excused thereby unless, within the period hereinafter mentioned, he declares the same and what he knows touching the same, and the persons by whom and in whose presence, and when and where, such oath or obligation or engagement was administered or taken, by information on oath before one of Her Majesty's justices of the peace for the district or city or county in which such oath or engagement was administered or taken. Such declaration may be made by him within fourteen days after the taking of the oath or, if he is hindered from making it by actual force or sickness, then within eight days of the cessation of such hindrance, or on his trial if it happens before the expiration of either of those periods. C. S. L. C., c. 10, s. 2.

**Secret Societies.** — The above three sections are taken from sections 1, 2, 3 and 4 of chapter 10 of the Consolidated Statutes of Lower Canada. With regard to the province of Quebec there is no doubt that the remaining sections 5, 6, 7, 8 and 9, (unrepealed), of that Act are still in force, and the law as contained therein may probably also apply to British Columbia, Manitoba and the North-West Territories, seeing that the statute was simply a re-enactment of the English law on the subject as it stood, in 1837, under 52 Geo. 3, c. 104, and 7 Will. 4, and 1 Vic., c. 91.

Under the law as embodied in these unrepealed sections of chap. 10, C. S. L. C., it is an indictable offence punishable by seven years' imprisonment, for any one to become a member of or to correspond or hold intercourse with or in any way to aid or support any society or association thereby declared to be an unlawful combination or confederacy; and every society or association is thereby deemed to be an unlawful combination or confederacy: —

1. Whose members, according to the rules thereof, or to any provision or any agreement for that purpose, are (*a*) *required to keep secret the acts or proceedings thereof*, or (*b*) admitted to take any unlawful oath or engagement within the meaning of that act, or any oath or engagement not required or authorized by law;

2. Whose members or any of them take or in any manner bind themselves by any such oath or engagement or in consequence of being members thereof;

3. Whose members or any of them *take, subscribe or assent to any engagement of secrecy* test or declaration not required by law;

4. The names of whose members, or any of them, are kept secret from the society at large;

5. Which has any committee or secret body so chosen or appointed that the members constituting the same are not known by the society at large to be members of such committee or select body;

6. Which has any president, treasurer, secretary, delegate or other officer so chosen or appointed that his election or appointment to such office it not known to the society at large;

7. Of which the names of all the persons and of the committee or select bodies of members and of all presidents, treasurers, secretaries, delegates

and other officers are not entered in a book kept for that purpose and open for the inspection or all the members;

8. Which is composed of different divisions or branches or of different parts acting in any manner separately or distinct from each other, or of which any part has any separate or distinct president, secretary, treasurer, delegate or other officer elected or appointed by or for such part or to act as an officer for such part.

Before its incorporation, the Royal Orange Society was held, under the above law relating to secret societies, to be an illegal association and confederacy, the members thereof being bound by an oath to keep secret the proceedings of the association.

The Orange Lodges had assembled in their meeting rooms in Montreal for the purpose of walking in procession, according to their annual custom on the twelfth of July, when the Mayor with the assistance of a large band of special constables armed with sticks, forcibly prevented the procession, and arrested the chief officers; and, in an action of damages for false arrest taken by them against the mayor, the latter was held to have acted legally, the Orange Order being an unlawful body, and there being a well grounded apprehension of a serious public disturbance taking place if the procession had been allowed to form and appear on the streets. (1)

In section 9 of chapter 10 of the Consolidated Statutes of Lower Canada, there is an exception in favor of certain masonic lodges, it being thereby enacted that the provisions of the Act shall not extend to the meetings of any society or lodge of freemasons constituted by or under the authority of warrants in that behalf granted by or derived from any GRAND MASTER OF GRAND LODGE in the UNITED KINGDOM of GREAT BRITAIN and IRELAND; and, by an amending Act of the late province of Canada passed in 1865, this exception was extended so as to include, therein, masonic lodges meeting under warrants from the Grand Lodge of Canada, an Ontario organization exercising no masonic authority in the province of Quebec.

At the time of the establishment of the Grand Lodge of Freemasons of Canada, there were, in the province of Quebec, some masonic lodges, (three of which are still in existence in Montreal), constituted and working under warrants of the Grand Lodge of England; and there has since been established and now exists in the province of Quebec, a separate body of freemasons called the Grand Lodge of Quebec.

The three English Lodges of freemasons in Montreal have always been within the above exception; and, with a view to give the same relief to freemasons and masonic lodges of the Grand Lodge of Quebec, it has been recently enacted by the Dominion Parliament, in the 58-59 Vic., c. 44, that the words "or Grand Master or Grand Lodge of Canada," added by chapter 46 of the statutes of 1865 of the late province of Canada, to section 9 of the Consolidated Statutes of Lower Canada, are amended by substituting the word "IN" for the word "OF;" so that the said words shall read "or Grand Master or Grand Lodge IN Canada." Therefore, section 9 of the C. S. L. C. now reads, by virtue of the two amendments above referred to, as follows: —

"And whereas certain societies have long been accustomed to be holden in this province under the denomination of lodges of freemasons, the meetings whereof have been in great measure directed to charitable purposes;— nothing in this Act shall extend to the meetings of any such society or lodge, holden under the said denomination and in conformity to the rules

(1) Grant v. Beaudry, 4 L. N., 394.

prevailing among the said societies of freemasons: Provided such society or lodge has been constituted by or under the authority of warrants in that behalf granted by or derived from any grand master or grand lodge in the United Kingdom of Great Britain and Ireland *or Grand Master or Grand Lodge in Canada*."

**123. Seditious words, libels and conspiracies.** — No one shall be deemed to have a seditious intention only because he intends in good faith —

(*a.*) to show that Her Majesty has been misled or mistaken in her measures; or

(*b.*) to point out errors or defects in the government or constitution of the United Kingdom, or of any part of it, or of Canada or any province thereof, or in either House of Parliament of the United Kingdom or of Canada, or in any legislature, or in the administration of justice ; or to excite Her Majesty's subjects to attempt to procure, by lawful means, the alteration of any matter in the state; or

(*c.*) to point out, in order to their removal, matters which are producing or have a tendency to produce feelings or hatred and ill-will between different classes of Her Majesty's subjects.

2. Seditious words are words expressive of a seditious intention.

3. A seditious libel is a libel expressive of a seditious intention.

4. A seditious conspiracy is an agreement between two or more persons to carry into execution a seditious intention.

Since the accession of King Edward VII, the words "His Majesty" and "His Majesty's subjects," will be substituted for "Her Majesty" and "Her Majesty's subjects," in this section. (See section 7, sub-section (6) of the *Interpretation Act*, p. 9, *ante*).

**124.** Every one is guilty of an indictable offence and liable to two years' imprisonment who speaks any seditious words or publishes any seditious libel or is a party to any seditious conspiracy.

It will be seen by the above section, 123, that there are three different ways in which a seditious offence may be committed, namely, by speaking words expressive of a seditious intention, by publishing a libel expressing a seditious intention, and by entering into a conspiracy to carry a seditious intention into execution. But there is no definition given shewing what a seditious intention is.

In section 102 of the English Draft Code there is, in addition to what is above contained in our section 123, a clause defining a seditious intention as, —

"An intention —

to bring into hatred or contempt or to excite disaffection against the person of Her Majesty, or the government and constitution of the United Kingdom or of any part of it as by law established, or either House of Parliament, or the administration of justice; or

to excite Her Majesty's subjects to attempt to procure, *otherwise than by lawful means*, the alteration of any matter in church or state by law established; or

to raise discontent or disaffection amongst Her Majesty's subjects; or

to promote feelings of ill-will and hostility between different classes of such subjects."

In a note to this definition of a seditious intention, the Royal Commissioners say that it is as accurate a statement of the existing law as they can make. As references, they give 60 Geo. 3, and 1 Geo. 4, c. 8, and the cases of O'Connell v. R., R. v. Lambert & Perry, R. v. Vincent, R. v. Winterbotham, and R. v. Binns; (2) and, in the body of their Report, (at p. 20,) they also say, with reference to sedition, "On this delicate subject we do not undertake to suggest any alteration of the law. It is not easy to find explicit authority, earlier than the case of R. v. Frost,(3) (tried before Lord Kenyon in 1793), for the proposition that to speak seditious words is an indictable offence. A passage in the 3rd Institute, (p. 14), certainly says, 'But words without an overt deed are to be punished in another degree as a high mispirision.' This, however, is an incidental remark at the end of a passage the main point of which is that mere words are not, in general, an overt act of treason."

Our Criminal Code, as originally drawn, and introduced into Parliament, contained a clause defining a seditious intention in terms similar to those above quoted from section 102 of the English Draft Code; but the clause evoked a long discussion and a great deal of criticism during its consideration in the Parliamentary Committee; and it was ultimately decided to strike out the clause and leave the definition to common law.

In tracing, with his usual clearness and ability, the history of this most interesting branch of the law, the late Sir James F. Stephen says, that there are "two different views of the relation between rulers and their subjects. If the ruler is regarded as the superior of the subject, as being by the nature of his position presumably wise and good, — the rightful ruler and guide of the whole population, — it must necessarily follow that it is wrong to censure him openly, that, if he is mistaken, his mistakes should be pointed out with the utmost respect, and, that whether mistaken or not, no censure should be cast upon him likely or designed to diminish his authority. If, on the other hand, the ruler is regarded as the agent or servant and the subject as the wise and good master who is obliged to delegate his power to the so-called ruler because, being a multitude, he cannot use it himself, it is obvious that this sentiment must be reversed. Every member of the public who censures the ruler for the time being exercises in his own person the right which belongs to the whole of which he forms part. He is finding fault with his servant. If others think differently they can take the other side of the dispute, and the utmost that can happen is that the servant will be dismissed and another put in his place, or perhaps that the arrangements of the household will be modified. To those who hold this view fully, and carry it out to all its consequences there can be no such offence as sedition. There may indeed be breaches of the peace, which may destroy or endanger life, limb or property, and there may be incitements to such offences, but no imaginable censure of the government, short of censure which has an immediate tendency to produce such a breach of the peace, ought to be regarded as criminal." (4)

After stating that each of these extreme views has had a considerable share in moulding the law of England so as to practically produce a com-

(2) O'Connell v. R., 11 Cl. & F., 155, 234; R. v. Lambert & Perry, 2 Camp., 398; R. v. Vincent, 9 C. & P., 91; R. v. Winterbotham, 22 St. Tr., 823; R. v. Binns, 26 St. Tr., 595.

(3) R. v. Frost, 22 St. Tr., 471.

(4) 2 Steph. Hist. Cr. L., 298-300.

promise such as is expressed in section 102 of the English Draft Code, (upon a part of which our section 123 is based), Sir James F. Stephen proceeds to trace the history of the legislation and of the legal controversies which, in conjunction with the development of broader popular views, have brought about this compromise. (5)

This history is of no small value in arriving at a proper appreciation of the present state of the law in regard to these offences; and I therefore take the liberty of giving here a short outline of it.

Under the old idea a libel was written blame, *true or false*, of any man public or private. For a long time the law was administered by the Star Chamber, the name given, during the Tudor period, to the king's privy council sitting as a court, — composed of the lord chancellor, the lord treasurer, the keeper of the privy seal, a bishop, a lord of the council, and the two chief-justices, — and trying cases and adjudging, without the aid of any jury, matters of fact as well as matters of law.

During the sixteenth century the Star Chamber took upon itself, in the plenitude of its power, to make and enforce, with extreme rigor and severity, a number of decrees and ordinances regulating the manner of printing and the number of presses throughout the kingdom, and prohibiting all printing and publishing against the meaning of the statutes and laws of the realm.

At that time libels, as such, would not receive a great deal of attention, many offences being more severely dealt with as treasons, which at a later period would only be treated, at most, as seditious libels; for although, as already seen, mere words unconnected with any deed were not regarded as an overt act of treason the publication of written words were regarded in that light, when they displayed a treasonable intention. (6)

After the abolition of the Star Chamber in 1641 by the Long Parliament, the latter introduced the system of licensing books, which system was continued by various Licensing Acts passed in the following reigns of Charles II, James II and William & Mary, until it finally expired in 1794.

The licensing system and the special laws, — which, under the Common wealth and under Charles II, exposed political libellers to prosecutions for treason, — made it very difficult and dangerous to publish any books or pamphlets objectionable to the government; and cases involving a discussion of the law of libel would not during this period be very numerous. Many prosecutions were either for offences amounting to treasonable publications under the special laws referred to, or for publishing without a license or in violation of some of the provisions of the Licensing Acts. As Sir James F. Stephen remarks, until the right to publish without license is conceded the question of the limits of the right does not become debateable. (7)

On the abolition of the Star Chamber, cases of libel, — whenever they did arise, — were tried in the Court of King's Bench; and the trials were by jury; but the Judges of that Court adopted and continued, for a long time, to follow, in regard to libel, the stringent doctrines of the Star Chamber, and held that, — as a libel was written blame, whether true or false, and as the law required the exact words of the matter complained of to be set out in order to judge by its tenor, of its libellous nature, — the question of whether it was or was not a libel was a question of law

(5) 2 Steph. Hist. Cr. L., 300-386.
(6) 3 Inst., 14; 2 Steph. Hist. Cr. L., 302.
(7) 2 Steph. Hist. Cr. L., 310.

for the Court, and that the only questions of fact to be left to the jury were, "Did the defendant publish it? And were the innuendoes (if there were any) correct?"

This rule, confining the jury to the simple question of whether or not the defendant committed the act of publishing, prevented them, — as the presiding judge invariably charged them, — from going into the intentions or motives of the author or the circumstances connected with the publication; for, the matter set out and complained of being in law libellous on its face, the act of publishing when found by the jury rendered the conviction complete.

After a time efforts were made by very distinguished advocates, — and especially towards the end of the eighteenth century by Erskine, — to bring about the adoption of a definition of libel different from that theretofore acted upon and more in accordance with changed popular sentiment. The controversy thus occasioned ultimately led to the passing of Fox's Libel Act in 1792.

It was during this controversy that the trial took place of the Dean of St. Asaph, who was prosecuted for a seditious libel said to be contained in certain extracts taken from a pamphlet called a dialogue between a gentleman and a farmer. (8) Mr. Justice Buller in his charge said that the only facts for the jury were the fact of publication and the meaning of the innuendoes; and they returned a verdict of guilty. On behalf of the defendant, Erskine then moved for a new trial; and, in his argument thereon before Lord Mansfield, he submitted that the criminal intent was a fact to be found, like any other, by the jury, and that the case of libel formed no legal exception to the general principles which govern the trial of all other crimes. (9) He supported his argument by the celebrated illustration first suggested by Algernon Sidney, — A is indicted for publishing a blasphemous libel in the words, "There is no God." Evidence is given that he sold a bible containing the words, "The fool hath said in his heart, there is no God." The matter complained of and set out in the indictment being the words, "There is no God," there is no need for any innuendo; and the jury would be bound, upon the old view of the law, to convict the defendant because, according to that old view, they had nothing to do with his intention, and on moving in arrest of judgment the defendant would be met with the answer that the indictment was good on its face, as the words were blasphemous in themselves, and the jury had found their publication.

As Erskine's argument proceeded, Lord Mansfield said, "To be sure, the jury may judge from the whole context;" to which Erskine replied, "And what is this, my lord, but determining the question of libel?"

Lord Mansfield: "They certainly may in all cases go into the whole context."

Mr. Erskine: "And why may they go into the context? Clearly, my lord, to enable them to form a correct judgment of the meaning of the part indicted; even though no particular meaning be submitted to them by averments in the indictment."

In commenting upon this portion of Erskine's argument Sir James F. Stephen says that, in his opinion, the jury might look at the whole to see whether the words "There is no God," mean "*to deny the existence of God*," but that it does not follow that they were at liberty to consider

(8) 21 St. Tr., 953.
(9) 2 Steph. Hist. Cr. L., 338.

what object the author had in view, or by what motives he was actuated when he made the assertion, if he did make it. (10)

For my own part, I think that one among other good reasons for holding the jury entitled to look at the whole context would have been so that they could see if the author himself did in reality make the assertion "There is no God;" in other words, to see if the book itself by its whole tenor actually asserted, (which it surely did not), that, "there is no God," or merely stated what a fool had in his heart foolishly asserted to that effect.

Erskine, in continuation of his argument, contended that as the writing in question in the Dean of St. Asaph's case neither contained nor was averred by the indictment to contain any slander of an individual, and as its criminality was charged to consist in its tendency to stir up general discontent, the trial of such a charge did not involve and could not in its obvious nature involve any abstract question of law for the judgment of a Court, but must wholly depend upon the judgment of the jury on the tendency of the writing to produce such consequences when connected with all the circumstances attending its publication. The question of seditious intention, he submitted, must in the nature of things be a question of fact dependent upon a variety of circumstances which could not appear on the record, to which the Court was confined; for words, which, in their literal meaning, were indifferent, temperate, or even conciliatory, might when spoken or written under special circumstances be seditious. He said, "Circumscribed by the record your Lordship can form no judgment of the tendency of this dialogue to excite sedition by anything but the mere words. You must look at it as if it were an old M. S. dug out of the ruins of Herculaneum. You can collect nothing from the time when or the circumstances under which it was published, the person by whom and those amongst whom it was circulated; yet these may render a paper, at one time and under some circumstances, dangerously wicked and seditious, which at another time and under different circumstances might be innocent and highly meritorious." (11)

Lord Mansfield, however, upheld the doctrine that the jury had nothing to determine but the question of publishing and that of the innuendoes, and accordingly dismissed the motion for new trial. He traced the history down to that time of the development of the law of seditious libel; and in support of his judgment he cited, amongst other authorities, the cases of R. v. Clarke and R. v. Francklin, (in the reign of George II), of Miller, Almon and Woodfall, (in 1770), and the later case of R. v. Stockdale.

Erskine afterwards moved, in the Dean of St. Asaph's case, in arrest of judgment, on the ground that the matter set forth and complained of was not libellous; and he succeeded.

This was in 1783; and nine years later Fox's Libel Act, (12) became law. By that Act it was enacted that in any trial of an indictment for libel, it should be competent for the jury to give their verdict on the whole matter in issue, and that they should not be required or directed by the Court or Judge to find the defendant guilty merely on proof of publication by the defendant of the paper charged as a libel and of the sense ascribed to it in such indictment; but it was provided that the Court should, according to its discretion, give its opinion and directions on the matters in issue in the same manner as in other criminal cases. Nearly thirty years later was

(10) 2 Steph. Hist. Cr. L., 338.
(11) 2 Steph. Hist. Cr. L., 340.
(12) 32 Geo. 3, c. 60.

passed the 60 Geo. 3 & 1 Geo. 4, c. 8, which practically defines a seditious libel as one which tends to bring into hatred or contempt the person of the reigning sovereign, his heirs or successors, or the government or the constitution of the United Kingdom as by law established or either House of Parliament, or to excite His Majesty's subjects to attempt the alteration of any matter in Church or State as by law established otherwise than by lawful means. Since the Reform Bill of 1832 there have been few instances of prosecutions for seditious libel; the more recent ones,—such as that of Most (13),—being, in reality, incitements to commit against reigning sovereigns, crimes of a similar kind to that of the assassination of the Emperor Alexander III of Russia.

Most was indicted tried and convicted under the 24-25 Vic., c. 100, s. 4, which enacts that any one who encourages or endeavors to persuade any person to murder any other person whether a subject of the Queen or within the Queen's dominions or not, shall be guilty of a misdemeanor. The encouragement and endeavor to persuade to murder proved at the trial was the publication and circulation by the defendant of an article written in German in a newspaper called "Freiheit" published in London, which article exulted in the then recent murder of the Emperor of Russia and commended it as an example to revolutionists throughout the world.

The law of seditious libel has been insensibly modified by the law of defamatory libels upon private persons, which has been the subject of a great many important decisions, the effect of which has been, "amongst other things, to give the right to every one to criticise fairly, that is, honestly, even if mistakenly, the public conduct of public men, and to comment honestly even if mistakenly upon the proceedings of parliament and the courts of justice." (14)

In regard to the irrelevancy of the truth of the matter complained of in the case of a libel, considered as a criminal offence, the law according to the original theory of libel fell into two main classes, namely, 1, the class in which written blame was cast upon the institutions of the country and the general conduct of the government, and, 2, the class consisting of attacks upon individuals whether public men or not. As to the first of these classes the principle was that no one should be allowed to attempt to bring into discredit the institutions of his country, and that their defects should be matter for representation to parliament by means of petition; but this principle has been superseded by the exception that, when criticism of existing institutions is made in good faith with the view of bringing about improvements and of removing defects, it is lawful, even if mistaken. With regard to criticism of this kind it may still be said that, when it is the subject of a prosecution for seditious libel its truth is immaterial; because the question at issue is not the truth or falsity of the assertions made, but what was the writer's object. Was it to procure a remedy by peaceable and lawful means, or was it to promote disaffection and bring about riots?

With regard to attacks made, by a newspaper or a pamphlet or any other written or printed publication, upon an individual holding a public position, such attacks do not, in general, charge him with anything for which he could be made responsible criminally but only with misconduct for which public discussion is practically the only available remedy. If the truth of such charges were not allowed to be proved by way of justification for making them, much official misconduct and incapacity would

(13) R. v. Most, 7 Q. B. D., 244; 50 L. J. M. C., 113. See section 234, *post*, the second subsection of which is the same in effect as section 4 of the Imperial statute 24-25 Vic., c. 100.

(14) 2 Steph. Hist. Cr. L., 376.

be practically altogether unchecked. For cases of this kind provision has been made in two separate ways, namely, — 1, by the establishment of the rule that it is lawful to make fair comment upon matters of public interest, — a rule established in a number of civil cases for libel but equally applicable to criminal prosecutions, — and, 2, by the passing of Lord Campbell's Act,(15) duly re-enacted in Canada,(16) by which it was provided that it should be competent for a defendant on an indictment or information for defamatory libel to plead the truth of the matters charged and that it was for the public benefit that such matters should be published.

With regard to seditious words they have on some few occasions been made the subject of prosecution, — the charge however being that of unlawful assembly or of seditious conspiracy, of which violent speeches were regarder as overt acts. In 1795, one Redhead Yorke was prosecuted and convicted on a charge of conspiracy to traduce and vilify the House of Commons and the Government and to excite disaffection and sedition; and as overt acts of conspiracy it was alleged that meetings were held to make and listen to seditious and inflammatory speeches. (17)

In 1820, Hunt was prosecuted for a conspiracy of which the holding of the meeting dispersed in 1819 at Manchester was the principal overt act; and in 1844 O'Connell and others were tried for seditious conspiracy, with intent to stir up hatred and strife between the Queen's English and Irish subjects, of which conspiracy the meetings held and the speeches made in connection with the agitation for repeal of the union between England and Ireland were overt acts.

That case shews how wide the legal notion of seditious conspiracy is. It seems to include every sort of attempt, — by violent language, either spoken or written, or by shew of force calculated to produce fear, — to effect any public object of an evil character; and no precise or complete definition has ever been given of objects which are to be regarded as evil.

At the present day, when the right of forming political organizations, of holding political meetings, and of giving, — through the press, or on the public platform, — free expression to our thoughts upon and criticism of public men and affairs, is so well recognized, a written or printed publication, a public speech, or an assembly, meeting, convention or combination would have to be of an extremely vicious, inflammatory, and dangerous character to form the basis of a successful prosecution for a seditious libel, a seditious speech, or a seditious conspiracy.

Archbold gives a form of indictment for seditious libel based upon a case of over a hundred years ago. (18) The proceeding itself was an *ex officio* information, but Archbold gives it in the shape of an indictment.(19)

The truth of a seditious libel or of a blasphemous libel cannot be pleaded. (20)

**125. Libels on foreign sovereigns.** — Every one is guilty of an indictable offence and liable to one year's imprisonment who, without lawful justification, publishes any libel tending to degra-

(15) 6 and 7 Vic., c. 96.
(16) R.S.C., c. 163; 37 Vic., c. 38.
(17) 25 St. Tr., 1003; 2 Steph. Hist. Cr. L., 379.
(18) R. v. Horne, Cowp., 672.
(19) Arch. Cr. Pl. & Ev., 21st Ed., 883, 884.
(20) R. v. Hicklin, L. R., 3 Q. B., 360, 374; R. v. Bradlaugh, 15 Cox C. C., 217. See comments on blasphemous libels under section 170, *post*.

de, revile or expose to hatred and contempt in the estimation of the people of any foreign state, any prince or person exercising sovereign authority over any such state.

This section gives the right to a foreign potentate to prosecute a person who publishes, here, a libel tending to degrade him in the estimation of the people of the foreign state; and it is for the jury, on the trial of such a charge, to say whether the words of the libel have that tendency or not.

In 1799, a defendant was found guilty in England of having published a libel on the Emperor of Russia by stating, in a newspaper article, that the Emperor was rendering himself obnoxious to his subjects by various acts of tyranny and that he was making himself ridiculous in the eyes of Europe. (21)

In 1781, Lord George Gordon was convicted of having published of the Queen of France a libel representing her as the leader of a faction. (22)

A French refugee in England wrote a poem suggesting that it would be a heroic deed to assassinate Napoleon Bonaparte, the first Consul of the French Republic; and, on being tried in England for libel, he was convicted, although the libel was purely political, affected no one in the British Isles, and attacked the man who at the time was England's greatest enemy. (23)

**126. Spreading false news.** — Every one is guilty of an indictable offence and liable to one year's imprisonment who wilfully and knowingly publishes any false news or tale whereby injury or mischief is or is likely to be occasioned to any *public* interest.

This is an old common law offence, prosecutions for which seem to have long since fallen out of practice. In 1778 there was a case of this kind in which the defendant was indicted for having unlawfully wickedly and maliciously published false news, — whereby discord might grow between the king and his subjects or the great men of the realm, — by publishing and placarding a printed paper or notice falsely announcing that an order in council had been made by the king proclaiming war with France. (24)

## PART VIII.

## PIRACY.

**127. Piracy by the law of nations.** — Every one is guilty of an indictable offence who does any act which amounts to piracy by the law of nations, and is liable to the following punishment: —

(*a*.) To death, if in comitting or attempting to commit such crime the offender murders, attempts to murder or wounds any

(21) R. v. Vint, 27 How. St. Tr., 627.
(22) R. v. Lord George Gordon, 22 How. St. Tr., 177.
(23) R. v. Peltier, 28 How. St. Tr., 617.
(24) Scott's case, 5 New Newgate Calendar, 284; 1 Bish. New Cr. L. Com., s. 477.

person, or does any act by which the life of any person is likely to be endangered;

(*b*.) To imprisonment for life in all other cases.

**Piracy at common law or by the law of nations.**— In reference to piracy the Royal Commissioners at p. 20 of their report on the English Draft Code say, —

"The Bill contained a definition of *Piracy by the law of Nations*. We have thought it better to leave this offence undefined, as no definition of it would be satisfactory which is not recognized as such by other nations; and after careful consideration of the subject we have not been able to discover a definition fulfilling such a condition. We may observe as to this that the subject has been much discussed in the Courts of the United States, and the result appears to justify the course we have adopted. We do not think it will lead to practical inconvenience."

Sir James F. Stephen says, in relation to this subject, "Piracy at common law or by the law of nations, is the only one of the offences mentioned" [piracy, slave trading, etc.] "which is not created by statute. There are singularities connected with the offence which I do not think it necessary to go into. The most authoritative definition of piracy in English law is '*robbery at sea*,' but I think it is easy to show that this is too wide in one direction and too narrow in another. If a foreign sailor on a foreign ship were to rob another sailor of the same nation on the same ship it would be absurd to call him a pirate, yet such an act would be *robbery at sea;* and if a piratical vessel were to attempt to capture a lawful ship and to be captured herself, it would be strange to describe her crew as anything but pirates, yet they would have committed, not what on shore would have been a robbery, but what would have been an assault with intent to rob." (1)

Robbery on the high seas in order to constitute piracy must be without authority from any prince or state. If a party making a capture at sea do so by the authority of any prince or state it cannot be considered piracy; for a nation can never be deemed pirates. Fixed domain, public revenue and a certain form of government exempt a people from that character.(2)

If the subjects of the same state, being in separate vessels, commit robbery upon each other upon the high sea, it is piracy. If the subjects of different states commit robbery upon each other upon the high sea, if their respective states be in amity, it is piracy; if at enmity it is not; for it is a general rule that enemies can never commit piracy upon each other, their depredations being deemed mere acts of hostility. (3)

**Piracy by statute.**— The principal Imperial statutes relating to and making certain acts piracy are 28 Hen. 8, c. 15; 11 Will. 3, c. 7, s. 7; 8 Geo. 1, c. 24, s. 1; 18 Geo. 2, c. 30; 7 Will. 4, and 1 Vict., c. 88, s. 2; 37 & 38 Vic., c. 35.

**128. Piratical acts.** — Every one is guilty of an indictable offence and liable to imprisonment for life who, within Canada, does any of the following piratical acts, or who, having done any of the following piratical acts, comes or is brought within Canada without having been tried therefor: —

(1) Steph. Gen. V. Cr. L., 91, 92.
(2) Grot. 2, c. 18, s. 2.
(3) 4 Inst. 154; Arch. Cr. Pl. & Ev., 21st Ed., 494.

(*a.*) Being a British subject, on the sea, or in any place within the jurisdiction of the Admiralty of England, under colour of any commission from any foreign prince or state, whether such prince or state is at war with Her Majesty or not, or under pretence of authority from any person whomsoever commits any act of hostility or robbery against other British subjects, or during any war is in any way adherent to or gives aid to Her Majesty's enemies:

(*b.*) Whether a British subject or not, on the sea or in any place within the jurisdiction of the Admiralty of England, enters into any British ship and throws overboard or destroys any part of the goods belonging to such ship, or laden on board the same ;

(*c.* Being on board any British ship on the sea or in any place within the jurisdiction of the Admiralty of England —

(i.) turns enemy or rebel, and piratically runs away with the ship, or any boat, ordnance, ammunition or goods ;

(ii.) yields them up voluntarily to any pirate :

(iii.) brings any seducing message from any pirate, enemy or rebel ;

(iv.) counsels or procures any persons to yield up or run away with any ship, goods or merchandise, or to turn pirate or to go over to pirates ;

(v.) lays violent hands on the commander of any such ship in order to prevent him from fighting in defence of his ship and goods ;

(vi.) confines the master or commander of any such ship ;

(vii.) Makes or endeavours to make a revolt in the ship ; or

(*d.*) Being a British subject in any part of the world, or (whether a British subject or not) being in any part of Her Majesty's dominions or on board a British ship, knowingly —

(i.) furnishes any pirate with any ammunition or stores of any kind ;

(ii.) fits out any ship or vessel with a design to trade with or supply or correspond with any pirate ;

(iii.) conspires or corresponds with any pirate.

Since the accession of King Edward VII, the words "His Majesty," "His Majesty's enemies," and "His Majesty's dominions," are to be substituted for "Her Majesty," "Her Majesty's enemies," and "Her Majesty's dominions," in this section. (See section 7, sub-section 6, of the *Interpretation Act*, at p. 9, *ante*).

**129. Piratical acts with violence endangering life.** — Every one is guilty of an indictable offence and liable to suffer death who, in committing or attempting to commit any piratical act, assaults with intent to murder, or wounds, any person, or does any act likely to endanger the life of any person.

A foreigner charged with committing an offence within the jurisdiction of the Admiralty of England cannot be tried and punished in any Canadian Court without the leave of the Governor-General. (4)

**130. Not fighting pirates.** — Every one is guilty of an indictable offence and liable to six months' imprisonment, and to forfeit to the owner of the ship all wages then due to him, who, being a master, officer or seaman of any merchant ship which carries guns and arms, does not, when attacked by any pirate, fight and endeavour to defend himself and his vessel from being taken by such pirate, or who discourages others from defending the ship, if by reason thereof the ship falls into the hands of such pirate.

## TABLE OF OFFENCES UNDER TITLE II.

### INDICTABLE OFFENCES.

| No. | Sec. | Offence. | Punishment. | Tribunal. |
|---|---|---|---|---|
| 1 | 65 | Treason | Death | Sup.Court Cr. Juris. |
| 2 | 67 | Accessory after fact to treason | Two years | do |
| 3 | 68 | Levying war, etc. | Death | Sup.Court Cr. Juris. or Court Martial. |
| 4 | 69 | Treasonable offences | Life | Sup.Court Cr. Juris. |
| 5 | 70 | Conspiracy to intimidate Legislature | Fourteen years | do |
| 6 | 71 | Assaults on Queen | Seven years and whipping | do |
| 7 | 72 | Inciting to mutiny | Life | do |
| 8 | 73 | (1) Enticing soldiers or seamen to desert | Five years | General or Quarter Sessions. |
| 9 | 77 | Unlawfully obtaining official information | One year or $100 fine | Sup.Court Cr. Juris. |
| 10 | 78 | Communication of information by official. If to a foreign State | Life | do |
| | 78 | In any other case | One year and $100 fine or both | do |
| 11 | 81 | Unlawful assembly | One year | General or Quarter Sessions. |
| 12 | 82 | Riot | Two years | do |
| 13 | 83 | Opposing Reading Riot Act | Life | do |
| 14 | 85 | Riotous destruction | Life | do |
| 15 | 86 | Riotous damage | Seven years | do |
| 16 | 87 | Unlawful drilling | Two years | do |
| 17 | 88 | | | |
| 18 | 89 | Forcible entry or detainer | One year | do |
| 19 | 90 | Affray | One year, with hard labor | do |
| 20 | 91 | Challenge to fight | Three years | do |
| 21 | 98 | Inciting Indians to riot | Two years | do |
| 22 | 99 | Causing dangerous explosions | Life | do |
| 23 | 100 | Having explosives | Fourteen years | do |
| 24 | 101 | Making explosives | Seven years | do |
| 25 | 102 | Having arms | Five years | do |
| 26 | 104 | Smugglers carrying arms | Ten years | do |
| 27 | 113 | Refusing to deliver weapon to a justice | Five years | do |
| 28 | 114 | Coming near meeting armed | $100 fine, or 3 months, or both | do |
| 29 | 115 | Lying in wait near meeting | $200 fine, or 3 months, or both | do |

(1) No. 8 (Enticing soldiers, etc.) may also be tried summarily. Fine $200 and not less than $80. In default of payment, six months' imprisonment.

(4) See section 542, *post*.

INDICTABLE OFFENCES. *(Continued).*

| No. | Sec. | Offence. | Punishment. | Tribunal. |
|---|---|---|---|---|
| 30 | 120 | Administering or taking oath to commit indictable offence | Fourteen years. | Sup.Court Cr. Juris. |
| 31 | 121 | Administering or taking other unlawful oaths | Seven years | do |
| 32 | 124 | Seditious offences | Two years | do |
| 33 | 125 | Libels on foreign sovereigns | One year | do |
| 34 | 126 | Spreading false news | One year | do |
| 35 | 127 | Piracy | Death and life imprisonment | do |
| 36 | 128 | Piratical Acts | Life | do |
| 37 | 129 | Piratical Acts and violence | Death | do |
| 38 | 130 | Not fighting pirates | Six months and forfeiture of wages | do |

*Note.*—It will be understood that with regard to offences mentioned in this Table as triable in a Sup. Court of Cr. Juris, those offences cannot be tried in a Court of General or Quarter Sessions, and that, with regard to offences mentioned therein as triable in a Court of General or Quarter Sessions, the latter Court has not exclusive jurisdiction over these offences, but that, in relation to them, its jurisdiction is concurrent with that of the Superior Courts of Cr. Juris. (See sec. 540 *post*.)

**Summary Trials of Indictable Offences.**—Under Part LV, *post*, provision is made for the summary trial of certain indictable offences. For instance, it is, by section 783, provided (amongst other things), that, whenever a person is charged before a Magistrate with having committed theft, or obtained money or property by false pretences, or received stolen property, and the value of the property alleged to have been stolen, etc., does not exceed ten dollars, the Magistrate may, *with the consent of the accused*, or,—as to certain specified offences,—*without his consent*, try the accused summarily; and section 784 (subsection 2) provides that in the case of a seafaring person transiently in Canada, being charged,—within the Cities of Quebec or Montreal, or any sea port, city or town in Canada,—with any of the offences mentioned in sec. 783, the summary jurisdiction of magistrates shall be absolute; and subsection 3 of the same section, 784, (as amended by the *Criminal Code Amendment Act*, 1900), makes the summary jurisdiction of the Magistrate in the provinces of Prince Edward Island and British Columbia and in the North-west Territories and the District of Keewatin, absolute, under Part LV, except as to certain cases in this subsection mentioned. By section 785, police magistrates and stipendiary magistrates, *in the province of Ontario*, are empowered to try summarily, with the accused's consent, any person charged with or committed to trial on a charge of having committed any offence triable in a Court of General or Quarter Sessions; and by sub-section 2, (added by the *Criminal Code Amendment Act*, 1900) to section 785, it is now provided that this section shall apply also to police and stipendiary magistrates of cities and incorporated towns *in every other part of Canada*, and to Recorders where they exercise judicial functions.

**Fines.—Sureties.**—Section 958, (as amended by the *Criminal Code Amendment Act* 1900), empowers every Court of Criminal Jurisdiction and every Magistrate under Part LV, in addition to the infliction of punishment, to order security for the convicted offender's future good behaviour. It provides, also, that, on conviction for any indictable offence punishable with imprisonment for five years or less, the offender may be fined, in addition to *or in lieu* of any punishment otherwise authorized, and that on conviction for any indictable offence punishable with imprisonment for more than five years the offender may be fined in addition to *but not in lieu* of any punishment otherwise ordered.

As to SUSPENSION OF SENTENCE in the case of a first offender see section 971 (as amended by the *Criminal Code Amendment Act* 1900).

**Restitution.** — Sections 803 and 838, *post*, provide for the restauration of stolen property to the owner after the conviction of the thief or the receiver; or even without a conviction, on satisfactory proof of ownership.

**Compensation.** — Section 836 also provides that, upon the trial of an indictment, the Court may render against the offender, when convicted, a judgment awarding, to the aggrieved party, compensation to the extent of one thousand dollars for any loss of property suffered by the applicant through the offence.

**Costs.** — Section 832 (as amended by the *Criminal Code Amendment Act* 1900), provides that upon conviction of any person for any indictable offence, such person may, by the Court, Judge or Magistrate, be condemned to pay the costs or expenses incurred, including a moderate allowance for loss of time, and that payment thereof may be ordered to be made out of any moneys taken from the prisoner on his apprehension (if such moneys are his own).

## NON-INDICTABLE OFFENCES.

| No. | Sec. | Offence. | Punishment. | Tribunal. |
|---|---|---|---|---|
| 1 | 74 | Resisting warrant for deserters | $80 penalty | Summary (Two justices). |
| 2 | 75 | Enticing Militia or Mounted Police men to desert | 6 months, with or without hard labor | Summary. |
| 3 | 93 | Challenge to prize-fight | $1,000 fine and not less than $100, or 6 months with or without hard labor or both | do |
| 4 | 94 | Principal in prize-fight | One year, with or without hard labor | do |
| 5 | 95 | Attending prize-fight | $500 fine (not less than $50) or one year, with or without hard labor or both | do |
| 6 | 96 | Leaving Canada for prize-fight | $400 fine (not less than $50) or 6 months with or without hard labor | do |
| 7 | 97 | Fight on quarrel | Discharge or $50 fine | do |
| 8 | 103 | Openly carrying dangerous weapons | $40 fine; in default of payment, 30 days | Summary (Two justices). |
| 9 | 105 | Carrying pistol, etc. | $25 fine, or one month | Summary. (Ibid). |
| 10 | 106 | Selling pistol, etc., to minor | $50 fine | do |
| 11 | 106 | Selling pistol, etc., without keeping record | $25 fine | do |
| 12 | 107 | Having weapon when arrested | $50 fine, or 3 months with or without hard labor | Summary (Two justices). |
| 13 | 108 | Having weapon with intent to do injury | $200 fine, or 6 months with or without hard labor | do |
| 14 | 109 | Pointing fire-arm | $100 fine, or thirty days | do |
| 15 | 110 | Carrying offensive weapon | $50 fine, or thirty days | do |
| 16 | 111 | Carrying Sheath knives | $40 fine, or thirty days | do |
| 17 | 116 | Sale of arms in N. W. T | $200 fine, or 6 months or both | do |
| 18 | 117 | Possessing weapons near Pub. Works | $4 fine, each weapon | Summary. |
| 19 | 117 | Concealing do do | $100 fine | do |
| | 118 | Selling liquor, etc., near Pub. Works | 1st offence: $40 and costs; and 3 months in default. Every other offence: same penalty and 6 months | do |
| 20 | 119 | Conveying liquors on H. M. Ships | $50 fine; and one month in default | Summary (Two justices). |

# TITLE III.

## OFFENCES AGAINST THE ADMINISTRATION OF LAW AND JUSTICE.

### PART IX.

### CORRUPTION AND DISOBEDIENCE.

**131. Judicial corruption.** — Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who —

(*a.*) holding any judicial office, or being a member of Parliament or of a legislature, corruptly accepts or obtains, or agrees to accept, or attempts to obtain for himself or any other person, any money or valuable consideration, office, place, or employment on account of anything already done or omitted, or to be afterwards done or omitted, by him in his judicial capacity, or in his capacity as such member; or

(*b.*) corruptly gives or offers to any such person or to any other person, any such bribe as aforesaid on account of any such act or omission.

No prosecution for any offence under this section can be instituted without the leave of the Attorney-General of Canada. (1)

In reference to the offences dealt with under the present title the Royal Commissioners, in their report on the English Draft Code, say, "Title III deals with offences affecting the administration of justice, by way of corrupting judicial or ministerial officers, by disobeying lawful orders, by deceiving courts, by perjury and other means of the same kind, or by escaping or rescuing others from lawful custody. In a general code of the criminal law we have thought it right to include the offence of judicial corruption, and to subject it to severe and infamous punishment. As no case of the kind has occurred (if we except the prosecutions of Lord Bacon and Lord Macclesfield), it is not surprising that the law on the subject should be somewhat vague. We have thought it right in order to protect persons holding judicial positions from malicious prosecutions to provide that no prosecution for this offence shall be instituted except by the Attorney General. * * * We have also provided for the punishment of corruption in ministerial officers connected with the administration of justice. Recent experience has shewn that the punishment awarded for such offences by the common law is not sufficiently severe." (See pp. 20-21 of the Commissioners Report).

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(1) See section 544, *post*.

**132. Corruption of officers employed in prosecuting offenders.** — Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who —

(*a.*) being a justice of the peace, peace officer, or public officer, employed in any capacity for the prosecution or detection or punishment of offenders, corruptly accepts or obtains, or agrees to accept or attempts to obtain for himself, or for any other person, any money or valuable consideration, office, place or employment, with the intent to interfere corruptly with the due administration of justice, or to procure or facilitate the commission of any crime, or to protect from detection or punishment any person having committed or intending to commit any crime ; or

(*b.*) corruptly gives or offers to any such officer as aforesaid any such bribe as aforesaid with any such intent.

Under section 3 (*s*) "PEACE OFFICER includes a mayor, warden, reeve, sheriff, deputy sheriff, sheriff's officer, and justice of the peace, and also the warden, keeper or guard of a penitentiary, and the gaoler or keeper of any prison, and any police officer, police constable, bailiff, constable, or other person employed for the preservation and maintenance of the public peace, or for the service or execution of civil process."

Under section 3 (*w*), "PUBLIC OFFICER, includes any Inland Revenue or Customs officer, officer of the army, navy, marine, militia, North-West mounted police or other officer engaged in enforcing the laws relating to the revenue, customs, trade or navigation of Canada."

**133. Frauds upon the Government.** — *As amended by 56 Vic., c. 32.*) Every one is guilty of an indictable offence and liable to a fine of not less than one hundred dollars, and not exceeding one thousand dollars, and to imprisonment for a term not exceeding one year and not less than one month, and in default of payment of such fine to imprisonment for a further time not exceeding six months who —

(*a.*) makes any offer, proposal, gift, loan, or promise, or who gives or offers any compensation or consideration, directly or indirectly, to any official or person in the employment of the Government, *or to any member of his family, or to any person under his control or for his benefit,* with intent to obtain the assistance or influence of such official or person to promote either the procuring of any contract with the Government, for the performance of any work, the doing of any thing, or the furnishing of any goods, effects, food or materials, the execution of any such contract, or the payment of the price, or consideration stipulated therein, or any part thereof, or of any aid or subsidy, payable in respect thereof; or

(*b.*) being an official or person in the employment of the Government, directly or indirectly, accepts or agrees to accept or allows to be accepted by any person under his control, or for his

benefit, any such offer, proposal, gift, loan, promise, compensaiton or consideration; or

(*c.*) in the case of tenders being called for by or on behalf of the Government, for the performance of any work, the doing of any thing, or the furnishing of any goods, effects, food or materials, directly or indirectly, by himself or by the agency of any other person on his behalf, with intent to obtain the contract therefor, either for himself or for any other person, proposes to make, or makes, any gift, loan, offer or promise, or offers or gives any consideration or compensation whatsoever to any person tendering for such work or other service, *or to any member of his family, or other person for his benefit*, to induce such person to withdraw his tender for such work or other service, or to compensate or reward him for having withdrawn such tender; or

(*d.*) in case of so tendering, accepts or receives, directly or indirectly, *or permits, or allows to be accepted or received by any member of his family, or by any other person under his control, or for his benefit*, any such gift; loan, offer, promise, consideration or compensation, as a consideration or reward for withdrawing or for having withdrawn such tender; or

(*e.*) being an official or employee of the Governement, receives, directly or indirectly, *whether personally, or by or through any member of his family, or person under his control, or for his benefit*, any gift, loan, promise, compensation or consideration whatsoever, either in money or otherwise, from any person whomsoever, for assisting or favouring any individual in the transaction of any business whatsoever with the Government, or who gives or offers any such gift, loan, promise, compensation or consideration; or

(*f.*) by reason of, or under the pretense of, possessing influence with the Government, or with any Minister or official thereof, demands, exacts or receives from any person, any compensation, fee or reward, for procuring from the Government the payment of any claim, or of any portion thereof, or for procuring or furthering the appointment of himself, or of any other person, to any office, place or employment, or for procuring or furthering the obtaining for himself or any other person, of any grant, lease or other benefit from the Government; or offers, promises or pays to such person, under the circumstances and for the causes aforesaid, or any of them any such compensation, fee or reward; or

(*g.*) having dealings of any kind with the Government through any department thereof, pays any commission or reward, or within one year before or after such dealings, without the express permission in writing of the head of the department with which such dealings have been had, the proof of which permission shall lie upon him, makes any gift, loan, or promise of any money, matter or thing, to any employee or official of the Government, or to any member of the family of such employee, or official, or to any person under his control, or for his benefit; or

(*h.*) being an employee or official of the Government, demands, exacts or receives, from such person, directly or indirectly, by himself, or by or through any other person for his benefit, or permits or allows any member of his family, or any person under his control, to accept or receive —

(i.) any such commission or reward; or

(ii.) within the said period of one year, without the express permission in writing of the head of the department with which such dealings have been had, the proof of which permission shall lie upon him, accepts or receives any such gift, loan or promise; or

(*i.*) having any contract with the Government for the performance of any work, the doing of anything, or the furnishing of any goods, effects, food or materials, and having or expecting to have any claim or demand against the Government by reason of such contract, either directly or indirectly, by himself or by any person on his behalf, subscribes, furnishes or gives, or promises to subscribe, furnish or give, any money or other valuable consideration for the purpose of promoting the election of any candidate, or of any number, class or party of candidates to a legislature or to a Parliament, or with the intent in any way of influencing or affecting the result of a provincial or Dominion election.

2. *If the value* of the amount or thing paid, offered, given, loaned, promised, received or subscribed, as the case may be, *exceeds one thousand dollars*, the offender under this section is liable to any fine not exceeding such value.

3. The words "the Government" in this section include the Government of Canada and the Government of any province of Canada, as well as Her Majesty in the right of Canada or of any province thereof.

No prosecution for any offence under this section can be commenced after the expiration of two years from its commission. (2)

The provisions of this and the next section are almost wholly taken from 54-55 Vict., c. 23.

Since the accession of King Edward VII, the words "His Majesty" are to be substituted for "Her Majesty" in this section. (See section 7, subsection 6 of the *Interpretation Act*, set out at p. 9, *ante*).

**134. Other consequences.** — Every person convicted of an offence under the next preceding section shall be incapable of contracting with the Government, or of holding any contract or office with, from or under it, or of receiving any benefit under any such contract. R.S.C., c. 173, ss. 22 and 23.

**135. Breach of trust by public officer.** — Every public officer is guilty of an indictable offence and liable to five years' imprison-

(2) See section 551 *b*), *post*.

ment who, in the discharge of the duties of his office, commits any fraud or breach of trust affecting the public, whether such fraud or breach of trust would have been criminal or not if committed against a private person.

**136. Corrupt practices in municipal affairs.** — Every one is guilty of an indictable offence and liable to a fine not exceeding one thousand dollars and not less than one hundred dollars, and to imprisonment for a term not exceeding two years and not less than one month, and in default of payment of such fine to imprisonment for a further term not exceeding six months, who directly or indirectly —

(*a.*) makes any offer, proposal, gift, loan, promise or agreement to pay or give any money or other material compensation or consideration to any member of a municipal council, whether the same is to inure to his own advantage or to the advantage of any other person, for the purpose of inducing such member either to vote or to abstain from voting at any meeting of the council of which he is a member or at any meeting of a committee of such council, in favour of or against any measure, motion, resolution or question submitted to such council or committee; or

(*b.*) makes any offer, proposal, gift, loan, promise or agreement to pay or give any money or other material compensation or consideration to any member or to any officer of a municipal council for the purpose of inducing him to aid in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person; or

(*c.*) makes any offer, proposal, gift, loan, promise or agreement to pay or give any money or other material compensation or consideration to any officer of a municipal council for the purpose of inducing him to perform or abstain from performing, or to aid in procuring or preventing the performance of, any official act; or

(*d.*) being a member or officer of a municipal council, accepts or consents to accept any such offer, proposal, gift, loan, promise, agreement, compensation or consideration as is in this section before mentioned; or in consideration thereof, votes or abstains from voting in favour of or against any measure, motion, resolution or question, or performs or abstains from performing any official act; or

(*e*) attempts by any threat, deceit, suppression of the truth or other unlawful means to influence any member of a municipal council in giving or withholding his vote in favour of or against any measure, motion, resolution or question, or in not attending any meeting of the municipal council of which he is a member, or of any committee thereof; or

(*f.*) attempts by any such means as in the next preceding para-

graph mentioned to influence any member or any officer of a municipal council to aid in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person, or to perform or abstain from performing, or to aid in procuring or preventing the performance of, any official act. 52 V., c. 42, s. 2.

No prosecution for any offence under this section can be commenced after the expiration of two years from its commission. (3)

**137. Selling office, appointment, &c.** — Every one is guilty of an indictable offence who, directly or indirectly —

(*a.*) sells or agrees to sell any appointment to or resignation of any office, or any consent to any such appointment or resignation, or receives, or agrees to receive, any reward or profit from the sale thereof; or

(*b.*) purchases or gives any reward or profit for the purchase of any such appointment, resignation or consent, or agrees or promises to do so.

Every one who commits any such offence as aforesaid, in addition to any other penalty thereby incurred forfeits any right which he may have in the office and is disabled for life from holding the same.

2. Every one is guilty of an indictable offence who, directly or indirectly —

(*a.*) receives or agrees to receive any reward or profit for any interest, request or negociation about any office, or under pretense of using any such interest, making any such request or being concerned in any such negociation; or

(*b.*) gives or procures to be given any profit or reward, or makes or procures to be made any agreement for the giving of any profit or reward, for any such interest, request or negociation as aforesaid: or

(*c.*) solicits, recommends or negotiates in any manner as to any appointment to or resignation of any office in expectation of any reward or profit; or

(*d.*) keeps any office or place for transacting or negotiating any business relating to vacancies in, or the sale or purchase of, or appointment to or resignation of offices.

The word "office" in this section includes every office in the gift of the Crown or any officer appointed by the Crown, and all commissions, civil, naval and military, and all places or employments in any public department or office whatever, and all depu-

(3) See section 551 (*b*), *post*.

tations to any such office and every participation in the profits of any office or deputation.

A person convicted of an offence under this section is liable to five years' imprisonment. (4)

**138. Disobedience to a Statute.** — Every one is guilty of an indictable offence and liable to one year's imprisonment who, without lawful excuse, disobeys any Act of the Parliament of Canada or of any legislature in Canada, by wilfully doing any act which it forbids, or omitting to do any act which it requires to be done, unless some penalty or other mode of punishment is expressly provided by law.

**139. Disobedience of orders of court.** — Every one is guilty of an indictable offence and liable to one year's imprisonment who, without lawful excuse, disobeys any lawful order other than for the payment of money made by any court of justice, or by any person or body of persons authorized by any statute to make or give such order, unless some penalty is imposed, or other mode of proceeding is expressly provided, by law.

**140. Neglect of peace officer to suppress riot.** — Every one is guilty of an indictable offence and liable to two years' imprisonment who, being a sheriff, deputy-sheriff, mayor, or other head officer, justice of the peace, or other magistrate, or other peace officer, of any county, city, town, or district, having notice that there is a riot within his jurisdiction, without reasonable excuse omits to do his duty in suppressing such riot.

See comments under sections 40-42, and 84, *ante*.

If, on a riot taking place, a magistrate neither reads the proclamation from the Riot Act, nor restrains nor apprehends the rioters, nor gives any orders to fire on them, nor makes use of a military force under his command, this is *prima facie* evidence of a criminal neglect of duty in him; and it is no answer to the charge for him to say that he was afraid, unless his fear arose from such danger as would affect a firm man; and if, rather that apprehend the rioters, his sole care was for himself, this is also criminal neglect. (5)

**141. Neglect to aid peace officer in suppressing riot.** — Every one is guilty of an indictable offence and liable to one year's imprisonment who, having reasonable notice that he is required to assist any sheriff, deputy-sheriff, mayor, or other head officer, justice of the peace, magistrate, or peace officer in suppressing any riot, without reasonable excuse omits so to do.

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(4) See section 951, *post*.
(5) R. v. Kennett, 5 C. & P., 282.

To support an indictment against a person for refusing to aid a constable in the execution of his duty in quelling a riot, it is necessary to prove — (*a*) that the constable actually saw a breach of the peace being committed, (*b*) that there was a reasonable necessity for the constable calling on the defendant for his assistance, and (*c*) that, when duly called upon to assist the constable, the defendant, without any physical impossible or lawful excuse, refused to do so; and, in such a case, it is no legal ground of defence that from the number of the rioters the single aid of the defendant would not have been of any use. (6)

Section 34 of the *Militia Act*, — (R.S.C., c. 41), — provides that upon the written requisition of the proper civil authorities, — for instance, three justices of the peace, of whom the mayor or other head of the municipality or county may be one, — the senior military officer of any locality may call out the active militia or any necessary portion thereof, for active service, with their arms and ammunition, in aid of the civil power to prevent or suppress any actual or anticipated riot disturbance of the peace or other emergency requiring such service; and, by section 107 of the Act, every officer and man of the Militia who, when his corps is so called out, refuses or neglects to go out with such corps or to obey any lawful order of his superior officer incurs a penalty.

**142. Neglect to aid peace officer in arresting offenders.** — Every one is guilty of an indictable offence and liable to six months' imprisonment who, having reasonable notice that he is required to assist any sheriff, deputy-sheriff, mayor or other head officer, justice of the peace, magistrate, or peace officer, in the execution of his duty in arresting any person, or in preserving the peace, without reasonable excuse omits so to do.

An indictment for refusing to aid a constable charged that B was in the custody of C., a constable, upon a criminal charge, and that the said B. committed an assault upon the said constable and a breach of the peace with intent to resist lawful apprehension, that the constable called upon A, the defendant for assistance in order to prevent the said assault and breach of the peace and that the defendant did unlawfully and knowingly refuse to aid and assist the said constable in the execution of his duty or to prevent an assault and breach of the peace. Held that the indictment was sufficient to sustain a conviction, without stating how the apprehension became lawful. (7)

**143. Misconduct of officers in executing writs.** — Every one is guilty of an indictable offence and liable to a fine and imprisonment who, being a sheriff, deputy-sheriff, coroner, elisor, bailiff, constable or other officer entrusted with the execution of any writ, warrant or process, wilfully misconducts himself in the execution of the same or wilfully, and without the consent of the person in whose favour the writ, warrant or process was issued, makes any false return thereto. R.S.C., c. 173, s. 29.

Under the terms of section 951, *post*, the length of imprisonment to which an offender against this section, 143, is liable is five years; and

(6) R. v. Brown, C. & Mar., 314.
(7) R. v. Sherlock, 10 Cox C. C., 170; L. R., 1 C. C. R., 20.

under section 934, *post*, the amount of the fine is in the discretion of the Court or person passing sentence.

**144. Obstructing public or peace officer in execution of his duty.** — Every one is guilty of an indictable offence and liable to ten years' imprisonment who resists or wilfully obstructs any *public officer* in the execution of his duty or any person acting in aid of such officer.

2. Every one is guilty of an offence and liable on indictment to two years' imprisonment, and on summary conviction before two justices of the peace to six months' imprisonment with hard labour, or to a fine of one hundred dollars, who resists or wilfully obstructs —

(*a*.) any *peace officer* in the execution of his duty or any person acting in aid of any such officer;

(*b*.) any person in the lawful execution of any process against any lands or goods or in making any lawful distress or seizure. R. S. C., c. 162, s. 34.

For the distinction between "*public officer*" and "*peace officer*," see section 3 (*s*) and section 3 (*w*), *ante*, pp. 5, 6.

On the trial of an indictment for the obstruction of a bailiff in the lawful execution of a writ of replevin, it appeared that the bailiff had, under the writ of replevin in question, obtained possession of the goods from the defendant in the action, but had, at the defendants' suggestion, left them in the possession of a third party, the prisoner, taking from the latter an agreement to deliver back the goods to the bailiff when called upon; and it appeared that when the bailiff returned and demanded the goods and attempted to get them, he was prevented by the prisoner who refused his getting them. Held that the bailiff was acting under the agreement, and was not a person acting in the lawful execution of any process against goods under the above section. (8)

## PART X.

## MISLEADING JUSTICE.

**145. Perjury.** — Perjury is an assertion as to a matter of fact, opinion, belief or knowledge, made by a witness in a judicial proceeding as part of his evidence, upon oath or affirmation, whether such evidence is given in open court, or by affidavit or otherwise, *and whether such evidence is material or not*, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury, or person holding the proceeding. Evidence in this section includes evidence given on the *voir dire* and evidence given before a grand jury.

2. Every person is a witness within the meaning of this section

(8) R. v. Carley, 18 C. L. T., 26.

who actually gives his evidence, *whether he was competent to be a witness or not, and whether his evidence was admissible or not.*

3. Every proceeding is judicial within the meaning of this section which is held in or under the authority of any court of justice, or before a grand jury, or before either the Senate or House of Commons of Canada, or any committee of either the Senate or House of Commons, or before any Legislative Council, Legislative Assembly or House of Assembly or any committee thereof, empowered by law to administer an oath, or before any justice of the peace, or any arbitrator or umpire, or any person or body of persons authorized by law or by any statute in force for the time being to make an inquiry and take evidence therein upon oath, or before any legal tribunal by which any legal right or liability can be established, or before any person acting as a court, justice or tribunal, having power to hold such judicial proceeding, *whether duly constituted or not, and whether the proceeding was duly instituted or not* before such court or person so as to authorize it or him to hold the proceeding, *and although such proceeding was held in a wrong place or was otherwise invalid.*

4. Subornation of perjury is counselling or procuring a person to commit any perjury which is actually committed.

**146.** Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who commits perjury or subornation of perjury.

2. If the crime is committed in order to procure the conviction of a person for any crime punishable by death, or imprisonment for seven years or more, the punishment may be imprisonment for life. R. S. C., c. 154, s. 1.

See section 221, *post*, as procuring death by false evidence.

The Royal Commissioners say that, in framing the section of their draft code relating to perjury, they proceeded on the principle that the guilt and danger of perjury consist in attempting by falsehood to mislead a tribunal *de facto* exercising judicial functions and that it seemed to them "not desirable that a person who has done this should escape from punishment, if he can shew some defect in the constitution of the tribunal which he sought to mislead, or some error in the proceedings themselves." (See p. 21 of the Commissioner's Report).

The words "*and whether such evidence is material or not*," forming part of the first paragraph of the above section do not appear in the corresponding section of the English Draft Code; and our law is thus made in positive terms, altogether different, on this point, from the law of England, under which the false swearing, to constitute perjury, must not only be in a judicial proceeding before a competent tribunal, but the evidence, or that part of it which is charged as false, must have been material to the matter which at the time of the swearing was in issue in such judicial proceeding. (1)

(1) R. v. Townsend, 10 Cox, 356; Arch. Cr. Pl. and Ev., 21st Ed., 934.

The effect of the above section, 145, seems to be to make it perjury to swear or affirm, in any judicial proceeding, (valid or invalid), to any verbal or written statement of a matter of fact, opinion, belief or knowledge, whether material, or admissable, or not, and which the deponent or affirmant knows to be false, and is intended by him to mislead justice.

The false statement to constitute perjury under section 145, must be sworn or affirmed in some judicial proceeding. False oaths, affirmations and solemn declarations, taken or made in other matters than judicial proceedings, are dealt with under section 147. See also the special provisions of section 148, (*post*).

With regard to false evidence in judicial proceedings the following are some instances of those who have been held guilty or not guilty of perjury in that respect:—

ILLUSTRATIONS.

It has been held that one commits perjury,—

(*a.*) who makes, in any, civil or criminal case, a false affidavit upon oath or affirmation in support of a plea; or in support of a motion for new trial; or in aid of a petition for a writ of *habeas corpus;* or in support of an information or complaint charging a criminal offence against another to procure his arrest; (2)

(*b.*) who being offered as bail or other surety swears or affirms falsely so as to qualify himself; (3)

(*c.*) who, as a juror, swears falsely as to his competency; (4)

A proceeding before a local marine board sitting under the Merchants Shipping Act 1854 and having power to suspend or cancel the certificates of the masters and mates of ships has been held to be a judicial proceeding. (5)

The administering of an oath by a returning officer to a voter at a civic election has been held not to be a judicial proceeding. (6)

But see section 148, *post*, which makes it perjury to take a false oath in relation to other matters than a judicial proceeding; and see the case of R. v. Chamberlain cited at page 141, *post*, as to false swearing at an election.

The offence of perjury cannot be founded on a mere oath of office. Hawkins says, "The notion of perjury is confined to such public oaths only as affirm or deny some matter of fact contrary to the knowledge of the party, and therefore it doth not extend to any promissory oaths whatsoever. From which it clearly follows that no officer public or private who neglects to execute his office in pursuance of his oath, or acts contrary to the purport of it, is indictable for perjury in respect of such oath; yet it is certain that his offence is highly aggravated by being contrary to his oath, and therefore that he is liable to the severer fine on that account." (7)

**Oaths and affirmations.**—"An oath has been defined to be a person's solemn asseveration, uttered in an appeal to the Supreme Being under the

(2) S. v. Roberts, 11 Humph., 539; S. v. Chandler, 42 Vt., 446; White v. S. 1 Sm. & M., 149; Pennaman v. S., 58 Ga., 336.
(3) C. v. Hatfield, 107 Mass., 227.
(4) C. v. Stockley, 10 Leigh, 678.
(5) R. v. Tomlinson, L. R., 1 C. C. R., 49.
(6) Thomas v. Platt, 1 U. C., Q. B., 217; Burb. Dig. Cr. L., 134, 135.
(7) 1 Hawk. P. C. Curw. Ed., p. 431.

sanction of his religion, that a thing stated or to be stated by him is true, made to a civil officer authorized to receive it; and an affirmation is a modern statutory device whereby those whose consciences are offended by such an appeal to God place themselves without it in the like civil position with those who have taken the oath. It is similar to the oath but omits the appeal to the Deity, and substitutes the word 'affirm' for the word 'swear.'" (8)

Under the Canada Evidence Act 1893, secs. 23 and 24, (9) a witness who objects, on grounds of conscientious scruples, to take an oath may, instead of being sworn, solemnly affirm to tell the truth; and his evidence is to have the same effect and render him liable to the same punishment for perjury as if he were sworn.

**Proof.**—The proof necessary to convict a person accused of having committed perjury must necessarily be something more than the evidence of a single witness; or it would be simply one oath against another, and therefore where there is only one witness to swear to the falsity of the statement charged as perjury the evidence of that one witness must be confirmed by proof of circumstances strongly corroborating it, as for instance, by the production and proof of a letter written by the accused contradicting his sworn testimony in question. Section 684 provides that the evidence of one witness shall not be sufficient to convict "unless such witness is corroborated in some material particular by evidence implicating the accused." (10)

The material particular in which corroboration is necessary is the falsity of the statement alleged as the perjury. The other facts such as the judicial proceeding in which the statement in question was sworn to or affirmed, the administering and taking of the oath or affirmation, and the making of the statement under oath or affifmation may be proved in the same manner and by the same evidence as in any ordinary case.

If in two causes, or in one at different examinations, or at one examination, a witness swears to two opposite and irreconcilable things he commits perjury by that one, of the two statements, which is false but not by that one which is true. And though what he said when he told the truth may be shewn in evidence against him on an indictment for the false statement, still there must be testimony over and above his own contradictory statements as to which of them is false. (11)

Perjury is committed only where there is the intent to testify falsely; and where professional advice is honestly acted upon it may negative this intent. Thus, where a lawyer reduces a man's *oral* statement to *writing* and the latter having confidence in the former swears to the writing under the impression that it does not differ in meaning from the oral words, there is no perjury, though in fact it does differ and is wrong. (12) And if through a mistake of one who draws up an affidavit or through a misreading of it to the deponent, or from any other cause the latter in good faith believes its contents to be what they are not, he does not become a perjurer by swearing to a falsehood therein, while understanding it to be something else which is true. (13)

If a man swears to a thing of which consciously he knows nothing, he

(8) 2 Bish. New Cr. L. Com., s. 1018.
(9) See The Can. Ev. Act 1893, *post*.
(10) See section 684, *post*.
(11) R. v. Hughes, 1 Car. & K., 519.
(12) U. S. v. Stanley, 6 McLean, 409; U. S. v. Conner, 3 McLean, 583; 2 Bish. Cr. L. Com., s. 1046.
(13) Jesse v. S., 20 Ga., 156, 169.

commits perjury; for the declaration of a witness is that he knows the truth of what he says, — that is, that it is to his knowledge that what he says is true,... and if he is really conscious that he does not know it he means to swear falsely. (14)

The averment in an indictment for perjury must be proved precisely. So that where an indictment charged the prisoner with having sworn that he saw W "about 15 minutes past 11 in the forenoon" on a particular day, and the proof was that he had sworn that he saw W. about a quarter past 11 on the day in question but had not sworn whether it was in the forenoon or in the afternoon, it was held that the evidence being ambiguous, the averment in the indictment was not proved. (15)

Section 4 of the R.S.C., c. 154, is unrepealed, and is as follows:

"4. Any judge of any court of record, or any commissioner before whom any inquiry or trial is held, and which he is by law required or authorized to hold, may, if it appears to him that any person has been guilty of wilful and corrupt perjury in any evidence given, or in any affidavit, affirmation, declaration, deposition, examination, answer or other proceeding made or taken before him, direct such person to be prosecuted for such perjury, if there appears to such judge or commissioner a reasonable cause for such prosecution, — and may commit such person so directed to be prosecuted until the next term, sittings or session of any court having power to try for perjury, in the jurisdiction within which such perjury was committed, or permit such person to enter into a recognizance, with one or more sufficient sureties, conditioned for the appearance of such person at such next term, sittings or session, and that he will then surrender and take his trial and not depart the court without leave, — and may require any person, such judge or commissioner thinks fit, to enter into a recognizance conditioned to prosecute or give evidence against such person so directed to be prosecuted as aforesaid."

**147. False oaths.** — Every one is guilty of an indictable offence and liable to seven years' imprisonment who, being required or authorized by law to make any statement on oath, affirmation or solemn declaration, thereupon makes a statement which would amount to perjury if made in a judicial proceeding.

See remarks under sections 145 and 146, *ante*.

**148. Other false oaths.** — Every one is guilty of perjury who —

(*a*.) having taken or made any oath, affirmation, solemn declaration or affidavit where by any Act or law in force in Canada, or in any province of Canada, it is required or permitted that facts, matters or things be verified, or otherwise assured or ascertained

(14) Byrnes v. Byrnes, 102 N. Y., 4, 9.
(15) R. v. Bird, 17 Cox C. C., 387.

by or upon the oath, affirmation, declaration or affidavit of any person, wilfully and corruptly, upon such oath, affirmation, declaration or affidavit, deposes, swears to or makes any false statement as to any such fact, matter or thing; or

(*b.*) knowingly, wilfully and corruptly, upon oath, affirmation, or solemn declaration, affirms, declares, or deposes to the truth of any statement for so verifying, assuring or ascertaining any such fact, matter or thing, or purporting so to do, or knowingly, wilfully and corruptly takes, makes, signs or subscribes any such affirmation, declaration or affidavit, as to any such fact, matter or thing,—such statement, affidavit, affirmation or declaration being untrue, in the whole or any part thereof. R.S.C., c. 154, s. 2.

Where a defendant was arraigned for having in a certain solemn declaration voluntarily made before a Justice of the Peace, falsely, wilfully and corruptly declared to a certain effect therein set forth, and the defendant applied to quash the indictment,—because it did not allege, in the language of the above section, 147, that the statement declared to was one authorized or required to be made on solemn declaration and because it was not alleged that the statement in question was declared with intent to mislead,—the Crown Counsel applied to amend the indictment if necessary, by adding, "he the said defendant being then duly authorized by law to make statements on solemn declaration."—The trial Judge, in refusing the motion to quash, held that the forms of indictment "F F.," *post*, are intended to illustrate the provisions of section 611, *post*, and that their effect is not confined to the offences stated in them, and that as an allegation of intent to mislead in the present indictment would not have given the defendant any better notice of the offence than he had without it, it was not necessary; (the statement on this subject contained in Taschereau's Criminal Code, p. 675, being dissented from). (16)

A prisoner had, on a Dominion Election day, presented himself at a polling station and applied for a ballot paper stating that he was Mathew Leggatt, an elector on the list of voters for the district. Being required to be sworn the prisoner took the oath and falsely swore that he was Mathew Leggatt and that he was an elector on the list of voters. The prisoner was convicted; but as it did not appear that he was an elector, the questions were raised and reserved as to whether the deputy returning officer was authorized only to administer the oath to an elector, whether as the prisoner was not an elector the deputy returning officer had authority to administer the oath to the prisoner, and whether therefore the prisoner, although he swore falsely that he was an elector, could be convicted. Held that the prisoner was properly convicted and the conviction was affirmed; the word "elector," in subsection 2 of section 45 of the Dominion Election Act, (54-55 Vic., c. 19), being held to apply to any person acting or representing himself as an elector. (17)

**149. False oath made out of a province.** — Every person who wilfully and corruptly makes any false affidavit, affirmation or solemn declaration, out of the province in which it is to be used but within Canada, before any person authorized to take the same, for the purpose of being used in any province of Canada, is guilty

(16) R. v. Skelton, 18 C. L. T., 205.
(17) R. v. Chamberlain, 14 C. L. T., 283; 10 Man. L. R., 261.

of perjury in like manner as if such false affidavit, affirmation or declaration were made before a competent authority in the province in which it is used or intended to be used. R. S. C., c. 154, s. 3.

**150. False statements.** — Every one is guilty of an indictable offence and liable to two years' imprisonment who, upon any occasion on which he is permitted by law to make any statement or declaration before any officer authorized by law to permit it to be made before him, or before any notary public to be certified by him as such notary, makes a statement which would amount to perjury if made on oath in a judicial proceeding.

In reference to this provision, the English Commissioners say:

"It may be doubtful whether this is at present even a common law misdemeanor; but we feel no doubt that it ought to be made indictable."

**151. Fabricating evidence.** — Every one is guilty of an indictable offence and liable to seven years' imprisonment who, with intent to mislead any court of justice or person holding any such judicial proceeding as aforesaid, fabricates evidence by any means other than perjury or subornation of perjury.

"Fabricating evidence is an offence which is not so common as perjury, but which does occur and is sometimes detected. An instance occurred a few years ago on a trial for shooting at a man with intent to murder him, when the defence was that though the accused did fire off a pistol, it was not loaded with ball, and the only intent was to frighten. Evidence was given that a pistol ball was found lodged in the trunk of a tree nearly in the line from where the accused fired to where the prosecutor stood. It was afterwards discovered that the ball had been placed in the tree by those concerned in the prosecution, in order to supply the missing link in the evidence. Such an offence is as wicked and as dangerous an offence as perjury, but the punishment as a common law offence, (if, irrespective of conspiracy, it be an offence), is only fine and imprisonment." [Royal Commissioners' Report, p. 21].

An attempt, by the manufacture of false evidence, to mislead a judicial tribunal which might be called into existence is a criminal offence although it happens that such tribunal though contemplated was never actually called into existence and the manufactured evidence was consequently not used. In other words, it is not necessary, in order to complete the offence of attempting to pervert the course of justice by the manufacture of false evidence, that such evidence should be made use of or that the tribunal for which it is intended should be called into actual existence. To tamper with evidence intended to be laid before arbitrators appointed by the parties to a contract for the determination of differences arising under such contract is to attempt to pervert the ends of justice by misleading a tribunal of a judicial nature, although in fact the arbitration happens not to take place. A defendant was indicted for having unlawfully, knowingly and designedly altered the character of the contents of certain sample bags of wheat which had become and were evidence to be used before arbitrators appointed in accordance with the terms of a contract to decide any question that might be in dispute between the buyers and the sellers of a cargo of wheat, with intent thereby to pass the same off as true and genuine samples of the bulk of such cargo and thereby to injure and prejudice

the buyers of the cargo and to pervert the due course of law and justice. By the contract of sale certain stipulations were made for settling by arbitration any disputes that might arise, and for the purpose of being used as evidence in any such arbitration samples were taken by the defendant on behalf of the sellers and by another person on behalf of the buyers. Both sets of samples were sealed and taken to the defendant's house, and while there the defendant tampered with them by extracting the contents of the bags and substituting other wheat, without breaking the seals, thereby producing very much better samples. The samples so altered were forwarded by the defendant to the London Corn Trade Association, who by the terms of the contract were to appoint the arbitrators. Held that the indictment was good and alleged a criminal offence, although it did not shew that an arbitration took place or that the samples were actually used as evidence, that the offence committed by the defendant was not a mere private cheat but was an attempt to mislead a tribunal of a judicial nature by the manufacture of false evidence. (18)

**152. Conspiring to bring false accusations.** — Every one is guilty of an indictable offence who conspires to prosecute any person for any alleged offence, knowing such person to be innocent thereof, and shall be liable to the following punishment :

(*a.*) To imprisonment for fourteen years if such person might, upon conviction for the alleged offence, be sentenced to death or imprisonment for life ;

(*b.*) To imprisonment for ten years if such person might, upon conviction for the alleged offence, be sentenced to imprisonment for any term less than life.

**153. Administering oaths without authority.** — Every justice of the peace or other person who administers, or causes or allows to be administered, or receives or causes or allows to be received any oath or affirmation touching any matter or thing whereof such justice or other person has not jurisdiction or cognizance by some law in force at the time being, or authorized or required by any such law is guilty of an indictable offence and liable to a fine not exceeding fifty dollars or to imprisonment for any term not exceeding three months.

2. Nothing herein contained shall be construed to extend to any oath or affirmation before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial or punishment of any offence, or to any oath or affirmation required or authorized by any law of Canada, or by any law of the province wherein such oath or affirmation is received or administered, or is to be used, or to any oath or affirmation, which is required or authorized by the laws of any foreign country to give validity to an instrument in writing or to evidence designed or intended to be used in such foreign country. R. S. C., c. 141, s. 1.

For the present law relating to extra-judicial oaths, see *The Canada Evidence Act*, 1893, (sections 26 and 27), *post*.

(18) R. v. Vreones, 17 Cox C. C., 267; [1891] 1 Q. B., 360.

**154. Corrupting juries and witnesses.** — Every one is guilty of an indictable offence and liable to two years' imprisonment who—

(*a*). dissuades or attempts to dissuade any person by threats, bribes or other corrupt means, from giving evidence in any cause or matter, civil or criminal ; or

(*b*.) influences or attempts to influence, by threats or bribes or other corrupt means, any juryman in his conduct as such, whether such person has been sworn as a juryman or not; or

(*c*.) accepts any such bribe or other corrupt consideration to abstain from giving evidence, or on account of his conduct as a juryman ; or

(*d*.) wilfully attempts in any other way to obstruct, pervert or defeat the course of justice. R. S. C., c. 173, s. 30.

**Embracery.** — Sub-section (*b*) covers a common law offence called embracery. Some of the old English statutes against embracery are the 5 Edward 3, c. 10, — entitled "The punishment of a Juror that is Ambidexter and taketh money;" the 34 Edward 3, c. 8, — entitled, "The Penalty of a Juror taking reward to give his verdict;" the 38 Edward 3, stat. 1, c. 12, — entitled "The punishment of a Juror taking reward to give verdict and of Embracers;" and the 32 Hen. 8, c. 9, — entitled "The Bill of Bracery and Buying of Titles." The preamble to this statute says, "that there is nothing within this realm that conserveth the king's loving subjects in more quietness, rest, peace and good concord than the due and just ministration of his laws and the true and indifferent trials of such titles and issues as have to be tried according to the laws of the realm; which His most Royal Majesty perceiveth to be greatly hindered by maintenance, embracery, champerty, subornation of witnesses, sinister labor, buying of titles and pretensed rights of persons not being in possession; whereupon great perjury hath ensued, and much inquietness, oppression, vexation, troubles, wrongs and disinheritance." The statute then goes on to enact, among other things, "that from henceforth all statutes heretofore made concerning maintenance, champerty and embracery shall be put in due execution; and that no person do hereafter unlawfully retain, for maintenance of any suit or plea, any person or persons, or embrace any freeholders or jurors."

An old law dictionary contains the following description of the offence. "*Embraceor*. He that when a matter is in trial between party and party comes to the bar with one of the parties, having received some reward so to do and speaks in the case, or privately labors the jury, or stands in the court to survey or overlook them, whereby they are awed or influenced or put in fear or doubt of the matter. But lawyers, attorneys, etc., may speak in the case for their clients, and not be embraceors. (19) If the party himself instructs a juror or promises any reward for his appearance then the party is likewise an embraceor. And a juror may be guilty of embracery when he by indirect practices gets himself sworn on the *tales* to serve on one side."

Blackstone defines embracery as "an attempt to influence a jury corruptly to one side by promises, persuasions, entreaties, money, entertainments, and the like." (20) And Hawkins says, "It seems clear that any at-

(19) Co. Lit., 369; 1 Hawk. P. C. Curw. ed., p. 467, s. 4.
(20) 4 Bl. Com., 140.

tempt whatsoever to corrupt or influence or instruct a jury, or in any way to incline them to be more favorable to the one side than the other, by money, promises, letters, threats or persuasions, except only by the strength of the evidence and the arguments of counsel in open court at the trial of the cause, is a proper act of embracery; whether the jurors on whom such attempt is made give any verdict or not, or whether the verdict given be true or false." (21)

Where a defendant was convicted under the above section, 154, of having attempted by corrupt means to dissuade a man from giving evidence in certain prosecutions under the Ontario Liquor License Act, (R. S. O., c. 194), it was held that, notwithstanding section 138, *ante*, of the Criminal Code, the conviction was right and that section 84 of the Ontario Liquor License Act was *ultra vires* of the Ontario Legislature. (22)

Where a defendant was summarily convicted under the *Canada Temperance Act* of the offence of tampering with a witness subpœnaed to attend the trial of a charge of violating the second part of the Act by endeavoring to induce him to absent himself from the trial, it was held affirming the conviction and dismissing the appeal that the special provisions of the section of the Act under which the conviction was made was not repealed by section 154 or by any other provision of the Criminal Code. (23)

**155. Compounding penal actions.** — Every one is guilty of an indictable offence and liable to a fine not exceeding the penalty compounded for, who, having brought, or under colour of bringing, an action against any person under any penal statute in order to obtain from him any penalty, compounds the said action *without order or consent of the court, whether any offence has in fact been committed or not.* R. S. C., c. 173, s. 31.

In reference to this offence, Blackstone says that the Statute of 18 Eliz., c. 5, provided "that if any person informing under pretense of any penal law, makes any composition without leave of the court or takes any money or promise from the defendant to excuse him (which demonstrates his intention of commencing the prosecution to be merely to serve his own ends, and not for the public good), he shall forfeit £10, shall stand two hours in the pillory, and shall be for ever disabled to sue on any popular or penal statute." (24)

**Compounding Criminal Offences.** — To compound a felony, (which is an indictable offence at common law), is to enter into an agreement, for any valuable consideration, — (such as the taking back, by the owner, of goods stolen from him), — not to prosecute one who has committed a felony, or to forbear from or to stifle a prosecution therefor, or to withhold evidence of the commission thereof. (25)

The *bare* re-taking of one's goods which have been stolen, or the receiving back of embezzled funds, or the acceptance of security for their future repayment is not unlawful, unless there be some agreement, express or implied, to shield the thief; and the fact that the owner, after the return

(21) 1 Hawk. P. C. Curw. ed., p. 466, s. 1.
(22) R. v. Holland, 14 C. L. T., 294. See R. v. Lawrence, 43 U.C.R., 164.
(23) R. v. Gibson, 29 N. S. R., 88.
(24) 4 Bl. Com., 136.
(25) 4 Steph. Com., 232, 234.

of the property or the taking of security, merely abstains, voluntarily, from prosecuting, while it may make him guilty of a misprision, cannot constitute a compounding. (26)

As the distinction between felonies and misdemeanors has been abolished by our Criminal Code, (see section 535, *post*), and as compounding a misdemeanor is not a criminal offence at common law, it is not easy to say where the line is now to be drawn between criminal offences, the compounding of which are crimes and the compounding of which are not crimes.

But, although the compounding of a misdemeanor is not a criminal offence at common law, it has always been considered illegal, and agreements made in respect thereof are ordinarily not enforceable. In cases, however, where the offence principally and more immediately affects the individual, — such, for instance, as an assault, — agreements of this kind are sometimes allowed, after conviction, with the sanction of the Court; and it is a common practice in England, when a person is convicted of such a misdemeanor, for the Court to permit the defendant to *speak* with the prosecutor, in private, before judgment is pronounced, and, if the prosecutor declares himself satisfied with the result of the interview, to inflict only a nominal sentence. Thus, in a case where a defendant was indicted for ill-treating a parish apprentice, and ,after conviction, a security was given by the defendant upon an understanding that the Court would abate the period of his imprisonment, the security was held good, upon the ground that it was given with the sanction of the Court and to be considered as part of the punishment suffered by the defendant in expiation of his offence, in addition to the imprisonment inflicted on him. (27)

In Archbold's Criminal Pleading and Evidence, 21st Edition, the following authorities, among others, are cited at pages 185, 186, 955 and 956, as to compounding offences, namely : — R. v. Burgess, R. v. Gotley, R. v. Crisp, R. v. Best, Keir v. Leeman, and the Windmill Local Board of Health v. Vint. (28)

In the case of R. v. Burgess, the prisoner had been employed to levy a distress for rent upon the goods of a Mr. Bedford, and, upon the occasion of making the distress, Arthur Bagley, while in possession, — as the prisoner's assistant, — of the distrained premises, stole twenty eight shillings belonging to Mr. Bedford from a drawer in the latter's room, and absconded. The prisoner was informed of this by Bedford, who was urged by the prisoner to put the matter in the hands of the police; but Bedford told the prisoner he would leave the matter in his (prisoner's) hands; and thereupon the prisoner gave information of the theft to the police. Subsequently the prisoner entered into some negociations with Bagley's family, and finally he handed, to Bagleys' mother, the following document; — "I, W. H. Burgess, undertake not to charge Arthur Bagley with any criminal case that I have now against him, on the money being provided to pay what he took from Peckham, while in possession, namely, 28 s. (signed) W. H. Burgess.

(26) R. v. Stone, 4 C. & P., 379; Bourke v. Mealy, 14 Cox C. C., 329; Flower v. Sadler, 10 Q. B. D., 572.

(27) Beeley v. Wingfield, 11 East, 46.

(28) R. v. Burgess, 16 Q. B. D., 141; 55 L. J. M. C., 97; R. v. Gotley, R. & R., 84; R. v. Crisp, 1 B. & Ald., 282; R. v. Best, 2 Moo. C. C., 125; 9 C. & P., 368; Keir v. Leeman, 6 Q. B., 308; 13 L. J. Q. B., 359; 15 L. J. Q. B., 360; Windwill Local Board of Health v. Vint, 45 Ch. D., 351; 17 Cox C. C., 41.

The money was paid to the prisoner, but Bagley was, nevertheless, on the evidence of Mr. Bedford, convicted summarily of the theft. The prisoner was then prosecuted for compounding a felony. The prisoner's counsel moved to quash the indictment on the ground that there being no allegation that the prisoner desisted from prosecuting the felon, no offence of compounding a felony was legally charged. For the prosecution, it was contended that the offence consisted in the corrupt agreement not to prosecute. The Recorder refused to quash the indictment, the trial went on, and, at the close of the case for the prosecution, the prisoner's counsel submitted that there was no case to go to the jury, on the ground that the owner of the property stolen or a person whose evidence would be necessary to convict the thief are the only persons who can compound a felony or a larceny, and that, in the present case, the defendant was not a necessary witness on the trial of Bagley, and that, therefore, the prisoner's undertaking not to charge Bagley with a criminal offence could not impede the course of justice. The objection was overruled and the prisoner was found guilty.

The questions reserved for the Court of Crown Cases Reserved were whether the indictment was bad as not disclosing any offence and whether there was evidence against the prisoner upon the indictment. The conviction was confirmed on both points, Lord Chief Justice Coleridge saying, in the course of his remarks in rendering the judgment of the Court, that the offence consisted in and was complete upon the making of the corrupt agreement, and that there was nothing in the second point reserved, but that, on the contrary, the offence of compounding a felony was one which could be committed not only by the owner of the stolen property but by other parties. (29)

In the case of the Windmill Local Board of Health v. Vint, the plaintiffs, a local board, had indicted the defendants for obstructing a highway. At the trial a compromise was made by the parties and sanctioned by the judges, and afterwards confirmed by deed. By this deed the defendants covenanted to restore the road within seven years, and the plaintiffs covenanted that when that had been done they would consent to a verdict of "not guilty" on the indictment. The defendants failed to restore the road, and the plaintiffs then brought an action on their covenant. It was held by the Court of Appeal affirming the judgment of *Stirling* J. that as the indictment was for a public injury, the agreement to consent to a verdict of "not guilty" was illegal, and that the plaintiffs could not maintain an action on the defendants' covenant. (30)

This case and the other authorities above cited shew that when an offence, — even if it be not very serious , — is one of a public nature, the compromise of a prosecution based upon it will be illegal; but it appears that if the offence is of a light character and one which might be made the subject of a civil action, such as a common assault or a libel, an agreement to withdraw the prosecution will be legal: but where the public characteristic of the offence predominates, as for instance, in the case of an assault and riot combined, an agreement to compromise the prosecution would be illegal.

**Misprision.** — Somewhat analogous to the offence of compounding a felony, is that of misprision of felony, "which consists in concealing or

(29) R. v. Burgess, 16 Q. B. D., 141; 15 Cox C. C., 779. See also Leggatt v. Brown, 30 O. R., 225, and Major v. McCraney, 2 Can. Cr. Cas., 547.

(30) Windmill Local Board of Health v. Vint, 45 Ch. D., 351; 17 Cox C. C., 41.

procuring the concealment of felony, (31) whether such felony be at common law or by statute. Silently to observe the commission of a felony, without using any endeavor to apprehend the offender is a misprision. If to knowledge of the committing of the offence there be added assent to its commission, the party assenting becomes an accessory. The punishment for the offence of misprision of felony is fine and imprisonment. (32) But, prosecutions for it are practically obsolete at the present day. (33)

**156. Corruptly taking reward for helping to recover stolen property.** — Every one is guilty of an indictable offence and liable to seven years' imprisonment who corruptly takes any money or reward directly or indirectly, under pretense or upon account of helping any person to recover any chattel, money, valuable security or other property which, by any indictable offence has been stolen, taken, obtained, extorted, converted or disposed of, unless he has used all due diligence to cause the offender to be brought to trial for the same. R. S. C., c. 164, s. 89.

**157. Unlawfully advertising reward for return of stolen property.** — Every one is liable to a penalty of two hundred and fifty dollars for each offence, recoverable with costs by any person who sues for the same in any court of competent jurisdiction, who —

(*a.*) publicly advertises a reward for the return of any property which has been stolen or lost, and in such advertisement uses any words purporting that no questions will be asked ; or

(*b.*) makes use of any words in any public advertisement purporting that a reward will be given or paid for any property which has been stolen or lost, without seizing or making any inquiry after the person producing such property; or

(*c.*) promises or offers in any such public advertisement to return to any pawnbroker or other person who advanced money by way of loan on, or has bought, any property stolen or lost, the money so advanced or paid, or any other sum of money for the return of such property ; or

(*d.*) prints or publishes any such advertisement. R. S. C., c. 164, s. 90.

The time within which a prosecution for an offence under sub-section (*d*) may be commenced is limited to six months. (34)

By section 50 of the Imperial statute 24-25 Vic., c. 96, it was made a misdemeanor, in England, for any person to advertize a reward for the return of stolen property and to use words purporting that no question would be asked, and by section 151 of the same statute it is enacted that, whosoever shall corruptly take any money or reward directly or indirectly under pretense or on account of helping any person to any chattel, money, valuable

(31) 1 Hawk. P. C., 73; Steph. Dig. Cr. L., 122, 401.
(32) 1 Hawk. P. C., c. 59, sec. 2.
(33) Steph. Dig. Cr. L., Articles 156, 157.
(34) See section 551 (*d*), *post*.

security or other property whatsoever which shall by any felony or misdemeanor have been stolen, etc., shall, unless he shall have used all due diligence to cause the offender to be brought to trial for the same, be guilty of felony.

Upon an indictment under this latter section of the Imperial statute it has been held in England that it is not necessary to shew that the prisoner had any connection with the commission of the previous felony, but that it is sufficient to shew that the prisoner had some corrupt and improper design when he received the money and did not *bona fide* intend to use such means as he could for the detection and punishment of the offender. (35)

Where A was charged with corruptly and feloniously receiving, from B, money under pretence of helping the latter to receives goods previously stolen from him, and with not causing the thief to be apprehended, three questions were left to the jury, as follows: — 1. Did A mean to screen the guilty party, or to share the money with him? 2. Did A know the thief and intend to assist him in getting rid of the property by promising B to buy it? and 3. Did A know the thief and, as B's agent, assist B at her request in endeavoring to purchase the stolen property from the thief, not intending to bring the latter to justice? The jury answered the first two questions in the negative and the third in the affirmative; and it was held that the receipt of the money under such circumstances was a corrupt receiving of the money under the statute. (36)

The origin of the above Imperial statute was the 4 Geo. 1, c. 11. The enactment is said by Mr. Blaegstone to have been brought about in the following manner. Referring to the taking of rewards under pretence of helping an owner of goods stolen from him, Mr. Blackstone says, "This was a contrivance carried to a great length of villany in the beginning of the reign of George the First, the confederates of the felons thus disposing of stolen goods at a cheap rate to the owners themselves and thereby stifling all further enquiry. The famous Jonathan Wild had under him a well disciplined corps of thieves who brought in all their spoils to him; and he kept a sort of public office for restoring them to the owners at half price. To prevent which audacious practice, it was enacted by the 4 Geo. 1, c. 11, that whoever, shall take a reward under pretence or helping anyone to stolen goods shall suffer as the felons who stole them, unless he caused such principal felons to be apprehended and brought to trial and also gave evidence against them. Wild still continuing in his own practice was upon this statute at last convicted and executed." (37)

**158. Signing false declaration of execution of judgment of death.** — Every one is guilty of an indictable offence and liable to two years' imprisonment, who knowingly and wilfully signs a false certificate or declaration when a certificate or declaration is required with respect to the execution of judgment of death on any prisoner. R. S. C., c. 181, s. 19.

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(35) R. v. King, 1 Cox C. C., 36.
(36) R. v. Pascoe, 1 Den. C. C., 456; 18 L. J. M. C., 186.
(37) 4 Bl. Com., 134.

PART XI.

## ESCAPES AND RESCUES.

"In reference to the somewhat intricate subject of escape and rescue we have made distinctions, which are, we think, insufficiently recognised by the existing law, between the commission of such offences by peace officers and gaolers, and by other persons." [Royal Commissioners' Report, p. 21.]

**159. Being at large while under sentence of imprisonment.** — Every one is guilty of an indictable offence and liable to two years' imprisonment who, having been sentenced to imprisonment, is afterwards, and before the expiration of the term for which he was sentenced, at large within Canada without some lawful cause, the proof whereof shall lie on him.

**160. Assisting escape of prisoners of war.**— Every one is guilty of an indictable offence and liable to five years' imprisonment who knowingly and wilfully —

(*a*) assists any alien enemy of Her Majesty, being a prisoner of war in Canada, to escape from any place in which he may be detained ; or

(*b.*) assists any such prisoner as aforesaid, suffered to be at large on his parole in Canada or in any part thereof, to escape from the place where he is at large on his parole.

**161. Breaking prison.** — Every one is guilty of an indictable offence and liable to seven years' imprisonment who, by force or violence breaks any prison with intent to set at liberty himself or any other person confined therein on any criminal charge.

**162. Attempting to break prison.** — Every one is guilty of an indictable offence and liable to two years' imprisonment who attempts to break prison, or who forcibly breaks out of his cell, or makes any breach therein with intent to escape therefrom. R. S. C., c. 155, s. 5.

By section 3 (*u*), "prison" includes any penitentiary, common gaol, public or reformatory prison, lock-up, guard-room, or other place in which persons charged with the commission of offences are usually kept or detained in custody.

**Prison breach.** — Under section 161, prison breach is forcibly or violently breaking a prison either by a prisoner confined therein, on a criminal charge, with intent to release himself, or by a third person with intent to release any such prisoner.

If a prisoner imprisoned on a criminal charge climbs over the prison wall, and so sets himself at liberty, this is not a prison breach under the terms of section 161; but it would be punishable as an escape, under, section 163; and where, in getting over the wall the escaping prisoner dis-

turbed and threw down some loose bricks it was held to be a prison-breaking. (1)

Under section 161 the forcible breaking with intent to escape seems to be sufficient to constitute the offence. It does not seem necessary that the prisoner should succeed in regaining his liberty.

To constitute a prison breach as distinguished from a mere escape the prison must be broken, or there must be real force or violence used when the escape is made or attempted. Therefore, if without any obstruction, a prisoner go out of the prison doors, they being opened by the consent or negligence of the gaoler, or if he otherwise escape, without using any kind of force or violence, he will not be guilty of anything more than an escape. (2) In Haswell's case the prisoner, who was convicted of horse stealing, made his escape from the house of correction by tying two ladders together and placing them against the wall of the yard, on the top of which wall was a range of bricks placed loose and without mortar, some of which were thrown down by the prisoner, (it was supposed accidentally), in getting over the wall. Mr. Baron Wood doubted whether there was such force used as to constitute the crime of prison-breaking or whether it amounted to only an escape; and the point being reserved, the judges were unanimously of opinion that it was a prison-breaking. (3)

**Escapes and Rescues.** — In law, an escape has two separate meanings. The one is the going away by the prisoner himself from lawful custody or imprisonment, without any prison-breaking and without any force or violence; and the other is where the officer having lawful charge of a prisoner voluntarily allows him to leave and go free from his place of confinement. (See sub-section (*b*) of sections 165 and 166, *post*).

Under the terms of sub-section (*a*) of sections 165 and 166, a rescue is the deliverance of a prisoner from lawful custody by a third person, or assistance rendered by a third person to any prisoner in escaping or attempting to escape from lawful custody.

**163. Escape from custody or from prison.**—Every one is guilty of an indictable offence and liable to two years' imprisonment who —

(*a.*) having been convicted of any offence, escapes from any lawful custody in which he may be under such conviction ; or

(*b.*) whether convicted or not, escapes from any prison in which he is lawfully confined on any criminal charge.

**164.** Every one is guilty of an indictable offence and liable to two years' imprisonment who being in lawful custody other than as aforesaid on any criminal charge, escapes from such custody.

**165. Assisting to escape.** — Every one is guilty of an indictable offence and liable to seven years' imprisonment who —

(*a.*) rescues any person or assists any person in escaping, or attempting to escape, from lawful custody, whether in prison or not,

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(1) R. v. Haswell, R. and R., 458; Burbridge, Dig. Cr. L., 143.
(2) 1 Hale, 611; 2 Hawk., c. 18, s. 9.
(3) R. v. Haswell, R. and R., 458.

under sentence of death or imprisonment for life, or after conviction of, and before sentence for, or while in such custody upon a charge of any crime punishable with death or imprisonment for life ; or

(*b.*) being a peace officer and having any such person in his lawful custody, or being an officer of any prison in which any such person is lawfully confined, voluntarily and intentionally permits him to escape therefrom.

**166.** Every one is guilty of an indictable offence and liable to five years' imprisonment who —

(*a*) rescues any person, or assists any person in escaping or attempting to escape, from lawful custody, whether in prison or not, under a sentence of imprisonment for any term less than life, or after conviction of, and before sentence for, or while in such custody upon a charge of any crime punishable with imprisonment for a term less than life ; or

(*b.*) being a peace officer having any such person in his lawful custody, or being an officer of any prison in which such person is lawfully confined, voluntarily and intentionally permits him to escape therefrom.

**166a.** Every one is guilty of an indictable offence and liable to one year's imprisonment, who, by failing to perform any legal duty, permits a person in his lawful custody on a criminal charge to escape therefrom. (Added by the *Criminal Code Amendment Act*, 1900, s. 3, which came into force on the 1st January 1901)

This section is identical with section 140 of the English Draft Code.

**167.** Every one is guilty of an indictable offence and liable to two years' imprisonment who with intent to facilitate the escape of any prisoner lawfully imprisoned conveys, or causes to be conveyed, anything into any prison.

**168. Unlawfully procuring a prisoner's discharge.**— Every one is guilty of an indictable offence and liable to two years' imprisonment, who knowingly and unlawfully, under colour of any pretended authority, directs or procures the discharge of any prisoner not entitled to be so discharged, and the person so discharged shall be held to have escaped. R. S. C., c. 155, s. 8.

**169. Punishment of escaped prisoner.** — Every one who escapes from custody, shall, on being retaken, serve, in the prison to which he was sentenced, the remainder of his term unexpired at the time of his escape, in addition to the punishment which is awarded for such escape; and any imprisonment awarded for such offence may

be to the penitentiary or prison from which the escape was made. R. S. C., c. 155, s. 11.

Section 1 of 53 Vic., chap. 37 has not been repealed, and contains the following additional provisions in reference to escapes:—

"Every one who, being sentenced to imprisonment or detention in, or being ordered to be detained in, any reformatory prison, reformatory school, industrial refuge, industrial home or industrial school, escapes or attempts to escape therefrom, is guilty of a misdemeanour, and may be dealt with as follows:—

"The offender may, at any time, be apprehended without warrant and brought before any magistrate, who, upon proof of his identity,—

"(*a.*) In the case of an escape or attempt to escape from a reformatory prison or a reformatory school, shall remand him thereto for the remainder of his original term of imprisonment or detention; or,—

"(*b.*) In the case of an escape or attempt to escape from an industrial refuge, industrial home or industrial school,—

"(i.) May remand him thereto for the remainder of his original term of imprisonment or detention; or

"(ii.) If the officer in charge of such refuge, home or school certifies in writing that the removal of such offender to a place of safer or stricter imprisonment is desirable, and if the governing body of such refuge, home or school applies for such removal, and if sufficient cause therefor is shown to the satisfaction of such magistrate, may order the offender to be removed to and to be kept imprisoned, for the remainder of his original term of imprisonment or detention, in any reformatory prison or reformatory school, in which by law such offender may be imprisoned for a misdemeanour,—and when there is no such reformatory prison or reformatory school, may order the offender to be removed to and to be so kept imprisoned in any other place of imprisonment to which the offender may be lawfully committed;

"(*c.*) And in any case mentioned in the preceding paragraphs (*a*) and (*b*) of this subsection, or if the term of his imprisonment or detention has expired, the magistrate may, after conviction, sentence the offender to such additional term of imprisonment or detention, as the case may be, not exceeding one year, as to such magistrate seems a proper punishment for the escape or attempt to escape."

# TABLE OF OFFENCES UNDER TITLE III.

## INDICTABLE OFFENCES (1)

| No. | Sec. | Offence. | Punishment. | Tribunal. |
|---|---|---|---|---|
| 1 | 131 | Corruption of Judges and Legislators | Fourteen years | Sup. Court Cr. Juris. |
| 2 | 132 | Corruption of officers of justice | Fourteen years. | do |
| 3 | 133 | Frauds upon the Government | $1,000 fine, and one year also 6 months extra in default of paying fine. Disabled from contracting with or holding office under Government | do |
| 4 | 135 | Breach of trust by public officer | Five years | do |
| 5 | 136 | Corrupt practices in municipal affairs. | $1,000 fine and 2 years, also 6 months extra, in default of paying fine. | Sup. Court Cr. Juris. |
| 6 | 137 | Selling offices, etc | Five years (See section 954). Disability from holding offices | do |
| 7 | 138 | Disobedience to a statute | One year | Gen'l or Qu'ter Sess. |
| 8 | 139 | Disobedience to orders of Court | One year | do |
| 9 | 140 | Neglect of peace officer to suppress riot | Two years | do |
| 10 | 141 | Neglect to aid peace officer in suppressing riot | One year. | do |
| 11 | 142 | Neglect to aid peace officer arresting offender | Six months | do |
| 12 | 143 | Misconduct of officers entrusted with warrants, etc | Fine and imprisonment. (See section 934 & 951) | do |
| 13 | 144 | Obstructing public officer | Ten years | do |
| 14 | 144 | Obstructing peace officer (2) | Two years | do |
| 15 | 146 & 148 | Perjury | Fourteen years and life | do |
| 16 | 146 | Subornation of perjury | Fourteen years | do |
| 17 | 147 | False oaths | Seven years | do |
| 18 | 150 | False statements | Two years | do |
| 19 | 151 | Fabricating evidence | Seven years | do |
| 20 | 152 | Conspiracy to bring false accusation | Fourteen years and ten years | do |
| 21 | 153 | Administering oaths without authority | $50 fine, or 3 months. | do |
| 22 | 154 | Corrupting jurors or witnesses | Two years | do |
| 23 | 155 | Compounding penal actions | Fine, not exceeding penalty compounded for | do |
| 24 | 156 | Corruptly taking reward for helping to recover stolen property | Seven years | do |
| 25 | 157 | Advertizing reward for stolen property | $250 penalty | Civil Court. |
| 26 | 158 | Signing false certificate of executing death sentence | Two years. | Gen'l or Qu'ter Sess. |
| 27 | 159 | Being at large while under sentence | Two years | do (3) |
| 28 | 160 | Assisting escape of prisoner of war | Five years | do |
| 29 | 161 | Prison-breach | Seven years | do |
| 30 | 162 | Attempted prison-breach | Two years | do |
| 31 | 163 & 164 | Escapes from lawful custody | Two years | do |
| 32 & 33 | 165 & 166 | Rescuing prisoners or assisting escape. | Seven years and 5 years | do |
| 33a | 166a | Permitting escape by failure to perform duty | One year | do |
| 34 | 167 | Conveying anything into prison to aid escape | Two years | do |
| 35 | 168 | Unlawfully procuring prisoner's discharge | Two years | do |

See comments (under Table of Indictable Offences at the end of Title II, *ante*), on the Summary Trials of Indictable Offences, Fines, Sureties, Suspension of sentence, Restitution, Compensation and Costs.

(1) The offences under Title III are all indictable except as to No. 14 more particularly mentioned in note (2).

(2) This offence, besides being indictable, may also be tried summarily before two justices, and, in that case, the punishment upon conviction is 6 months imprisonment with hard labor or $100 fine.

(3) See sec. 540, *post*, as amended by 57-58 Vic., c. 57.

# TITLE IV.

## OFFENCES AGAINST RELIGION, MORALS AND PUBLIC CONVENIENCE.

### PART XII.

### OFFENCES AGAINST RELIGION.

**170. Blasphemous libels.** — Every one is guilty of an indictable offence and liable to one year's imprisonment who publishes any blasphemous libel.

2. Whether any particular published matter is a blasphemous libel or not is a question of fact. But no one is guilty of a blasphemous libel for expressing *in good faith* and *in decent language*, or attempting to establish by arguments used in good faith and conveyed in decent language, any opinion whatever upon any religious subject.

Among the old English common law and statutory offences against religion were, — 1, All blasphemies, (oral or written), against God, — as denying His being or providence, — and all contumelious reproaches of Jesus Christ; 2, all profane scoffing, (oral or written), at the Holy Scriptures, or exposing any part thereof to contempt or ridicule; and, 3, impostures in religion, — as falsely pretending to extraordinary commissions from God, and terrifying and abusing the people with false denunciations of judgment, etc. (1)

But modern statutes and decisions have greatly modified the old law: so that many things which were formerly indictable as blasphemy are not so now. At the present day, no prosecution could be sustained for, *calmly* and *dispassionately* and *with decent language*, discussing or even calling in question the truth of Christianity. The offence of blasphemy consists, now, in attacking Christianity in a vulgar, profane or indecent manner, and not in endeavoring, by legitimate argument, to prove its falsity.

A blasphemous libel consists in the publication of any profane words vilifying or ridiculing God, Jesus-Christ, the Holy-Ghost, the Old or New Testament or Christianity in general, with intent to shock and insult believers, or to pervert or mislead the ignorant and unwary; and if a publication be "full of scurrilous and opprobrious language, — if sacred subjects are treated with levity, if indiscriminate abuse is employed instead of argument, — then a design to wound the religious feelings of

(1) 1 Hawk. P. C., 358-365.

others may be readily inferred. But where the work is free from all offensive levity, abuse and sophistry, and is, in fact the honest and temperate expression of religious opinions conscientiously held and avowed, it is not a blasphemous libel." (2)

In one case, Mr. Justice Erskine said: "It is indeed still blasphemy scoffingly or irreverently to ridicule or impugn the doctrines of the Christian faith, yet any man may without subjecting himself to any penal consequences, soberly and reverently examine and question the truth of those doctrines which have been assumed or essential to it." (3)

The Royal Commissioners, in their report on the English Draft Code, say, in regard to blasphemous libel, that they deem it inexpedient to define it otherwise than by the use of that expression. They then go on to say, "As however we consider that the essence of the offence (regarded as a subject for criminal punishment) lies in the outrage it inflicts upon the religious feelings of the community, and not in the expression of erroneous opinions, we have added a proviso to the effect that no one shall be convicted of a blasphemous libel only for expressing in good faith and decent language any opinion whatever upon any religious subject. We are informed that the law was stated by Mr. Justice Coleridge to this effect in the case of R. v. Pooley tried at Bodmin in 1857. We are not aware of any later authority on the subject." [See pp. 21 and 22 of the Report.]

The law, as laid down by Mr. Justice Coleridge in R. v. Pooley (4) and as since stated by Lord Chief Justice Coleridge in the case of R. v. Ramsay and Foote, is in effect that the publication of any matter, which has reference to God, Jesus-Christ, the Bible or the Book of Common Prayer, intended and calculated to wound the feelings of mankind or to excite contempt and hatred against the church or religion or to promote immorality is blasphemous; but that matters couched in decent and proper language and published and intended in good faith to advance religious opinions, which the publisher regards as true, are not blasphemous merely because their publication is likely to wound the feelings of those who have contrary opinions or because their general adoption might tend by lawful means to alterations in religion or in the constitution of the church. (5) Lord Chief Justice Coleridge in the course of his charge in the case of R. v. Ramsay and Foote, said, "*If the decencies of controversy are observed*, even the fundamentals of religion may be attacked, without a person being guilty of blasphemous libel."

The same principle was followed in the case of the Queen v. Bradlaugh and others, where it was held that publications discussing with gravity and decency questions as to christian doctrines or statements in the Hebrew Scriptures, and even questioning their truth are not to be deemed blasphemous so as to be fit subjects for criminal prosecution but that publications which, in an indecent and malicious spirit, assault and asperse the truth of Christianity or of the Scriptures, in language calculated and intended to shock the feelings and outrage the belief of mankind are properly to be regarded as blasphemous so as to be fit subjects for criminal prosecution. (6)

By section 634, *post*, every one accused of publishing a *defamatory* libel may plead the truth of the matter published and that its publication was

(2) Odgers Lib. and Sl., 3rd Ed., 463, 464.
(3) Shore v. Wilson, 9 Cl. and F., 524-5.
(4) Steph. Dig. Cr. Law, 125, *note* 2.
(5) R. v. Ramsay and Foote, 15 Cox C. C., 231.
(6) R. v. Bradlaugh and others, 15 Cox C. C., 217, 218.

for the public benefit. But this does not apply to a blasphemous libel, the truth of which cannot be pleaded as a defence. (7)

**171. Obstructing officiating clergyman.** — Every one is guilty of an indictable offence and liable to two years' imprisonment who —

(*a.*) by threats or force, unlawfully obstructs or prevents, or endeavours to obstruct or prevent, any clergyman or other minister in or from celebrating divine service, or otherwise officiating in any church, chapel, meeting-house, school-house or other place for divine worship, or in or from the performance of his duty in the lawful burial of the dead in any church-yard or other burial place. R. S. C., c. 156, s. 1.

**172. Violence to officiating clergyman.** — Every one is guilty of an indictable offence and liable to two years' imprisonment who strikes or offers any violence to, or, upon any civil process or under the pretence of executing any civil process, arrests any clergyman or other minister who is engaged in or, to the knowledge of the offender, is about to engage in, any of the rites or duties in the next preceding section mentioned, or who, to the knowledge of the offender is going to perform the same, or returning from the performance thereof. R. S. C., c. 156, s. 1.

**173. Disturbing religious meetings.** — Every one is guilty of an indictable offence and liable, on summary conviction, to a penalty not exceeding fifty dollars and costs, and in default of payment to one month's imprisonment, who wilfully disturbs, interrupts or disquiets any assemblage of persons met for religious worship, or for any moral, social or benevolent purpose, by profane discourse, by rude or indecent behaviour, or by making a noise, either within the place of such meeting or so near it as to disturb the order or solemnity of the meeting. R. S. C., c. 156, s. 2.

SUNDAY OBSERVANCE.

It has been held that cab driving on Sunday, by a cab driver, is not an offence under the Lord's Day Acts of Ontario, (R.S.O., 1897, c. 246; R.S.O., 1887, c. 203), a cab driver not being one of the persons included in the classes mentioned in the Acts, and, in the case of a conviction on that charge, the conviction was held bad, moreover, for uncertainty, because it did not specify the act or acts which constituted the offence, it being merely alleged that, on a certain Sunday, the defendant did unlawfully exercise the worldly business of his ordinary calling as a cab driver, the Court being of opinion that it is not sufficient.— *unless expressly declared by statute to be so,* — to describe the offence merely in the words of the

(7) Cooke v. Hughes, R. & M., 115; R. v. Hicklin, L. R., 3 Q. B., 360; 37 L. J. M. C., 89; 11 Cox C. C., 19.

statute, without specifying the act or acts constituting the alleged offence. (8)

Where a municipal by-law, as to *Sunday Observance*, exceeded in its prohibition the terms of the provincial statute on which the by-law was based, by including classes of persons not included in such statute, it was held to be too wide in its scope and void for unreasonableness. (9)

Where a chemist and druggist was convicted of having, in his shop in Toronto, unlawfully sold and exposed and offered for sale, on the Lord's Day, certain goods, by selling two glasses of ice cream soda, thereby doing and exercising the worldly business and work of his ordinary calling, his counsel applied, in *certiorari* proceedings, for a rule *nisi* to quash the conviction on the ground that it was bad, because, although the magistrate had stated that the articles in question were sometimes sold as medicines, there was no evidence in the case to shew that on the occasion in question they were not sold as medicines, — the result being that there was no evidence to support the magistrate's finding that the sale was not a sale of drugs or medicines within the exception contained in the statute under which the conviction was rendered; but the Court held that it was well established that the finding of the magistrate upon a question of fact within his jurisdiction would not be reviewed upon *certiorari*, and that the defendant's remedy (if any) was by appeal; and the rule was refused. (10)

In another Ontario case, a defendant was convicted of having in his shop sold two glasses of ice cream, to two constables, on a Sunday. From the evidence adduced at the trial and upon appeal, it appeared that the defendant carried on business, — under the authority of a City license, — as an eating house and victualling house keeper, and that, among other things, he kept, for sale to his customers, soda water and ice cream, that his place was largely patronized by University and College students, many of whom boarded at his place by the week, including Sundays, that his place was kept open on Sundays, that, in addition to his ordinary bill of fare, he provided ice cream which, however, was not included in the price of a meal but charged for, extra. It was established by medical testimony that ice cream is a food. The Court of Appeal, in rendering judgment, reviewed the statutes, relative to the observance of the Lord's Day, on which the Ontario statute under which the proceedings were taken, was based, commencing with the English Act, 29 Car. 2, c. 7, which enacts, among other things, that no tradesman, etc., shall do or exercise worldly labor, business or work of their ordinary calling upon the Lord's Day, (selling drugs and medicines *and other works of necessity excepted*), and, after reviewing the facts at length and discussing the meaning of the statutory exception and comparing the English enactments with the Ontario Act, it was held that, on the Sunday in question, the defendant was carrying on strictly and exclusively his business as a victualler or eating house keeper, that the business he thus carried on was a work of necessity legally performed by him, in view of the express exception above referred to, and that, under all the circumstances of the case, the supplying of the two constables with the ice cream in question was the supplying of a refreshment in the nature of a light meal in the ordinary course of the defendant's business as an eating house keeper or a victualling house keeper, and was not an offence. Conviction quashed. (11)

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(8) R. v. Somers, 1 Can. Cr. Cas., 46. See, also, R. v. Budway, 8 C.L.T., 269, and R. v. Spain, 18 O. R., 385.
(9) R. v. Petersky, 1 Can. Cr. Cas., 91.
(10) R. v. Urquhart, 20 C. L. T., 7.
(11) R. v. Albertie, 1 Can. Cr. Cas., 356.

It has been held by the Supreme Court of Nova Scotia, (McDonald, C. J., dissenting), that a Sunday Observance law of that province, passed before Confederation, was legislation dealing with public wrongs, and that, as by the British North America Act the criminal law is placed within the exclusive legislative authority of the Dominion Parliament, the law in question became, upon Confederation, a part, as to that province, of the criminal law of Canada, and that as such it is subject to repeal or amendment by a Dominion statute only and not by an Act of the provincial legislature, although similar legislation as applied to various classes only and not to the public generally would be within the jurisdiction of the provincial legislature, as dealing with civil rights. (12)

## PART XIII.

## OFFENCES AGAINST MORALITY.

**174. Sodomy.**— Every one is guilty of an indictable offence and liable to imprisonment for life who commits buggery, either with a human being or with any other living creature. R. S. C., c. 157, s. 1.

**175.** Every one is guilty of an indictable offence and liable to ten years' imprisonment who attempts to commit the offence mentioned in the next preceding section. R. S. C., c. 157, s. 1.

In the common law,—which is not affected, on this subject, by the Criminal Code,—there is a conclusive presumption that a minor under fourteen is physically incapable of committing sodomy; (1) but he may be convicted, under section 260, *post*, of an indecent assault upon a person under fourteen or upon a person over fourteen, if, in the latter case, his act is against the will of the other party.

See section 261, *post*, which provides that the consent of children under fourteen years of age is no defence to a charge of indecent assault.

**176. Incest.**— Every parent and child, every brother and sister, and every grandparent and grandchild, who cohabit or have sexual intercourse with each other, shall each of them, *if aware of their consanguinity*, be deemed to have committed incest, and be guilty of an indictable offence and liable to fourteen years' imprisonment, and the male person shall also be liable to be whipped : Provided that, if the court or judge is of opinion that the female accused is a party to such intercourse only by reason of the restraint, fear or duress of the other party, the court or judge shall not be bound to impose any punishment on such person under this section. 53, Vic., c. 37, s. 8.

Incest, adultery and fornication are not common law offences; but in England they are criminally cognizable under the ecclesiastical law, al-

(12) R. v. Halifax Electric Tramway Co., 1 Can. Cr. Cas., 424.
(1) R. v. Hartlen, 2 Can. Cr. Cas., 12.

though, as Sir James F. Stephen points out, the only one which is prosecuted in these days is incest, an instance of which he mentions as having been prosecuted in recent times in the Bishop of Chichester Court. (2)

There being no competent Ecclesiastical Court in Canada, and the ecclesiastical law of England not being in force here, (3) none of these offences have heretofore been punishable in any part of Canada, except in the provinces of Nova-Scotia, New-Brunswick and Prince-Edward Island, under special enactments passed by the legislatures of those provinces for the punishment of incest, (4) and also, as regards New-Brunswick, for the punishment of adultery. (5)

See section 188, *post*, as to conspiracy to induce a woman to commit adultery or fornication.

The word "brother" used in the statutes of Vermont, punishing incest, has been held to include a brother of the half-blood. (6)

It has been held that it is not necessary to prove more than a single sexual act. (7) But although proof of one commission of the offence is sufficient for conviction, proof is admissible of the various times and circumstances of the repetition of the offence. (8)

Either party to the offence, or both of them may be indicted. In a Nebraska case a party was indicted alone for the crime of incest, under the provisions of section 203 of the Criminal Code of that State. *Held* that he was properly indicted, and that it was not necessary that the indictment should be against both parties to the incestuous intercourse. (9)

The relationship must not only exist but the accused parties must have been aware of it; and therefore ignorance on the part of either party of the consanguinity, would relieve such party from culpability.

Oral evidence is not admissible in the province of Quebec to prove relationship; but the relationship must be established by the production of extracts from the registers of civil status, as required by the provincial laws of evidence, which are made applicable to criminal proceedings by section 21 of the *Canada Evidence Act*, unless the absence of such registers is established. (10)

**177. Indecent acts.** — Every one is guilty of an offence and liable, on summary conviction before two justices of the peace, to a fine of fifty dollars or to six months' imprisonment with or without hard labour, or to both fine and imprisonment, who wilfully—

(*a*.) in the presence of *one* or more persons does any indecent

(2) 2 Steph. His. Cr. L., 396.

(3) *In re* Lord Bishop of Natal, 3 Moo. C. C. N. S., 115; Burb. Dig. Cr. L. 162.

(4) R. S. N. S., (3rd S.), c. 160, s. 2; R. S. N. B., c. 145, s. 2; 24 Vic. (P. E. I.), c. 27, s. 3.

(5) R. S. N. B., c. 145, s. 3; Burb, 162.

(6) S. v. Wyman, (Vermont Supreme Ct.), 8 Atl. Rep., 900; 9 Cr. L. Mag., 574.

(7) S. v. Brown, 23 N. E. Rep. (Ohio), 747; 12 Cr. L. Mag., 882.

(8) P. v. Cease, 45 N. W. Rep. (Mich.), 585; Mathis v. C. (Ky.), 13 S. W. Rep., 360; 12 Cr. L. Mag., 883.

(9) Yeoman v. S. (Nebraska Supreme Ct.), 31 N. W. Rep., 669; 9 Cr. L. Mag., 411.

(10) R. v. Garneau, Que. Jud. Rep., 8 Q. B., 447; 4 Can. Cr. Cas., 69.

act in any place to which the public have or are permitted to have access ; or

(*b.*) does any indecent act in any place intending thereby to insult or offend any person. 53 V., c. 37, s. 6.

Section 6, of 53 Vic., c. 37, (which remains unrepealed), expressly mentions *indecent exposure of the person* as a punishable offence. It reads as follows:

"Every one who wilfully commits any indecent exposure of the person or act of gross indecency in any public place, in the presence of *one* or more persons, is guilty of a misdemeanor, and liable, on summary conviction before two justices of the peace, to a fine of fifty dollars or to six months' imprisonment with or without hard labor, or to both fine and imprisonment."

It has been held in England that the offence of indecent exposure of the person may be indictable if committed before several persons, even if the place be not public (11), and that men who bathe, — without any screen or covering, — so near to a public footpath that exposure of their persons must necessarily occur, are guilty of an indictable nuisance. (12) Nor is it any defence that there has been, so long as living memory extends, an usage so to bathe at the place, and that there has been no exposure beyond what is necessarily incidental to such bathing. (13)

In a case in New-York six women in a room in a bawdy-house exposed their persons for hire to five men, the doors, windows and shutters being closed, and it was held that thereby they committed this offence ; the place being deemed public. (14)

The act of indecency must be *wilful;* and therefore one, in a place however public, having by careful looking satisfied himself that no person was in a position to see him, might innocently do what would constitute an exposure if people were present. So that, if under these circumstances he happened, in fact to be seen, he would not be subject to punishment. (15)

Where, upon a race-course, a booth was kept for the purpose of an indecent exhibition, — the public having no right of admission thereto except by paying, — it was held, in England, that such booth was a public place so as to support an indictment for an indecent exhibition therein. (16)

An omnibus has also been held to be a sufficiently public place to sustain an indictment for an indecent exposure therein; (17) and so also has the roof of a house visible from the back windows of several other houses. (18)

**178. Gross indecency.** — Every male person is guilty of an indictable offence and liable to five years' imprisonment and to be whipped who, in *public* or *private*, commits, or is a party to the commission of, or procures or attempts to procure the commission

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(11) R. v. Wellard, 14 Q. B. D., 63; L. J. (M. C.), 14.
(12) R. v. Reid, 12 Cox, 1; *per Cockburn*, C. J.; Arch. Cr. Pl. and Ev., 21st Ed. 1061.
(13) Ib. *See also* R. v. Crunden, 2 Camp., 89.
(14) P. v. Bixby, 4 Hun., 636; 1 Bish. New Cr. L. Com., s. 1129.
(15) 1 Bish. New Cr. L. Comm., (8th Ed.), s. 1133.
(16) R. v. Saunders, 13 Cox C. C., 116.
(17) R. v. Holmes, 6 Cox C. C., 216.
(18) Thallman's Case, L. & C., 326.

by any male person, of any act of gross indecency with another male person. 53 V., c. 37, s. 5.

It has been held in England that it is not necessary, in order to convict a male person, under section 11 of the *Criminal Law Amendment Act*, 1885, of an act of gross indecency with another male person, that such other male person should also be charged with and convicted of such act of indecency. It is an indictable offence, under the English Act above mentioned, for one male person to procure the commission by a second male person of an act of gross indecency with himself, the first mentioned of such persons. (19)

**179. Publishing obscene matter.** — Every one is guilty of an indictable offence and liable to two years' imprisonment who knowingly, without lawful justification or excuse —

(*a.*) manufactures, or sells, or exposes for sale or to public view, or distributes or circulates, or causes to be distributed or circulated any obscene book, or other printed, typewritten, or otherwise written matter, or any picture, photograph, model or other object tending to corrupt morals; or

(*b.*) publicly exhibits any disgusting object or any indecent show ; or

(*c.*) offers to sell, advertises, publishes an advertisement of, or has for sale or disposal any medicine, drug or article intended or represented as a means of preventing conception or causing of abortion or miscarriage.

2. No one shall be convicted of any offence in this section mentioned if he proves that the public good was served by the acts alleged to have been done and that there was no excess in the acts alleged beyond what the public good requires.

3. It shall be a question for the court or judge whether the occasion of the manufacture, sale, exposing for sale, publishing, or exhibition is such as might be for the public good, and whether there is evidence of excess beyond what the public good requires in the manner, extent or circumstances in, to or under which the manufacture, sale, exposing for sale, publishing or exhibition is made, so as to afford a justification or excuse therefor; but it shall be a question for the jury whether there is or is not such excess.

4. The motives of the manufacturer, seller, exposer, publisher or exhibitor shall in all cases be irrelevant. (As amended by the *Criminal Code Amendment Act*, 1900, 63-64 V., c. 46, s. 3, which came into force on the 1st January 1901.)

The corresponding section of the English Draft Code does not contain the words of the above sub-section (*c*), but has instead the clause "publishes any obscene libel," and it also omits the provision contained in

(19) R. v. Jones and another, 18 Cox C. C., 207.

paragraph 2 of the above section. The English section makes the punishment two years imprisonment *with hard labor*.

The Royal Commissioners in their report say that the section of the English Draft Code as to obscene publications expresses the existing law, but that it puts it in a much more definite form than before. They add, "We do not, however, think it desirable to attempt any definition of obscene libel other than that conveyed by the expression itself."

It will be seen by sub-section (*e*) of section 207 and by section 208, *post*, that any one, *openly exposing or exhibiting in any street, road, highway or public place any indecent exhibition*, is liable to be summarily convicted as a vagrant.

Where a defendant had been summarily convicted of having, without lawful excuse or justification, exposed to public view an obscene book tending to corrupt morals, — the evidence shewing that the book in question was one describing certain diseases and that it was distributed *gratis* by the defendant with the object of assisting the sale by him of certain medicines, — and the defendant's counsel, on a motion to make absolute a rule *nisi* to quash the conviction, contended that the conviction was bad on its face for not disclosing the offence alleged to have been committed by setting out the alleged obscene portions of it, and in simply following the language of section 179, and that it should not be amended because an offence was not shewn to have been committed of the nature specified in the conviction, the book in question not being one tending to corrupt public morals,—it was held that the conviction was bad on its face and could not be amended by setting out such parts of the book as might be deemed obscene or tending to corrupt public morals; and the rule was made absolute. (20)

This case appears to have been decided on the strength of, (among other authorities), the decision of the English Court of Appeal in the case of Charles Bradlaugh and Annie Besant, who were charged with and convicted of having published an obscene book called "Fruits of Philosophy," professedly a work on medical science and political economy, and whose conviction was, in appeal, set aside on the ground that the indictment was bad, after verdict, because it did not set out the alleged obscene portions of the work, it being held that, as the words of a libel constitute the crime, the rule of the common law, — when the common law is unaltered by any statutory provision to the contrary, — is that the words of the alleged libel, (whether defamatory, blasphemous, seditious or obscene), must be set out in the indictment, and that their omission therefrom is a defect which could be attacked either by demurrer, by motion in arrest of judgment or by appeal, (writ of error). (21)

But, in England, since the Bradlaugh case, the law has been altered by the *Law of Libel Amendment Act*, 1888, section 7 of which renders it unnecessary to set out in the indictment the obscene passages in full, by providing that it is "sufficient to deposit the book, newspaper or other document containing the alleged libel with the indictment or other judicial proceeding, together with particulars shewing, precisely, by reference to pages, columns and lines, in what part of the book, newspaper or other document the alleged libel is to be found, and such particulars shall be deemed to form part of the record."

And see section 613, *post*, of the present Code, which, by sub-section (*e*) thereof, declares that no count shall be objectionable or insufficient on the

(20) R. v. Gibbons, 14 C. L. T., 503.
(21) Bradlaugh & Besant v. R., 3 Q. B. D., 607; 14 Cox C. C., 68.

ground that it does not set out the words used where words used are the subject of the charge; and see, also, section 615, *post*, which expressly declares that no count for publishing a blasphemous, seditious, obscene or defamatory libel, or for selling or exhibiting an obscene book, etc., shall be deemed insufficient for not setting out the words thereof, provided that a particular may be ordered to be furnished stating what passages in such book, etc., are relied on in support of the charge.

**180. Posting immoral books, &c.** — (As amended by the *Criminal Code Amendment Act 1900*, 63-64 Vic., c. 46, s. 3, which came into force on the 1st January 1901). — Every one is guilty of an indictable offence and liable to two years' imprisonment who posts for transmission or delivery by or through the post —

(*a.*) any obscene or immoral book, pamphlet, newspaper, picture, print, engraving, lithograph, photograph or any publication, matter or thing of an indecent, immoral, or scurrilous character ; or

(*b.*) any letter upon the outside or envelope of which, or any post card or post band or wrapper upon which there are words, devices, matters or things of the character aforesaid ; or

(*c.*) any letter or circular concerning schemes devised or intended to deceive and defraud the public or for the purpose of obtaining money under false pretenses.

**181. Seduction.** — Every one is guilty of an indictable offence and liable to two years' imprisonment who seduces *or* has illicit connection with any girl of previously chaste character, of or above the age of fourteen years and under the age of sixteen years. R. S. C., c. 157, s. 3 ; 53 Vic., c. 37, s. 3. (As amended by 56 Vic., c. 32).

No prosecution for any offence under this section or under sections 182, 183, 185, 186 and 187, can be commenced after the expiration of one year from its commission. (22)

No conviction can be had under this or any of the remaining sections of this part upon the evidence of one witness, unless such witness is corroborated in some material particular implicating the accused. (23)

Where the girl is *under* the age of fourteen, the charge should be made under section 269, *post*, for carnally knowing her.

**Previous chastity.** — The above section, 181, provides that the girl seduced or with whom the illicit intercourse is had shall be of previously chaste character; and, in some American cases, it has been held that, although the law *presumes* that every woman is chaste and of good repute, it also *presumes* every one to be innocent of crime till proven guilty, and, that, therefor, in cases of seduction, the burden is upon the prosecution to prove, in the first instance, that the girl is of good repute. (24) But it will be seen that, by section 183A, *post*, of our Code, it is now expressly provided

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(22) See section 551 (*c*), *post*.

(23) See section 684, *post*.

(24) S. v. McCaskey, (Mo.), 16 S. W. Rep., 511; 13 Cr. L. Mag., 819. See, also, Norton v. S., (Miss.), 16 So., 264; 17 Cr. L. Mag., 264.

that the burden of proof of the previous *unchastity* of the girl or woman under sections 181, 182 and 183 shall be upon the accused.

On an indictment for seduction of a virtuous unmarried female, it was held, in an American case, that the want of chastity may be considered on the question of whether the girl, though a virgin, was really seduced or whether she shared the intercourse for the gratification of lascivious propensities and without being influenced by the acts or importunity of the accused; (25) and, in another American case, it was held that an act of carnal intercourse induced simply by mutual desire of the parties to gratify the sexual passion is not seduction. (26)

It should, however, be further observed that the above section, 181, of our Code provides that every one is guilty of an indictable offence who "*seduces* or *has illicit connection*," etc.; so that while seduction, if proved, is punishable, it seems, also, that the mere act of *illicit connection* with a previously chaste girl between *fourteen* and *sixteen* years of age is sufficient of itself to constitute an offence under this section.

**Proof of age.** — With regard to proof of the child's age, see the English case of R. v. Weaver, in which the defendant was indicted for and found guilty of carnally knowing a girl under twelve and over ten, and in which it was held that an extract from a register of births, purporting to be signed and certified by a deputy superintendent registrar as the person in whose custody the register was, was admissible in evidence on its mere production, and that, — in the testimony of the child's grandmother, who testified that she believed the prosecutrix to be the child named in the extract, — there was sufficient evidence of the identity of the prosecutrix with the child mentioned in the extract. (27)

Where the mother of a child stated its age, in the first instance, but in cross examination appeared neither to know the year nor the month of its birth, it was held that there was evidence to go to the jury of the child's age. (28)

By an addition made to the Criminal Code, by the *Criminal Code Amendment Act*, 1900, it is now provided, that in order to prove a child's age for the purposes of sections 181, etc., the following shall be sufficient *prima facie* evidence, namely, "(*a*) any entry or record by an incorporated society or its officers having had the control or care of the child at or about the time of its being brought to Canada, if such entry or record has been made before the alleged offence was committed;" and that "(*b*) in the absence of other evidence, or by way of corroboration of other evidence, the judge or the jury before whom an indictment is tried, or the justice before whom a preliminary enquiry thereinto is held, may infer the age from the child's appearence. (29)

**Corroboration.** — The corroboration made necessary by section 684, *post*, may consist of the accused's admission, made after the girl attained the age of sixteen, that he had had connection with her; and an admission, made by the accused before being charged with the offence, that he had been advised that if he could get the girl to marry him he would escape punishment, is corroborative evidence implicating him and is proper to be considered by a jury or by a judge exercising the functions of a jury. (30)

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(25) O'Neill v. S. (Ga.), 11 S. E. Rep., 856.
(26) P. v. DeFore, 31 N. W. Rep., 585; 9 Cr. L. Mag., 426.
(27) R. v. Weaver, L. R., 2 C. C. R., 85; 45 L. J. M. C., 13.
(28) R. v. Nicholls, 10 Cox C. C., 476; Arch. Cr. Pl. & Ev., 21st Ed., 822.
(29) See section 701A, *post*.
(30) R. v. Wyse, 2 N. W. T. Rep., (Part 1), 82; 1 Can. Cr. Cas., 6.

Mere proof of opportunity to have sexual intercourse is not sufficient corroboration. (31)

Evidence of the girl's pregnancy and of her having been employed in domestic service at the defendant's residence and of facts shewing merely a strong probability of there having been no opportunity at which any other man could have been responsible for her condition does not constitute corroborative evidence implicating the accused and which is required by section 684 in order to sustain a conviction. (32)

**Evidence of a higher crime than seduction.** — Where a prisoner was indicted and convicted, under section 3, clause *a* of the R.S.C., c. 157, of having seduced a girl under sixteen, it was held that he was properly convicted of the offence, although the evidence adduced would, — if believed in toto, — have supported a conviction for rape, — (an indictment for which had been previously ignored by the Grand Jury), — the Court, in confirming the conviction remarking that the Jury, (as they were perfectly competent to do), had evidently given credit to the girl's evidence as to seduction but had not accepted her statement with reference to violence. (33)

This was the principle acted upon in an American case in which it was held that, in a case of seduction, it was proper to instruct the jury that before acquitting on the ground of there being evidence of the commission of a higher offence, — for instance, rape, — they must believe that such evidence would, on a trial for the higher offence, have been sufficient to justify a conviction, but that if they believed that, although the defendant had made use of force, the prosecutrix had yielded her consent, however reluctantly, before the carnal act was accomplished, the defendant would not be guilty of the higher crime. (34)

There is an important difference between section 181 of our Code and section 3, clause *a* of the R.S.C., c. 157, the latter making it a criminal offence to *seduce* AND *have illicit connection* with a girl of previously chaste character between the ages of fourteen and sixteen, while, as already above observed, section 181, *ante*, makes it a criminal offence either to *seduce* OR *have illicit connection* with such a girl.

**182. Seduction under promise of marriage.** — Every one, above the age of twenty-one years, is guilty of an indictable offence and liable to two years' imprisonment who, *under promise of marriage*, seduces *and* has illicit connection with any unmarried female of previously chaste character and under twenty-one years of age. 50-51 V., c. 48, s. 2.

The word "seduce," though a general term having a variety of meanings according to the subject to which it is applied, has, when it is used with reference to the conduct of a man towards a woman, a precise and determinate signification, and is universally understood to mean an enticement of her on his part to surrender her chastity, by means of some art, influence, promise or deception calculated to accomplish that object, and to include the yielding of her person to him as much as if it was expressly stated. (35)

(31) S. v. Gnagy, (Iowa), 50 N. W. Rep., 882; 14 Cr. L. Mag., 522.
(32) R. v. Vahey, 2 Can. Cr. Cas., 258.
(33) R. v. Doty, 14 C. L. T., 298; 25 O. R., 362.
(34) R. v. Ingle, 31 S. W. Rep., 20; 17 Cr. L. Mag., 430.
(35) S. v. Patterson, 88 Mo., 88.

The offence consists in enticing a woman from the path of virtue and obtaining her consent to illicit intercourse by means of promises made at the time. The promise and yielding her virtue in consequence thereof is the gist of the offence. If she resists, but finally assents or yields induced thereto by or in reliance upon the promise made, the offence is committed. (36)

To establish a charge of seduction it must be made to appear that the intercourse was accomplished by some artifice or deception and that there was something more than a mere appeal to the lust or passion of the woman. (37)

Where the law, as in the above section, 182, expressly provides that the seduction must be accomplished by means of a promise to marry, the offence is committed if the man has had carnal intercourse to which the woman assented by reason of a promise of marriage made by the man at the time and to which without the promise she would not have yielded. (38)

It has been held by the New York Court of Appeal that, where a defendant had induced a woman to have sexual intercourse with him by promising to marry her in case of her becoming pregnant, he was not guilty of seduction under promise of marriage, the Court remarking that the statute, making seduction under promise of marriage a crime, was passed to protect a confiding and chaste woman in yielding to the solicitation of the man who promised to marry her and not for the purpose of protecting a woman who was willing to consent to the act and who only asked for a promise to marry her in case of her lapse from chastity being discovered by reason of her becoming pregnant as a result of the intercourse. (39)

A defendant was convicted for that, being a person above the age of twenty one years, he did, under promise of marriage, seduce and have illicit connection with an unmarried female of previously chaste character and under the age of twenty one, — the trial judge charging the jury that if the seduction took place while there was between the parties an existing engagement to marry, the Act applied. *Held*, a misdirection, that the seduction contemplated by the Act must be accomplished by means of a promise of marriage, that the jury should have been so directed, and that, therefore, there was a mistrial; and a new trial was ordered. (40)

**Corroboration.** — With regard to the necessity of corroboration required by section 684, *post*, it has been held in an American case that, where the woman or girl is the only witness, evidence otherwise of such circumstances as usually accompany a marriage engagement is sufficient to satisfy that prevision of the law which requires that the evidence of the woman in a trial for seduction under promise of marriage must as to the promise of marriage be corroborated to the same extent as that of the principal witness in a case of perjury; (41) and, again, where the law makes it an offence to seduce an "innocent and virtuous" woman, under promise of marriage, and provides "that the unsupported testimony of the woman shall not be sufficient to convict," the additional evidence required must be not only as to the act of sexual intercourse but also as to its inducement by a promise of marriage. (42)

(36) Boyce v. P., 55 N. Y., 644.
(37) S. v. Fitzgerald, 63 Iowa, 268; 19 N. W. Rep., 202.
(38) P. v. DeFore, 64 Mich., 693; 31 N. W. Rep., 585.
(39) P. v. Van Alstyne, 39 N. E. Rep., 343; 17 Cr. L. Mag., 205. See also, P. v. Duryea, 30 N. Y. S., 877; 17 Cr. L. Mag., 134.
(40) R. v. Walker, 1 N. W. T. Rep., (Part 4), 84.
(41) S. v. Hill, (Mo. Supreme Ct.), 4 S. W. Rep., 121; 9 Cr. L. Mag., 594.
(42) S. v. Ferguson, (N. C.), 12 S. E. Rep., 574; 13 Cr. L. Mag., 486.

**Subsequent marriage of the parties.** — See sub-section 2 of section 184, *post*, which makes the subsequent marriage of the parties, if pleaded, a good defence.

Where in a case of seduction the accused stated in open Court on the case being called for trial that he was willing to marry the prosecutrix it was held in an American case that the charge should be dismissed. (43) It is doubtful, however, if this would hold good here, seeing that it is not a mere *offer of marriage* but an *actual marriage* subsequent to the seduction that is declared by sub-section 2 of section 184 to be a good defence.

**183. Seduction of ward, servant, &c.**—Every one is guilty of an indictable offence and liable to two years' imprisonment, —

(*a.*) who, being a guardian, seduces or has illicit connection with his ward; or

(*b.*) who seduces or has illicit connection with any woman or girl previously chaste and under the age of twenty-one years who is in his employment in a factory, mill, workshop, shop or store, or who, being in a common, but not necessarily similar, employment with him in such factory, mill, workshop, shop or store, is, in respect of her employment or work in such factory, mill, workshop, shop or store, under or in any way subject to his control or direction, or receives her wages or salary directly or indirectly from him. (As amended by 63-64 V., c. 46, which came into force on the 1st January 1901).

**183a.** The burden of proof of previous unchastity on the part of the girl or woman under the three next preceding sections shall be upon the accused. (Added by the 63-64 V., c. 46.)

According to the terms of section 183, the mere fact of illicit connection by a guardian with his ward constitutes of itself, — independently of and in addition to seduction, — an offence; and the same observation applies to that part of the section which refers to an employer of or one in common employment with and having illicit connection with a woman or girl employed in a factory, mill, workshop, shop or store.

It has been held that an indictment of a guardian for carnally knowing his ward is insufficient when it fails to allege that the act was committed while the female remained in his care or custody. (44) But see section 186A, *post*, as to the meaning of the term "guardian;" and see sub-section 3 of section 611, *post*, which provides that a count of an indictment may be in the words of the enactment describing the offence or in any words sufficient to give the accused notice of the offence with which he is charged.

**184. Seduction of female passengers on vessels.** — Every one is guilty of an indictable offence and liable to a fine of four hundred dollars, or to one year's imprisonment, who, being the master or other officer or a seaman or other person employed on board of

(43) C. v. Wright, (Ky.), 27 S. W., 815; 17 Cr. L. Mag., 135.
(44) S. v. Buster, (Mo. Supreme Ct.), 2 S. W. Rep., 834; 9 Cr. L. Mag., 427.

any vessel, while such vessel is in any water within the jurisdiction of the Parliament of Canada, *under promise of marriage*, or *by threats*, or *by the exercise of his authority*, or *by solicitation*, or *the making of gifts or presents*, seduces *and* has illicit connection with any female passenger.

2. The subsequent intermarriage of the seducer and the seduced is, if pleaded, a good defence to any indictment for any offence against this or either of the two next preceding sections *except in the case of a guardian seducing his ward*. R. S. C., c. 65, s. 37.

**185. Procuring defilement of women.** — Every one is guilty of an indictable offence, and liable to two years' imprisonment with hard labour, who —

(*a.*) procures, or attempts to procure, any girl or woman *under twenty-one years of age*, not being a common prostitute or of known immoral character, to have unlawful carnal connection, either within or without Canada, with any other person or persons ; or

(*b.*) inveigles or entices *any such woman or girl* to a house of ill-fame or assignation for the purpose of illicit intercourse or prostitution, or knowingly conceals in such house any such woman or girl so inveigled or enticed ; or

(*c.*) procures, or attempts to procure, *any* woman or girl to become, either within or without Canada, a common prostitute ; or

(*d.*) procures, or attempts to procure, *any* woman or girl to leave Canada with intent that she may become an inmate of a brothel elsewhere ; or

(*e.*) procures *any* woman or girl to come to Canada from abroad with intent that she may become an inmate of a brothel in Canada ; or

(*f.*) procures, or attempts to procure, *any* woman or girl to leave her usual place of abode in Canada, such place not being a brothel, with intent that she may become an inmate of a brothel within or without Canada ; or

(*g.*) by threats or intimidation procures, or attempts to procure, *any* woman or girl to have any unlawful carnal connection, either within or without Canada ; or

(*h.*) by false pretences or false representations procures *any* woman or girl, not being a common prostitute or of known immoral character, to have any unlawful carnal connection, either within or without Canada ; or

(*i.*) applies, administers to, or causes to be taken by *any* woman or girl any drug, intoxicating liquor, matter, or thing with intent to stupify or overpower so as thereby to enable any person to have unlawful carnal connection with such woman or girl. 53 V., c. 39, s. 9 ; R. S. C., c. 157, s. 7.

There is an evident clerical error in the reference made at the end of this section. Instead of chapter 39 it should be chapter 37 of 53 Vict.

**Search warrants.** — Section 574, *post*, provides that, — "Whenever there is reason to believe that any woman or girl, mentioned in section 185, has been inveigled or enticed to a house of ill-fame or assignation, then upon complaint thereof being made under oath by the parent, husband, master or guardian of such woman or girl, *or in the event of such woman or girl having no known parent, husband, master nor guardian* in the place in which the offence is alleged to have been committed, *by any other person*, to any justice of the peace, or to a judge of any court authorized to issue warrants in cases of alleged offences against the criminal law, such justice of the peace or judge of the court may issue a *warrant to enter, by day or night*, such house of ill-fame or assignation, and if necessary use force for the purpose of effecting such entry whether by breaking open doors or otherwise, and *to search* for such woman or girl, and bring her, and the person or persons in whose keeping and possession she is, before such justice of the peace or judge of the court, who may, on examination, order her to be delivered to her parent, husband, master or guardian, or to be discharged, as law and justice require."

**186. Parent or guardian procuring defilement.** — Every one who, being the parent or guardian of any girl or woman, —

(*a.*) procures such girl or woman to have carnal connection with any man other than the procurer ; or

(*b.*) orders, is party to, permits or knowingly receives the avails of the defilement, seduction or prostitution of such girl or woman.

Is guilty of an indictable offence, and liable to fourteen years' imprisonment if such girl or woman is under the age of fourteen years, and if such girl or woman is of or above the age of fourteen years to five years' imprisonment. 53 V., c. 37, s. 9.

**186a. Meaning of word "guardian."**— The word "guardian" in sections 183 and 186 includes any person who has in law or in fact the custody or control of the girl or child. (Added by the *Criminal Code Amendment Act 1900*).

**187. Householders permitting defilement of girls on their premises.** — Every one who, being the owner and occupier of any premises, or having, or acting or assisting in, the management or control thereof, induces or knowingly suffers any girl of such age as in this section mentioned to resort to or be in or upon such premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man, or generally, is guilty of an indictable offence and —

(*a.*) is liable to ten years' imprisonment if such girl is under the age of fourteen years ; and

(*b.*) is liable to two years' imprisonment if such girl is of or above the age of fourteen and under the age of eighteen years. R. S. C., c. 157, s. 5; 53 V., c. 37, s. 3. (As amended by the *Criminal Code Amendment Act 1900.*)

A father who allows his daughter living with him to act as a prostitute in his house is within this provision. (45)

**188. Conspiracy to defile.**— Every one is guilty of an indictable offence and liable to two years' imprisonment who conspires with any other person by false pretenses, or false representations or other fraudulent means, to induce any woman to commit adultery or fornication.

See comments, — under section 176, *ante*, — on incest, adultery and fornication.

In a recent American case,(46) it was held by the Illinois Supreme Court that a count charging a conspiracy to induce a female to commit fornication (which, under the statutes of Illinois, is a misdemeanor), may be joined in the same indictment with counts charging defendants with abduction of the same female for the purpose of prostitution, and with unlawfully detaining her in a house of ill-fame, although, under the laws of Illinois, these latter charges are felonies; and that upon trial on such an indictment, a verdict finding the defendants "guilty as charged in the indictment," and fixing a punishment that might be inflicted under any one of the counts, is sufficient.

**189. Carnally knowing idiots &c.** — Every one is guilty of an indictable offence and liable to four years' imprisonment who unlawfully and carnally knows, or attempts to have unlawful carnal knowledge of, any female idiot or imbecile, insane or deaf and dumb woman or girl, under circumstances which do not amount to rape but where the offender knew, or had good reason to believe, at the time of the offence, that the woman or girl was an idiot, or imbecile, or insane or deaf and dumb. R. S. C., c. 157, s. 3 ; 50-51 Vic., c. 48, s. 1. (As amended by the *Criminal Code Amendment Act 1900*).

**190 Prostitution of Indian woman.** — Every one is guilty of an indictable offence and liable to a penalty not exceeding one hundred dollars and not less than ten dollars, or six months' imprisonment —

(*a*.) who, being the keeper of any house, tent or wigwam, allows or suffers any unenfranchised Indian woman to be or remain in such house, tent or wigwan, knowing or having probable cause for believing that such Indian woman is in or remains in such house, tent or wigwan with the intention of prostituting herself therein; or

(*b*.) who, being an Indian woman, prostitutes herself therein; or

(*c*.) who, being an unenfranchised Indian woman, keeps, frequents or is found in a disorderly house, tent or wigwam used for any such purpose.

(45) R. v. Webster, L. R., 16 Q. B. D., 136.

(46) Herman et al. v. People, S. C., 22 N. E. Rep., 471; 12 Cr. L. Mag., 222 et seq.

2. Every person who appears, acts or behaves as master or mistress, or as the person who has the care or management, of any house, tent or wigwam in which any such Indian woman is or remains for the purpose of prostituting herself therein, is deemed to be the keeper thereof, notwithstanding he or she is not in fact the real keeper thereof. R. S. C., c. 43, s. 106; 50-51 Vic., c. 33, s. 11.

## PART XIV.

## NUISANCES.

**191. A common nuisance.** — *A common nuisance* is an unlawful act or omission to discharge a legal duty, which act or omission *endangers* the lives, safety, health, property or comfort of the public, or by which the public are *obstructed* in the exercise or enjoyment of any right common to all Her Majesty's subjects.

This section is in the exact words of the corresponding section of the English Draft Code; and the following are the remarks thereon of the Royal Commissioners:

"With regard to nuisances, * * * we have, — in sections 151 and 152 — (1), drawn a line between such nuisances as are and such as are not to be regarded as criminal offences. It seems to us anomalous and objectionable upon all grounds that the law should in any way countenance the proposition that it is a criminal offence not to repair a highway when the liability to do so is disputed in perfect good faith. Nuisances which *endanger the life, safety or health* of the public stand on a different footing.

By the present law, when a civil right such as the right of way is claimed by one private person and denied by another, the mode to try the question is by an action. But when the right is claimed by the public, who are not competent to bring an action, the only mode of trying the question is by an indictment or information, which is in form the same as an indictment or information for a crime. But it was very early detemined that though it was in form a prosecution for a crime, yet that as it involved a remedy for a civil right, the Crown's pardon could not be pleaded in bar. *See* 3 Inst., 237. And the legislature, so recently as in the statute 40 and 41 Vic., c. 14, again recognized the distinction. The existing remedy in such cases is not convenient, but it is not within our province to suggest any amendment. The other sections are mostly reenactments of statutes; but sections 153 and 158 (2) are declaratory of the common law, though we have suggested the addition of hard labor to the punishment."

**Public and private nuisances.** — The term "nuisance" is derived from the French word *nuire*, to do hurt or to annoy.

A common or public nuisance, under the common law, is such as in its nature or its consequences is "an injury or damage to all persons who come within the sphere of its operation, though it may be so in greater degree to some than to others." (3) According to Blackstone it is an of-

(1) Sections 151 and 152 of the English Draft Code are similar to our sections 192 and 193.

(2) Sections 153 and 158 are similar to our sections 194 and 206, *post*.

(3) Soltau v. DeHeld, 2 Sim. N. S., 142.

fence "against the public order and economical regimen of the State, being either the *doing* of a thing to the annoyance of the king's subjects or the *neglecting to do* a thing which the common good requires." (4) For example, if, in the operation of a manufactory, — such as a dye-works, a tallow furnace, a smelting house, a tanning factory, or a lime-pit for cleaning skins, — volumes of noxious smoke or poisonous effluvia are emitted; to persons who are within the reach of these operations and whose health may be thereby endangered, a nuisance, in the popular sense of the term, is committed. So, also, an obstruction in a highway is, to all who have occasion to travel upon it, a nuisance. It may be a greater nuisance to those who have to travel over it daily than it is to a person using it only once a year; but it is more or less a nuisance to every one who has occasion to use it, and it is therefore a *common or public nuisance*,(5) although not of so serious a character as a nuisance endangering life or health.

Where, however, the thing complained of is such as to be limited to one or only a few individuals, it is a private nuisance. For instance, if a man by building up a wall darkens the ancient windows of one or of several different dwelling houses, this is only an injury or a nuisance to the particular persons who live in them. It does not affect the public generally and he is not, in thus acting, necessarily guilty of a common nuisance.(6)

Of course, it is needless to remark that a private nuisance cannot be the subject of a criminal prosecution. A nuisance is not a criminal offence unless it is a common nuisance; and, as will be seen by sections 192 and 193 even a common nuisance is not always and under all circumstances a criminal offence. Section 191 defines what common nuisances are; and section 192 specifies which of them are indictable as criminal offences, by enacting that a common nuisance is so indictable which endangers the lives safety or health of the public or which, (though not dangerous to life, etc.), occasions injury to the person of any individual. (7)

It has been said that in judging of a public nuisance, the public good it does might, in some cases, where the public health was not concerned, be taken in consideration, in order to see if the public annoyance was outweighed by the public benefit derived; (8) but this doctrine was overruled in Ward's case, where it was held to be no answer to an indictment for a nuisance in a harbor, by erecting an embankment, that, although the work was in some degree a hindrance to navigation, it was advantageous in a greater degree to the other uses of the port. (9)

No length of time will legalize a nuisance. (10)

**192. Common nuisances which are criminal.** — Every one is guilty of an indictable offence and liable to one year's imprisonment or a fine, who commits any common nuisance which *endan-*

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(4) 4 Bl. Com., 166.

(5) See Att. Gen. v. Sheffield Gas Consumer's Co., 3 De G., M. and G., 304; Imperial Gas Light & Coke Co. v. Broadbent, 7 H. L. Ca., 600; Crowder v. Tinkler, 19 Ves., 617; R. v. Train, 2 B. & S. 640; Jones v. Powell, Palm., 539; Bliss v. Hall, 4 Bing. N. C., 183; Broom's Com. L., 706, 894.

(6) Soltau v. DeHeld, 2 Sim. N. S., 143.

(7) See further comments under section 192, *post*.

(8) R. v. Russell, 6 B. & C., 566.

(9) R. v. Morris, 1 B. & Ad., 441; R. v. Randall, C. & Mar., 496.

(10) R. v. Cross, 3 Camp., 227; S. v. Rankin, 3 S. C., 438, 16 Am. R., 737; 1 Bish. New Cr. L. Com., s. 1078*a*.

*gers* the lives, safety or health of the public, or which *occasions* injury to the person of any individual.

Under the general definition contained in Section 191 there must, — in order to constitute a common nuisance, — be either an unlawful act *done* or a legal duty *omitted*, which unlawful act or unlawful omission *endangers* public life, safety, health, property, or comfort, or obstructs the public in the exercise or enjoyment of a common right.

When we take Sections 191, 192, and 193, and read them together, we find that common nuisances, as therein dealt with, divide themselves into two classes, namely, 1, those which are dangerous to the lives, safety or health of the public, and, 2, those which are not dangerous to the lives, safety, or health of the public, — although they may interfere with or even endanger public comfort or property, or obstruct the public in exercising or enjoying a common right.

With regard to the first of these two classes, — a common nuisance of a nature to endanger the lives, safety or health of the public, — it is criminal in itself, and is so treated in section 192, which makes it an indictable offence; but, with regard to the second class, — those which are not of a nature to endanger the lives, etc., of the public, — it seems that none of them is to be treated as a criminal offence, except when occasioning actual injury to the person of some individual; and, then being, — (under the general definition in section 191), — a common nuisance, (though not criminal, in itself, because not in its nature dangerous to public life, safety, or health), it becomes an indictable offence by the terms of section 192, which makes *every* common nuisance, (not, in itself, dangerous to public life, safety or health), a criminal offence if it occasions injury to the person of any individual. In other words, all common nuisances, which are in themselves dangerous to public life, safety or health, are indictable offences, and all other common nuisances become indictable and punishable when they occasion actual injury to the person of any individual.

Section 192 must not be taken to mean that an *act* which occasions injury to the person of any individual is thereby constituted a common nuisance. As any one, who makes but a cursory examination of it, will readily see, the section does not say so.

On the contrary, it deals, disjunctively, but distinctly, with two different classes of common nuisance; and if we were to take out from the section the words, — "which *endangers* the lives, safety or health of the public, or," — the section would still be complete and would read as follows:

"Every one is guilty of an indictable offence, and liable to one years imprisonment or a fine, who commits *any common nuisance* which *occasions injury* to the person of any individual."

If, on the other hand, we were to take out from the section the words "or which *occasions injury* to the person of any individual," the section would, in that case also, be complete and would read as follows:—

"Every one is guilty of an indictable offence, and liable to one years imprisonment or a fine, who commits *any common nuisance* which *endangers* the lives, safety or health of the public."

There are, thus, two separate and distinct offences dealt with by this section, 192. In each there is a common nuisance, and each must conform to and fulfil the essential elements of a common nuisance as defined, in a general way, by section 191; but one is and must be a common nuisance which in its nature endangers public life, safety or health; while the other is and must be a common nuisance which, (not being in itself dangerous to public life, safety or health), has occasioned injury to some individual.

The omission of an electric railway company, operating their cars upon a highway, to use reasonable precautions to avoid, endangering the lives

of the public using the highway in common with the Company is a breach of a legal duty constituting a common nuisance under the above sections 191 and 192, for which an indictment will lie against such company. (11)

A prosecution of a municipal corporation for a nuisance in not keeping a public street in repair can only be by indictment under the provisions of section 641, sub-section 2, *post*. (12)

**193. Common nuisances which are not criminal.** — Any one convicted upon any indictment or information for any common nuisance other than those mentioned in the preceding section, shall not be deemed to have committed a criminal offence; but all such proceedings or judgments may be taken and had as heretofore to abate or remedy the mischief done by such nuisance to the public right.

See comments under sections 191 and 192.

**194. Selling articles unfit for human food.** — Every one is guilty of an indictable offence and liable to one year's imprisonment who *knowingly* and *wilfully* exposes for sale, or has in his possession with intent to sell, for human food articles which he *knows* to be unfit for human food.

2. Every one who is convicted of this offence after a previous conviction for the same crime shall be liable to two years' imprisonment.

Section 117 of the *English Public Health Acts, 1875 and 1890*, (38-39 Vic., c. 55, and 53-54 Vic., c. 59), is similar in effect, though not in wording to the above section, 194, of our Code except that there is a difference in the punishment inflicted.

Where, under the English Act, a butcher was charged with having in his possession a diseased carcase for the purpose of preparation for sale and intended for the food of man, and the proof shewed that the defendant had purchased a cow which he knew to be unfit for human food, had slaughtered the beast, and was about to dress it for human food, when it was seized by a nuisance inspector, the justices on this proof dismissed the charge on the ground that the defendant had not exposed the meat for sale; but, in appeal, it was held that the justices were wrong, and that a person who has unsound meat in his possession with the intention of selling the same for food of man is guilty of an offence under the Act; although he may not have actually exposed it for sale. (13)

Foreign walnuts were sold by a fruit broker to a retail dealer upon condition that the latter "destroy the unsound portion before offering them to the public." The retail dealer having, after making the purchase, found that the bulk of the nuts were bad, did not offer them for sale but handed them over to a sanitary inspector who procured their condemnation as unfit for the food of man. The fruit broker was then indicted and convicted; but the Court of Crown Cases Reserved quashed the conviction on the grounds that there had been no sale nor exposure for sale by the retail

(11) R. v. Toronto Railway Co., 4 Can. Cr. Cas., 4.
(12) R. v. City of London, 21 C. L. T., 71.
(13) Mallinson v. Carr, 60 L. J. M. C., 34; 17 Cox C. C., 220.

dealer and that it had not been shewn that the nuts had been purchased from the defendant by the retail dealer for the food of man. (14)

The day after a purchaser had purchased some meat he had it inspected by a medical officer, and it was condemned; and in proceedings then taken, under the *Public Health Act, (London), 1891*, the seller of the meat was convicted; but the conviction was quashed on the ground that the statute authorized a conviction for selling meat when at once found upon examination to be unsound, but not, as in this case, when only found to be bad on the day after it was sold and in hot weather in the month of July. (15)

## ADULTERATION.

The "*Adulteration Act*," is chapter 107 of the R. S. C., as amended by various statutes.

The INTERPRETATION CLAUSES of the *Adulteration Act* are contained in its second section, which, (as amended and added to by the 53 Vic., c. 26, section 1, by the 61 Vic., c. 24, secs. 1, 2 and 3, and by the 62-63 Vic., c. 26, sec. 1), is as follows: —

"In this Act, unless the context otherwise requires, —

(*a.*) The expression FOOD includes every article used for food or drink by man or cattle, and every ingredient intended for mixing with the food or drink of man or cattle for any purposes whatsoever;

(*b.*) The expression DRUG includes all medicines for internal or external use for man or for cattle;

(*c.*) The expression AGRICULTURAL FERTILIZER means and includes every substance imported, manufactured, prepared or disposed of for fertilizing or manuring purposes, which is sold at more than ten dollars per ton and which contains phosphoric acid, nitrogen, ammonia or nitric acid: (16)

(*d.*) The expression OFFICER means any officer of Inland Revenue, or any person authorized under this Act or "*The Fertilizers Act*" to procure samples of articles of food, drugs or agricultural fertilizers and to submit them for analysis;

(*e.*) FOOD shall be deemed to be ADULTERATED within the meaning of this Act, —

(1) If any substance has been *mixed* with it, so as to reduce or lower or injuriously affect its quality or strength;

(2) If any *inferior* or *cheaper substance* has been *substituted*, wholly or in part, for the article;

(3) If any *valuable constituent* of the article has been wholly or in part *abstracted*;

(4) If it is an *imitation* of, or is sold under the name of, another article;

(14) R. v. Dennis, [1894] 2 Q. B., 458; 42 W. R., 586; 63 L. J. M. C., 153.

(15) Billing v. Prebble, 45 W. R., 101.

(16) The *Fertilizers Act* is the 53 Vic., c. 24, as to which see p. 192, *post*.

(5) If it consists wholly or in part of a *diseased* or *decomposed*, or *putrid* or *rotten animal* or *vegetable substance*, whether manufactured or not, or in the case of milk or butter, if it is the *produce* of a diseased animal, or of an animal fed upon unwholesome food ;

(6) If it contains any *added poisonous ingredient*, or any ingredient which may render such an article injurious to the health of a person consuming it ;

(7) If its strength or purity falls below the standard, or its constituents are present in quantity not within the limits of variability fixed by the Governor in Council as hereinafter provided.

(8) If it so *coloured* or *coated* or *polished* or *powdered* that damage is concealed, or if it is made to appear better or of greater value than it really is ;

(*f*.) Every DRUG shall be deemed to be ADULTERATED within the meaning of this Act, —

(1) If, when sold, or offered or exposed for sale, under or by a name recognized in the edition of 1898 of the British Pharmacopœia, it *differs* from the standard of strength, quality or purity laid down therein ;

(2) If when sold, or offered or exposed for sale, under or by a name recognized in any foreign pharmacopœia, such as *Le Codex Medicamentarius* in France or the pharmacopœia of the United States and having the name of such pharmacopœia plainly labelled upon the article, it differs from the standard of strength, quality or purity laid down therein ;

(3) If when sold or offered or exposed for sale under or by a name which is not recognized in any Pharmacopœia, but which is found in some generally recognized standard work on *materia medica*, or chemistry, it *differs* from the standard of strength, quality or purity laid down therein ;

(4) If its strength or purity falls below or *differs* from the professed standard under which it is sold or offered or exposed for sale ;

(*g*.) Provided, that the foregoing definitions as to the adulteration of food and drugs shall not apply, —

(1) If any matter or ingredient not injurious to health has been added to the food or drug because it is required for the production or preparation thereof as an article of commerce, in a state fit for carriage or consumption, and not fraudulently to increase the bulk, weight or measure of the food or drug, or to conceal the inferior quality thereof, if each package, roll, parcel or vessel containing every such article manufactured, sold or exposed for sale is distinctly labelled as a MIXTURE, in conspicuous characters forming an inseparable part of the general

label, which shall also bear the name and address of the manufacturer.

(2) If the food or drug is a proprietary medicine, or is the subject of a patent in force, and is supplied in the state required by the specification of the patent ;

(3) If the food or drug is unavoidably mixed with some extraneous matter in the process of collection or preparation ;

(4) If any articles of food not injurious to the health of the person consuming them are mixed together and sold or offered for sale as a compound, and if each package, roll, parcel or vessel containing such articles is distinctly labelled as a MIXTURE, in conspicuous characters forming an inseparable part of the general label, which shall also bear the name and address of the manufacturer.

(*h.*) Every AGRICULTURAL FERTILIZER shall be deemed to be ADULTERATED within the meaning of this Act, if, when sold, offered or exposed for sale, the chemical analysis thereof shows a deficiency of more than one per cent of any of the chemical substances, the percentages whereof are required to be specified in the certificate, by "*The Fertilizers Act*" required to be affixed to each barrel, box, sack or package containing the same or (if the agricultural fertilizer is in bulk) to be produced to the inspector; or if it contains less than the minimum percentage of such substances required by the said Act to be contained in such fertilizer;

(*i.*) The expression ANALYST includes any member of the examining board appointed under the authority of sub-section two of section three of this Act, and any assistant analyst to the chief analyst at Ottawa."

**Appointment of Analysts and Food Examiners.** — Section 3 of the *Adulteration Act* provides for the appointment, by the Governor in Council, of skilled persons, who have passed the required examination, as ANALYSTS of food, drugs and agricultural fertilizes purchased sold or exposed or offered for sale *within such territorial limits as are assigned to them*, as well as a CHIEF ANALYST; and, (by an addition made by the 53 Vic., c. 26, sec. 2), the Governor in Council is authorized to appoint persons nominated by the Council of any city, town, county or township or other municipality and who have passed the required examination, as "FOOD EXAMINERS," for such municipality, to examine certain articles of food; and with regard to such articles of food as he is appointed to examine the certificate of analysis of any such "food examiner" has the same force and effect as that of an official analyst.

**Officers of Inland Revenue, and others, to submit samples for analysis.** — Section 5 of the *Adulteration Act* provides that Officers of Inland Revenue, Inspectors and Deputy Inspectors of weights and measures, and Inspectors and Deputy Inspectors acting under "*The General Inspection Act*," or any of them shall when required to do so by any regulation in that behalf of the Minister of Inland Revenue, procure and submit samples of food, drugs or agricultural fertilizers, suspected to be adulterated to be analysed by the analysts appointed under the Act.

**Appointment of Inspectors of Food in Cities, etc.** — Under section 6 of the *Adulteration Act*, the Council of any City, county, town or village may

appoint inspectors of food, drugs and agricultural fertilizers with all the powers vested by the Act in Officers of Inland Revenue; and any such inspector may have any sample collected by him analysed by the public analyst, upon whose certificate of analysis such inspector may prosecute any person who manufactures, sells or offers or exposes for sale, *within the city, county, town or village for which he is appointed inspector*, any article of food, drug or agricultural fertilizer certified by the public analyst to have been adulterated.

It has been held, in proceedings under the *English Food and Drugs Acts*, that inspectors and analysts cannot act, for the purpose of taking or analysing samples or otherwise putting the Acts in operation, for any district other than the district for which they have been appointed. (17)

**Method of obtaining and analysing samples.** — Sections 7, 8, 9, 10 and 11, — of our *Adulteration Act*, — relating to the method of procuring and submitting samples of food, etc., for analysis, — are as follows: —

"Any officer may procure samples of food, drugs or agricultural fertilizers which have not been declared exempt from the provisions of this Act, from any person who has such articles in his possession for the purpose of sale, or who sells or exposes the same for sale; and he may procure such samples either by purchasing the same or by requiring the person in whose possession they are to show him and allow him to inspect all such articles in his possession, and the place or places in which such articles are stored and to give him samples of such articles, on payment or tender of the value of such samples." (Sec. 7.)

"If the person who has such articles in his possession, or his agent or servant, refuses or fails to admit the officer, or refuses or omits to show all or any of the said articles in his possession, or the place in which any such articles are stored, or to permit the officer to inspect the same, or to give any samples thereof, or to furnish the officer with such light or assistance as he requires, when required so to do in pursuance of this Act, he shall be liable to the same penalty as if he knowingly sold or exposed for sale adulterated articles knowing them to be adulterated." (Sec 8).

"The officer purchasing any article with the intention of submitting the same to be analysed, shall, after the purchase has been completed, forthwith notify the seller or his agent selling the article, of his intention to have the same analysed by the public analyst, and shall, except in specific cases, respecting which provision is made by the Governor in Council, divide the article into three parts, — to be then and there separated, and each part to be marked and sealed up or fastened up, as its nature permits, — and shall deliver one of the parts to the seller or his agent, if required by him so to do:

2 He shall transmit another of such parts to the Minister of Inland Revenue for submission to the chief analyst in case of ap-

(17) R. v. Horace Smith and Kerr, 18 Cox C. C., 307.

peal, and shall submit the remaining part to the analyst for the district within which the samples were taken, unless otherwise directed by the Minister of Inland Revenue." (Sec. 9.)

"3. The Minister of Inland Revenue, or the Commissioner of Inland Revenue, or any person duly authorized in that behalf, may, however, cause the part intended to be analyzed, as in the next preceding subsection mentioned, to be submitted to the chief analyst, or to any other of the analysts appointed under this Act, who is deemed by him to have special skill and experience in the examination of particular substances, and such analyst shall report to the Minister of Inland Revenue; and in every such case the certificate of the analyst employed under this sub-section shall have the like force and effect as the certificate of the analyst hereinafter mentioned." (Subsection 3 added to sec. 9 by 51 Vic., c. 24, sec. 3.)

"The person from whom any sample is obtained under this Act may require the officer obtaining it, to annex to the vessel or package containing the part of the sample which he is hereby required to transmit to the Minister of Inland Revenue, the name and address of such person, and to secure, with a seal or seals belonging to him, the vessel or package containing such part of the sample, and the address annexed thereto, in such manner that the vessel or package cannot be opened, or the name and address taken off, without breaking such seals; and the certificate of the chief analyst or of his assistant analyst shall state the name and address of the person from whom the said sample was obtained, that the vessel or package was not open, and that the seals, securing to the vessel or package the name and address of such person, were not broken until such time as he opened the vessel or package for the purpose of making his analysis; and in such case no certificate shall be receivable in evidence, unless there is contained therein such statement as above, or a statement to the like effect." (Sec. 10 as amended by 51 V., c. 24, s. 4.)

"When the officer has, by either of the means aforesaid, procured samples of the articles to be analyzed, he shall cause the same to be analyzed by one of the analysts appointed under this Act, and if it appears to the analyst that the sample is adulterated within the meaning of this Act, he shall certify such fact, stating in such certificate, in the case of an article of food or a drug, whether such adulteration is of a nature injurious to the health of the person consuming the same; and the certificate so given shall be received as evidence in any proceedings taken against any person in pursuance of this Act, *subject to the right of any person against whom proceedings are taken to require the attendance of the analyst for the purpose of cross-examination.*" (Sec. 11).

"2. Should any sample on examination be found by the analyst to be adulterated within the meaning of this Act, and be so re-

ported to the Minister of Inland Revenue, the said Minister may, at his discretion, cause the result of the analysis to be communicated to the vendor, and require him to pay, at the rate specified in the second schedule to this Act, the cost of procuring and analyzing the said sample :

3. Should the said vendor refuse or neglect so to do, the Minister may then cause legal proceedings to be taken against him, as hereinafter provided." (Subsections 2 and 3 added to sec. 11 by 53 V., c. 26, s. 3).

**Appeals to chief analyst.** — Section 12 of the *Adulteration Act*, relates to appeals from the decision of an analyst to the chief analyst, and, (as amended by the 53 Vic., c. 26, sec. 4), is as follows: —

" If the vendor of the article respecting which the certificate referred to in the next preceding section is given, deems himself aggrieved thereby, he may, within forty-eight hours of the receipt of the first notification of the intention of the officer or other purchaser to take proceedings against him (whether such notification is given by the purchaser or by the ordinary process of law), notify the said officer or purchaser in writing that he intends to appeal from the decision of the analyst to the judgment of the chief analyst; and in such case the officer or purchaser shall transmit such notification to the chief analyst, and the chief analyst shall, with all convenient speed, analyze the part of the sample transmitted to the Minister of Inland Revenue for that purpose, and shall report thereon to the said Minister; and the decision of such chief analyst shall be final, and his certificate thereof shall have the same effect as the certificate of the analyst in the next preceding section mentioned."

**Essentials and effect of the certificate of analysis.** — Where the offence charged is that of having *abstracted* some constituent part of the article, it seems that it is not necessary for the analyst to set out in his certificate of analysis the constituent parts of the sample analysed, and that it is sufficient for the certificate to shew what has been abstracted without giving all the constituent parts of the sample; but, where it is a case of adulteration by *adding* something which is one of the constituent parts of the article analysed, the certificate should give particulars of its constituent parts and of the substance added; (18) or disclose the grounds upon which the analyst has arrived at the conclusion that some foreign ingredient has been added. (19)

So, that, where, in a prosecution under the *English Food and Drugs Acts*, for selling milk containing added water, the analyst's certificate stated that the analyst was of opinion that "the sample analysed contained the percentage of foreign ingredient as under, — 5 per cent of added water," it was held that the certificate was bad as evidence of adulteration, because water is one of the constituent parts of all milk and it was not sufficient for the analyst to merely certify that a certain percentage of water had been added, but that he should have given in his certificate

(18) Bakewell v. Davis, 63 L. J. M. C., 93; [1894] 1 Q. B., 296.
(19) See Fortune v. Hanson, and Bridge v. Howard, cited below.

information of the total percentage of water found in the analysed sample, and because the analyst's certificate of analysis was merely a statement of his own conclusion without shewing what standard he had adopted in arriving at his conclusion, it being further held that if the substance added had been found to be something that could not exist in milk as a constituent, — such, for instance, as pepper or sand, — it would have been sufficient to have stated in the certificate that the sample analysed contained so much per cent of such added foreign ingredient, but that when the thing said to be added is one of the constituents of the article analysed, then, the analyst must sufficiently certify the facts on which he bases his opinion to enable the magistrates themselves to come to a conclusion. (20)

On the same principle, it was held that a certificate, which stated that a sample of rum contained "thirteen per cent of water in excess of the quantity allowed by statute," was too vague, and did not warrant a conviction, but that it should have specified the total quantities of pure spirit and of added water contained in the sample, — it being for the justices and not for the analyst, in such a case, to determine conclusions of law and of fact. (21)

Where the certificate of a public analyst stated that a sample submitted to him contained 94 per cent of milk and 6 per cent of added water and went on to say, "This opinion is based on the fact that the sample contained only 7.97 per cent of solids not fat, whereas genuine milk contains not less than 8.5 per cent of solids not fat," it was held that the certificate was good, because it gave the grounds upon which the analyst had based his opinion, although it did not set out all the ingredients found in the sample analysed. (22)

The purchase by an Inspector of six small bottles of camphorated oil in one lot for the purpose of having them analysed and their division by him into three parts of two bottles each, one part, (consisting of two of the bottles), being sent to the public analyst, is not a compliance with the Act, because each bottle, however small, is itself an article and ought to be divided into three parts. (23)

In proceedings under the English *Sale of Food and Drugs Act, 1875*, it has been held that, — notwithstanding section 21 of that Act which is somewhat similar to the latter part of the first clause of section 11 (page 180, *ante*), of our *Adulteration Act*, to the effect that the analyst's certificate shall be received as evidence, subject to the defendant's right to have the analyst called as a witness, — the effect of this provision is not that the certificate shall, — in case of the analyst not being called as a witness, — be *conclusive* evidence but merely evidence on which the justices may regard the facts therein stated as proved unless there is other evidence, including the testimony of the defendant given as a witness on his own behalf, to shew that such facts are erroneous; the meaning of the provision being, (in the language of Lindley, L. J.), that the justices may act upon the certificate, that they must weigh it as evidence, but that they are also bound to weigh any evidence offered on the other side, and to come to a conclusion upon the whole of the evidence given on both sides. (24)

**Adulteration prohibited.** — In section 14 of the *Adulteration Act*, there is a general prohibition against *adulteration*, as follows: —

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(20) Fortune v. Hanson, [1896] 1 Q. B., 202; 18 Cox C. C., 258.
(21) Newby v. Sims, [1894] 1 Q. B., 478; 63 L. J. M. C., 228.
(22) Bridge v. Howard, 18 Cox C. C., 421; [1897] 1 Q. B., 80.
(23) Mason v. Cowdary, 69 L. J., Q. B., 667; [1900] 2 Q. B., 419.
(24) Hewitt v. Taylor, [1896] 1 Q. B., 287; 18 Cox C. C., 226.

"14. No person shall manufacture, expose or offer for sale or sell any food, drug or agricultural fertilizer which is adulterated within the meaning of this Act."

**Adulteration of milk. — Skimmed milk.** — In section 15 of the Adulteration Act, there are special provisions as to the *adulteration* of *milk* and the conditions under which *skimmed milk* may be sold.

The section is as follows: —

"If milk is sold, or offered or exposed for sale, after any valuable constituent of the article has been abstracted therefrom, or if water has been added thereto, or if it is the product of a diseased animal or of an animal fed upon unwholesome food, it shall be deemed to have been adulterated in a manner injurious to health, and such sale, offer or exposure for sale shall render the vendor liable to the penalty hereinafter provided in respect to the sale of adulterated food ; except that SKIMMED MILK may be sold as such if contained in cans bearing upon their exterior, within twelve inches of the tops of such vessels, the word SKIMMED in letters of not less than two inches in length, and served in measures also similarly marked; but any person supplying such skimmed milk, unless such quality of milk has been asked for by the purchaser, shall not be entitled to plead the provisions of this section as a defence to or in extenuation of any violation of this Act :

2. Nothing in this section shall be interpreted to permit or warrant the admixture of water with milk, or any other process than the removal of cream by skimming."

As to the punishments for selling food adulterated in a manner injurious to health, and for selling food adulterated in a manner not injurious to health, see section 23 of the *Adulteration Act*, at p. 186, *post*.

See pp. 191, 192, *post*, as to the *sale of Dairy products* to cheese, butter or condensed milk makers, as to "*skim milk cheese*," and as to *registration of cheese factories and creameries*, etc.

Where milk, which was purchased at the defendant's shop, was found on analysis to be deficient in cream to the extent of 33 per cent, and it appeared that the milk, after being received pure and good from the country, had been placed in a large vessel from which it was served out in small quantities as occasion required, it was urged on the part of the defendant that it was the natural tendency of the fatty matter to rise to the surface, that consequently the quality of the milk necessarily diminished as the upper portion containing more than its due proportion of cream was removed in serving it out to customers and that therefore the defendant was not responsible. The magistrate accepted this excuse and refused to convict; but, in appeal, it was held that an offence under section 9 of the English Sale of Food and Drugs Act, 1875, had been committed; and that it was sufficient to prove that an article of food has been altered by the abstraction of some part of it and sold in its altered state, the intention of the abstractor being immaterial, and his ignorance of the abstraction affording no excuse. (25)

(25) Dyke v. Gower, 17 Cox C. C., 421; [1892] 1 Q. B., 220; 61 L. J. M. C., 70; Pain v. Broughtwood, 16 Cox C. C., 747; 24 Q. B. D., 353, approved.

Where a milk dealer's servant, employed by his master to sell milk out of cans, adulterated the milk with water, the master was convicted as the seller; and in appeal it was held that the conviction was right, the master being liable for his servant's act in selling adulterated milk, whether the master did or did not connive at the offence, although proof of the entire absence of connivance on his part might, in the discretion of the convicting magistrate, be properly admitted with a view to mitigate any penalty he might otherwise think fit to impose. (26)

A milk dealer, being asked for a pint of new milk, sold to a food inspector a pint of skimmed milk and charged, for it, one penny, the usual price for skimmed milk. At the trial of a charge under the *English Food and Drugs Acts*, the justices differed, one being of opinion that, as only a penny a pint had been charged, the purchaser must have been aware that it was skimmed milk he was buying; but it was held that the knowledge of the purchaser was immaterial, and the case was remitted to the justices to convict. (27)

Section 3 of the *English Sale of Food and Drugs Act, 1879*, (42-43 Vic., c. 30), provides that an Inspector "may procure at the place of delivery any sample of milk in the course of delivery to the purchaser," for the purpose of making an analysis of the same and taking proceedings thereon; and where a farmer at A had entered into an agreement to supply milk to a dairy company at B., the latter place being appointed as the place at which delivery was to be made, the purchasers, however, to pay the carriage of the milk from A. to B., and it appeared that two churns of the milk were consigned by the farmer from A. to the purchasers at B., and that on the arrival of the milk at B., samples of it were taken at the railway station by an inspector and were found on analysis to be adulterated, the farmer was convicted; and, on appeal it was held that the conviction was right and that B was the place of delivery, notwithstanding the stipulation for payment of the carriage by the purchasers. (28)

A milk dealer undertook, under a contract with the Guardians of the Poor of West Derby Union, in England, to supply the latter, daily, at their workhouse with a specified quantity of new milk, free from adulteration and yielding seven degrees of cream, at a certain price, the milk to be tested on delivery; and it was stipulated that a reduction in the price should be made if the milk was found deficient in a certain specified proportion of cream. On a certain date, five cans of milk were delivered by the milk dealer at the workhouse of the West Derby Union, from each of which cans a sample was taken by an Inspector of weights and measures, and two of these samples having been found on analysis to be deficient in cream, the milk dealer was summoned, convicted and fined. In appeal it was held, (in affirmance of the decision of the Justices), 1, that the Inspector of weights and measures was justified in laying two charges, notwithstanding that, as between the defendant and the Guardians of the Union, there was only one sale and delivery on the occasion in question, 2, that the Inspector was right in taking a sample from each of the five cans, 3, that the defendant was not entitled to give in evidence the analysis of the milk contained in the three cans in respect of which no information had been laid, and 4, that the defendant's contract with the Guardians could not alter the liability of the defendant on informations laid against him by an Inspector of weights and measures. (29)

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(26) Brown v. Foot, 17 Cox C. C., 509; 61 L. J. M. C., 110.
(27) Heywood v. Whitehead, 18 Cox C. C., 615.
(28) Filsbie, (Appellant), v. Evington, (respondent), 17 Cox C. C., 481; [1892] 2 Q. B., 200.
(29) Fecitt v. Walsh, 17 Cox C. C., 322; [1892] 2 Q. B., 304; 60 L. J. M. C., 143.

**Adulteration of Vinegar.** — Section 16 of the Adulteration Act relating to the adulteration of vinegar is as follows: —

"Vinegar sold, or offered or exposed for sale, shall be deemed to be adulterated in a manner injurious to health if any mineral acid has been added thereto, or if it contains any soluble salt having copper or lead as a base thereof — whether such mineral acid or salt is added, either during the process of manufacture or subsequently."

**Adulterated Liquors.** — Section 17, relating to this subject, is as follows: —

"Alcoholic, fermented or other potable liquors sold, or offered or exposed for sale, shall be deemed to have been adulterated in a manner injurious to health if they are found to contain any of the articles mentioned in the first schedule to this Act, or any article hereafter added to such schedule by the Governor in Council." (As amended by 53 V., c. 26, s. 6).

**Exempted articles, etc.** — Sections 18 and 19 (as amended by 53 Vic., c. 26, s.s. 7 and 8), provide that the Governor in Council, by orders in Council to be published in the *Canada Gazette*, may declare from time to time certain articles or preparations to be exempt, from the provisions of the Act, and may add to the list contained in the first schedule of the Act, and may also establish a standard of quality for and fix the limits of variability permissible in any article of food or drug or compound, the standard of which is not established by any such pharmacopœia or standard work as is therein before mentioned.

**Seizure and confiscation of adulterated articles.** — See sections 20 and 21 of the *Adulteration Act*.

**Adulteration of Honey.** — Section 21*a* of the *Adulteration Act*, (added by 59 Vic., c. 12, sec. 1), declares that the feeding to bees of sugar, glucose or any other sweet substance than such as bees gather from natural sources, with intent that such substance shall be used by bees in the making of honey, or the exposing of any such substance, with the said intent, shall be a wilful adulteration of honey, and that no honey made by bees in whole or in part from any such substances and no imitation of honey, or sugar honey, so called or other substitute for honey shall be manufactured or produced for sale, or sold or offered for sale in Canada. Provided that this section shall not prevent the giving of sugar in any form to bees to be consumed by them as food.

**Punishment for wilful adulteration.** — This is provided for by section 22 of the Act, which (as amended by 61 Vic., c. 24, sec. 4), is as follows:—

"Every person who wilfully adulterates any article or food or any drug, or orders any other person so to do, shall, —

(*a*) if such adulteration is, within the meaning of this Act, deemed to be injurious to health, for the first offence, incur a penalty not exceeding five hundred dollars and costs, or six months' imprisonment, or both, and not less than fifty dollars and costs, and for each subsequent offence a penalty not exceeding one thousand dollars and costs, or one year's imprisonment, or both, and not less than one hundred dollars and costs ;

(*b*) if such adulteration is, within the meaning of this Act, deemed not to be injurious to health, incur a penalty not exceeding

two hundred dollars and costs, or three months' imprisonment, and for each subsequent offence a penalty not exceeding five hundred dollars and costs, or six months' imprisonment or both, and not less than one hundred dollars and costs."

**Punishment for selling or exposing for sale any adulterated article.** — This is provided for by section 23 of the Act, which (as amended by 61 Vic., c. 24, section 5), is as follows: —

Every person who, by himself or his agent, sells, offers for sale, or exposes for sale, any article of food or any drug, which is adulterated within the meaning of this Act, shall, —

(*a*) if such adulteration is, within the meaning of this Act, deemed to be injurious to health, for a first offence incur a penalty not exceeding two hundred dollars and costs, or three months' imprisonment, or both, and for each subsequent offence a penalty not exceeding five hundred dollars and costs, or six months' imprisonment, or both, and not less than fifty dollars and costs ;

(*b*) if such adulteration is, within the meaning of this Act, deemed not to be injurious to health, incur for each such offence a penalty not exceeding one hundred dollars and costs, and not less than five dollars and costs.

2. Provided that if the person accused proves to the court before which the case is tried that he had purchased the article in question as the same in nature, substance and quality as that demanded of him by the purchaser or inspector, and with a written warranty to that effect, — which warranty, in the form in the third schedule to this Act, is produced at the trial of the case, — and that he sold it in the same state as when he purchased it, *and that he could not with reasonable diligence have obtained knowledge of its adulteration*, he shall be discharged from the prosecution, but shall be liable to pay the costs incurred by the prosecutor, unless he has given due notice to him that he will rely on the above defence, and has called the party from whom he purchased the said article into the case, as provided for by the next following subsection of this section, in which case he shall be liable only to the forfeiture provided by section 21 of this Act.

3. The person presenting the defence referred to in the next preceding subsection shall, upon his sworn declaration that he purchased the article in good faith, and as provided for in the said subsection, obtain a summons to call such third party into the case; and the court shall at the same time hear all the parties, and decide upon the entire merits of the case, not only as regards the person originally accused, but also as regards the third party so brought into the case."

A defendant had purchased a cask of vinegar from "G. & Co., Lim." The cask had on it a printed label bearing the words "Vinegar warranted unadulterated — G. & Co., Lim., Cumberland Market, London," and the vinegar was invoiced to the defendant as "G. & Co's vinegar." The defen-

dant having been convicted of selling adulterated vinegar, it was held, in appeal, that there was a sufficient written warranty to entitle the defendant to the protection afforded by section 25 of the English *Sale of Food and Drugs Act, 1875*, which is the same in effect as sub-section 2 of the above section, 23, of our Adulteration Act. (30)

In another English case, it was held that if the document relied upon as a written warranty amounts to a warranty in law, it is sufficient as a defence and will entitle the defendant to be discharged, without the word "warrant" or the word "warranty" being *expressly* stated in the document. (31)

Where a company was convicted of having sold milk from which twenty per cent of its original fat had been abstracted, and it appeared by the evidence that the defendants had purchased the milk under a written contract by which the producers of the milk had agreed to supply the company defendant, daily, with a certain quantity of "genuine good new milk of the best quality with all its cream on," and by which each and every supply of milk was warranted to be pure, genuine new milk unadulterated and with all its cream on, and that attached to each churn containing the milk, of which the milk in question was a part, was a label having on it the words "warranted genuine new milk with all its cream on," it was held, in appeal, that the contract and the label together constituted a sufficient warranty to entitle the Company defendant to the protection of section 25 of the English *Sale of Food and Drugs Act, 1875*, and that the conviction must be quashed. (32)

A local foreman of a Company sold on their behalf milk which was found upon analysis to contain 12 per cent of added water. The milk in question had been consigned by one Thompson by rail in cans each of which bore a label with the words "Warranted genuine good milk with all its cream on." There was also a written agreement between Thompson and the Company whereby Thompson agreed to supply the Company with genuine good milk of the best quality with all its cream on. In proceedings against the foreman, the latter stated that the milk in question was served by him in the same state as he got it from the cans, *but he admitted that he had not tested it, though the milk had travelled a distance of ninety miles and although a lactometer had been supplied to him for the purpose of testing the milk.* Upon these facts he was convicted; and in appeal it was held that the conviction was right, the defendant, though an employee of the Company, being the seller of the milk, and further that, even if the provision of law relating to warranty had any application, the defendant had not brought himself within its provisions. (33)

It has been held that, to support a defence of warranty under section 25 of the *English Sale of Food and Drugs Act, 1875*, a retailer of milk must shew that the producer's contract with him, — contracting that the milk should be pure new milk, — covers each consignment of milk delivered under it. (34)

**Punishment for possessing adulterated liquors.** — This is provided for by section 24 of the *Adulteration Act*, which (as amended by 53 Vic., c. 26, section 10), is as follows: —

"Every compounder or dealer in, and every manufacturer of

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(30) Lindsay v. Rook, 63 L. J. M. C., 231.
(31) Laidlaw v. Willson, 63 L. J. M. C., 31; [1894] 1 Q. B., 74.
(32) The Farmers and Cleveland Dairy Company Limited, (Appellants), v Stephenson, (Respondent), 17 Cox C. C., 201; 60 L. J., M. C., 70.
(33) Hotchin v. Hindmarsh, 60 L. J., M. C., 146; [1891] 2 Q. B., 181.
(34) Robertson v. Harris, 69 L. J., Q. B., 526; [1900] 2 Q. B., 117.

intoxicating liquors, who has in his possession or in any part of the premises occupied by him as such, any adulterated liquor, knowing it to be adulterated, or any deleterious ingredient specified in the first schedule hereto, or added to such schedule by the Governor in Council, for the possession of which he is unable to account to the satisfaction of the court before which the case is tried, shall be deemed knowingly to have exposed for sale adulterated food, and shall incur for the first offence a penalty not exceeding one hundred dollars, and for each subsequent offence a penalty not exceeding four hundred dollars."

**Knowingly attaching false labels.**—The punishment for this is provided for by section 25 of the *Adulteration Act*, which is as follows:—

"Every person who knowingly attaches to any article of food, or any drug, any label which falsely describes the article sold, or offered or exposed for sale, shall incur a penalty not exceeding one hundred dollars and not less than twenty dollars, and costs."

**Procuring samples, and officer or private individual submitting them for analysis.**—Special provisions on this subject are contained in sections 27, 27A, 27B, and 27C, which (as amended by 61 Vic., c. 24, secs. 6 and 7), are as follows:—

"It shall be the duty of any officer entrusted with the enforcement of this Act, when he is required thereto by any person, to purchase from the vendor of any article sold or exposed for sale a sample thereof and submit it for analysis in accordance with the provisions of this Act, provided the person so requiring such purchase and analysis deposits with such officer at the time such a demand is made, a sum of money sufficient to pay for such sample and analysis.

2. If, upon analysis, such article is found to be adulterated within the meaning of this Act, the person at whose instance the analysis is made, may prosecute the vendor of the article, or may require such officer to prosecute the vendor upon making a deposit of twenty-five dollars with the collector of Inland Revenue, as security for the costs of such prosecution, and every person so prosecuting shall be entitled to a moiety of the penalty imposed, upon conviction of the person accused.

3. Nothing herein contained shall be held to preclude such officer, or the Department of Inland Revenue, from prosecuting the vendor of such article so adulterated: Provided that a second prosecution shall not be instituted for the same offence."

"**27a.** Nothing herein contained shall be held to preclude any person from submitting any sample of food, drug, or agricultural fertilizer for analysis to any public analyst, or from prosecuting the vendor thereof, if it is found to be adulterated within the meaning of this Act.

2. Any public analyst shall analyse such sample on payment of the fee prescribed with respect to such article or class of articles by the Governor in Council."

"**27b.** The person purchasing any article with the intention of submitting it to analysis shall, after the purchase is completed, forthwith notify to the seller or his agent selling the article his intention to have it analysed by the public analyst, and shall offer to divide the article into three parts to be then and there separated, each part to be marked and sealed or fastened up in such manner as its nature will permit of, and shall, if required to do so, proceed accordingly, and he shall deliver one of the parts to the seller or his agent, retain one of the parts for future comparison, and submit the third part to the analyst, if he deems it right to have the article analysed."

"**27c.** If the seller or his agent does not accept the offer of the purchaser to divide in his presence the article purchased, the analyst receiving the article for analysis shall divide it into two parts, and shall seal or fasten one of those parts, and shall cause it to be delivered, either upon receipt of the sample or when he supplies his certificate, to the purchaser, who shall retain such part for production in case proceedings are afterwards taken in the matter."

**Expenses and costs.** — Section 28 of the *Adulteration Act*, (as amended by 53 Vic., c. 26, section 11), provides that any expenses incurred in procuring and analysing any food, drug or agricultural fertilizer shall, if the person from whom the sample is taken is convicted of having in his possession, selling, offering or exposing for sale adulterated food, drugs or agricultural fertilizers, in violation of the Act be deemed to be a portion of the costs of the proceedings against him and be paid by him accordingly; and by sub-section 2, (added to the same section by 61 Vic., c. 24, sec. 8), it is provided that such expenses of prosecution shall also include a reasonable counsel fee, in the discretion of the judge, and that in the case of a private prosecution, if the prosecution is dismissed as being without reasonable and probable cause, the costs of defence shall be taxed against such prosecutor.

**Proceeding by Indictment.** — Section 31, (added to the *Adulteration Act*, by 61 Vic., c. 24, sec. 9), declares that nothing in the Act contained shall affect the power of proceeding by indictment nor take away any other remedy against any offender under the Act.

**First schedule.** — The first schedule of the *Adulteration Act*, (as amended by the 53 Vic., c. 26, section 12, and by the 61 Vic., c. 24, section 10), is as follows:—

"Cocculus indicus, chloride of sodium (otherwise common salt), copperas, opium, cayenne pepper, picric acid, salicylic acid, Indian hemp, strychnine, tobacco, darnel seed, extract of logwood, salts of zinc, copper or lead, alum, methyl alcohol and its derivatives, amyl alcohol, and any extract or compound of any of the above ingredients."

**Second schedule.** — The second schedule of the Act is as follows: —

| | |
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| Milk.. .... .... .... .... .... .. ..... .... .... | $ 8 00 |
| Bread, sweets and any other articles not mentioned in this schedule, each... .... .. .. .. | 9 00 |

| | |
|---|---|
| Butter, cheese, malt liquors, cider, wines, alcoholic liquors, tinctures, liqueurs, condiments, spices, drugs, oils, fats, proprietary medicines, infants' and invalids' foods, condensed milk and fertilizers, each.... .... .. | 12 00 |
| Tea, coffee, tobacco, cocoa, chocolate, opium, pharmaceutical liquors, fluid extracts, dispensed medicines and waters, each... .. ... | 14 00 |

**Third schedule.** — The third schedule, (added to the *Adulteration Act* by the 61 Vic., c. 24, section 10), is as follows: —

*Form of Warranty.*

I hereby warrant that the undermentioned articles manufactured by myself or by persons known to me and sold by me to on the dates opposite thereto, are pure and unadulterated within the meaning of the Adulteration Act.

| Date. | Article. |
|---|---|
| | |

*(Signature of manufacturer or vendor.)*

## CANNED GOODS.

The Act relating to canned goods is chapter 105 of the R.S.C., as amended by the 50-51 Vic., c. 38.

**Interpretation of the word "Package."** — Section 1 of the Act declares that the expression "Package" means every can, tin or package in which articles or goods are put up for sale and which are closed by being hermetically sealed.

**Stamping of Packages.** — Section 2 of the Act (as amended by the 50-51 Vic., c. 38), is in the following terms: —

"Every package of canned goods sold or offered for sale in Canada, for consumption therein, shall have attached thereto or imprinted thereon a label or stamp, setting forth in legible characters the name and address of the person, firm or company by whom the same was packed, or of the dealer who sells the same or offers it for sale ;

2. Every such package containing goods prepared from products which have been dried previously to being so prepared, shall, in addition, be labelled or stamped with the word "soaked", which word shall be plainly printed diagonally across the face of the label in large, legible type at least half an inch in height and three eights of an inch in width.

3. Every person who sells or offers for sale any such goods in violation of any provision of this section shall, on summary conviction before a justice of the peace, for a first offence, incur a penalty of two dollars for each such package, and for a subsequent offence a penalty not exceeding twenty dollars and not less than four dollars, for each such package in respect of which any such provision has been violated."

**Misrepresentation of contents of package.** — Section 3 is as follows: —

"Every person who places on any package any label, brand or mark which falsely represents the quantity or weight of the contents of such package, shall, on summary conviction before a justice of the peace, incur a penalty of two dollars for each package on which the quantity or weight is so falsely represented: Provided always, that a variation under the rate of three per cent, shall not be deemed a violation of the provisions of this section."

**Misrepresentation of date of packing.** — Section 4 is as follows: —

"Every person who places on any package any label, brand or mark which falsely represents the date when the article or goods contained therein were packed, shall, on summary conviction before a justice of the peace, incur a penalty of two dollars for each package on which such date is falsely represented."

## DAIRY PRODUCTS.

**Sale of milk to Cheese, Butter or Condensed milk makers.** — The 52 Vic., c. 43, imposes,— for selling, supplying or sending, to any cheese, butter or condensed milk maker or manufacturer, any milk diluted with water, or in any way adulterated, or any skimmed milk, or any milk tainted or partly sour, or any milk drawn from a diseased cow, — a penalty of $50 (and not less than $5) and costs, and imprisonment, not exceeding six months, in default of payment.

**Cheese.** — By section 2 of the 56 Vic., c. 37, the making of any cheese from or by the use of skimmed milk to which there has been added any fat foreign to such milk and the knowingly buying, selling, or exposing or having for sale any cheese so manufactured, is punishable by a fine not exceeding $500 (and not less than $25) and costs, with imprisonment, not exceeding six months with or without hard labor, in default of payment; and, by section 3 of the same statute, it is enacted that cheese made from or by the use of skimmed milk must not be sold, offered, or exposed or had in possession for sale, unless the words "SKIM-MILK CHEESE" are legibly branded, marked or stamped on the side of every cheese, and also upon the outside of every box or package containing the same, under a

penalty of $5 (and not less than $2) and costs, for every such cheese or box or package sold, offered, exposed or had in possession for sale, and three months imprisonment with or without hard labor in default of payment.

**Registration of Cheese Factories and Creameries.** — It is provided by sections 2 and 3 of the *Dairy Act, 1897*, (60-61 Vic., c. 21), that any person engaged in cheese or butter making may register, in the Department of Agriculture at Ottawa, the cheese factory or creamery owned or duly represented by him, and that the person to whom a registration number has been allotted shall thereafter have the exclusive right to use it for the purpose of designating the dairy products manufactured by him or such cheese factory or creamery.

By section 4 of the same Act it is enacted that no person shall sell, offer, expose or have in his possession for sale any butter or cheese made in Canada and destined for export therefrom unless the word "Canadian," "Canadien," or "Canada" is printed, stamped or marked in a legible and indelible manner in letters not less than three-eights of an inch high and one quarter of an inch wide upon — (*a*) the box or package containing the butter or cheese, and — (*b*) moreover, in the case of cheese, upon the cheese itself before it is taken from the factory where it was made; and by section 5 it is provided that no person, with intent to misrepresent, shall remove or in any way efface, obliterate or alter the word "Canadian" "Canadien," or "Canada" or the registration number on any cheese or on any box or package which contains cheese or butter.

By sec. 6 of the Act it is enacted that no person shall knowingly sell, or offer, expose or have in his possession for sale, any cheese or butter upon which or upon any box or package containing which is printed, stamped or marked any month other than the month in which such butter or cheese was made, and that no person shall, knowingly and with intent to misrepresent, sell, or offer, expose or have in his possession for sale any cheese or butter represented in any manner as having been made in any month other than the month in which it was actually made.

By section 7 of the Act it is enacted that every person who by himself or by any other person to his knowledge, violates any of the provisions of sections 4, 5 and 6 shall for each offence, upon summary conviction, be liable to a fine not exceeding $20 and not less than $5, for every cheese or box or package of butter or cheese which is sold, or offered, exposed or had in his possession for sale contrary to the provisions of those sections together with costs of prosecution, and in default of payment shall be liable to imprisonment, with or without hard labor, for a term not exceeding three months, unless such fine and the costs of enforcing it are sooner paid.

## FERTILIZERS.

The *Fertilizers Act* is the 53 Vic., c. 24, by section 2 (*b*) of which the term "fertilizer" is declared to mean and include every natural or artificial manure which is sold at more than $10 per ton, and which contains phosphoric acid, nitrogen, ammonia or nitric acid.

For the meaning given to the expression "agricultural fertilizer" by the *Adulteration Act*, see p. 178, *ante*.

Section 14 of the *Fertilizers Act* (53 Vic., c. 24), provides that every person who sells or offers or exposes for sale any fertilizer, in respect of which the provisions of the Act have not been complied with, is liable to a penalty not exceeding $50 for the first offence and to a penalty not exceeding $100 for each subsequent offence, besides forfeiture of the fertilizer in respect of which the conviction is had. And by section 15 of the Act it is provided that the forging or uttering or using, knowing it to be

forged, of any manufacturer's certificate, bill of inspection, certificate of analysis or inspector's tag required under the Act, shall be punishable by two years' imprisonment with or without hard labor.

### OLEOMARGARINE.

By the R. S. C., c. 100, it is enacted that no person shall manufacture oleomargarine, butterine or any other substitute for butter from any animal substance other than milk, and that no person shall sell oleomargarine, butterine or other such substitute for butter, under a penalty of $400, (and not less than $200), with twelve months, (and not less than three months) imprisonment, in default of payment.

A law, — similar in effect to the above, — enacted by the Legislature of Pennsylvania, has been held, by the United States Supreme Court, to be invalid, on the ground that oleomargarine has, for nearly a quarter of a century, been recognized, in Europe and in the United States, as an article of food and commerce and was recognized as such in an Act, chapter 840, passed by Congress in August, 1886, and on the ground that, being thus a lawful article of commerce, it could not be wholly excluded from importation into a State from another State where it was manufactured, although the State into which it was imported may so regulate its introduction as to insure its purity, without having the power to totally exclude it. (35)

In England, the sale of margarine or butterine is regulated by the Imperial *Margarine Act*, 1887, (50-51 Vic., c. 29).

## DISORDERLY HOUSES DEFINED.

**195. Common bawdy house.** — A common bawdy house is a house, room, set of rooms or place of any kind kept for purposes of prostitution.

**Bawdy-house.** — Other definitions of a bawdy-house, different in words though not in effect from that contained in this section are "any place whether of habitation or temporary sojourn, kept open to the public, either generally or under restrictions, for licentious commerce between the sexes;" (36) and "a house of ill-fame is one kept for the resort and convenience of lewd people of both sexes." (37) Coke says, "Although adultery and fornication be punishable only by the ecclesiastical law, yet the keeping of a house of bawdry, or stews, or a brothel-house being as it were a common nuisance is punishable by the common law, and is the cause of many mischiefs, not only to the overthrow of the bodies and wasting of their livelihoods, but to the endangering of their souls. (38)

If a lodger let her apartment for the purpose of indiscriminate prostitution, it is as much a bawdy-house as if she held the whole house. (39)

It is not necessary that there should be evidence of any indecency or disorderly conduct perceptible from the outside of the house. Evidence shewing that men and women meet there for immoral purposes and that the defendants receive gain therefrom is sufficient. (40)

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(35) Schollenberger v. Pennsylvania, 171 U. S. Rep., 1.
(36) 1 Bish. New Cr. L. Com., 1083.
(37) Bouv. Law Dict. "Bawdy-house;" Harwood v. P., 26 N. Y., 190.
(38) 3 Inst., 205.
(39) R. v. Pearson, 2 Ld. Raym., 1197; 1 Salk., 382.
(40) R. v. Rice, L. R., 1 C. C. R., 21; 35 L. J., M. C., 93; 10 Cox C. C., 155.

The keeper of a bawdy-house may be a man or a woman; and a married woman may be indicted for the offence either alone or with her husband. (41)

The gist of the offence appears to consist in the allurement which the place holds out to a miscellaneous and common bawdry corrupting to public morals. By way of comparison and illustration it has been said that as an inn is for all travellers, so a bawdy-house is for all persons lewdly inclined. Generally,—though not necessarily,—it supplies the girls, who may either dwell in the house, or visit it with or without the men accompanying, for the evil practice. (42)

It has been held that a place where ONE woman receives men for the purpose of sexual intercourse is not a brothel; (43) and evidence of one act of fornication committed in a house, particularly if committed without the knowledge of the keeper of the house, will not be sufficient to prove that it is a bawdy-house or house of ill-fame. (44)

It has been held, in England, that if a weekly tenant of a house use it as a brothel and the landlord receive no additional rent by reason of its immoral occupation, the latter cannot be convicted of keeping a brothel, merely because, having notice of the nature of the occupation, he does not give the tenant notice to quit. (45) And it has been held further that the landlord would not be liable to be so convicted even if, at the time he let the house, he knew it was to be used as a brothel, and, by reason of its occupation as such, has received an additional rent. (46)

It has been recently held, however, by the Court of Queens Bench at Montreal, upon a reserved case stated by the Recorder, that a person who leases a house to another for purposes of prostitution renders himself under the provisions of paragraph (*b*) of section 61, *ante*, a party to and guilty of the offence committed by his lessee, subsequently to the leasing of the house, of keeping a disorderly house, although he was not himself the keeper, and that he can be prosecuted, tried, convicted and punished for such offence in the same manner as the actual keeper. (47)

Upon a charge of keeping a bawdy-house, a conviction should not be made upon evidence of the *general reputation* of the house alone, but the prosecution should be required to produce proof of *acts* or *conduct* from which the character of the house may be inferred. (48)

See section 207, sub-sections (*j*) and (*k*), *post*, as to the liability of keepers inmates and frequenters of bawdy-houses to be dealt with as vagrants.

**196. Common gaming-house.** (49) — A common gaming-house is —

(*a*) a house, room or place kept by any person for gain, to which persons resort for the purpose of playing at any game of chance,

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(41) R. v. Williams, 10 Mod., 63; 1 Salk., 384; C. v. Cheney, 114 Mass., 281; 1 Bish. New Cr. L. Com., 1084.
(42) King v. P., 83 N. Y., 587.
(43) Singleton v. Ellison, 64 L. J., M. C., 123; [1895] 1 Q. B., 607.
(44) R. v. Newton, 11 Ont. P. R., 101.
(45) R. v. Barrett, L. & C., 263; 32 L. J., M. C., 36.
(46) R. v. Stannard, L. & C., 349; 33 L. J., M. C., 61.
(47) R. v. Roy, Que. Jud. Rep., 9 Q. B., 312; 3 Can. Cr. Cas., 472.
(48) R. v. St. Clair, 3 Can. Cr. Cas., 551.
(49) See section 201, sub-section 3, *post*, which makes a Bucket Shop a common gaming-house.

or at any mixed game of chance and skill; (As amended by 58-59 Vic., c. 40); or

(*b*) a house, room or place kept or used for playing therein at any game of chance, or any mixed game of chance and skill, in which

(i) a bank is kept by one or more of the players exclusively of the others; or

(ii) in which any game is played the chances of which are not alike favourable to all the players, including among the players, the banker or other person by whom the game is managed, or against whom the game is managed, or against whom the other players stake, play or bet.

2. Any such house, room or place shall be a common gaming-house although part only of such game is played there and any other part thereof is played at some other place, either in Canada, or elsewhere, and although the stake played for, or any money, valuables, or property depending on such game, is in some other place, either in Canada or elsewhere. (Added by 58-59 Vic., c. 40).

As to *prima facie* evidence of a place being a common gaming-house, see sections 702 and 703, *post*.

In order to obtain a conviction of a person for keeping a common gaming-house as defined by section 196 (*a*), it must be shewn by satisfactory evidence that the person charged is deriving some gain or profit from keeping the house room or place and by allowing games of chance or mixed games of chance and skill to be played therein. And, where a defendant was shewn to be in the habit of inviting his friends to his private apartment once or twice a week and engaging with them in a game of poker for money stakes, the defendant putting up his own stake the same as the others and taking his chance in the game with the others, the chances being alike favorable to all the players, and where it was also shewn that there was merely a small deduction made, (with the consent of the players and not as a matter of right or as a condition of any one being admitted to the game), from the total stakes upon the table at various times, for the ostensible purpose of paying for the refreshments provided, and it was not shewn that the total sum derived from such deductions more than covered the cost of the refreshments, it was held that the defendant could not be convicted. (50)

A defendant, who was the lessee of a room to which the public had free access and in which several people congregated and played a game called "black jack," was convicted of keeping a common gaming-house upon evidence shewing that although the defendant, as lessee, got no benefit, and although there was no constant dealer, the person who happened to be the dealer, (and who is chosen at the commencement by cutting the cards), had an advantage, and, as a rule, could keep the deal five or six minutes; and, in appeal, the conviction was confirmed, it being held that, as the dealer, (banker), had an advantage over the other players, the case came within the provisions of section 196 (*b*). (51)

It has been held in Montreal that a judge of the sessions of the peace

(50) R. v. Saunders, 20 C. L. T., 213.
(51) R. v. Petrie, 20 C. L. T., 250; 3 Can. Cr. Cas., 439.

has no jurisdiction (either with or without the consent of the accused), to summarily try a charge, (laid under sections 196 and 198), of keeping a common gaming-house; but that, under Part 54, *post*, — relating to the *speedy trials of indictable offences*, — such a charge may, after a preliminary examination and a committal for trial, if the accused makes option therefor, be tried before a judge of sessions instead of before the Court of King's Bench and a jury; it being further held that section 783 (*f*). *post*, — relating to the summary trials of certain indictable offences does not apply to the offence of keeping a common gaming-house, — the meaning of the words "disorderly house" in that clause and in section 784, *post*, being governed by the rule "*noscitur a sociis*, — under which rule it is immaterial whether the general term precedes or follows the specific terms used, the general word taking its meaning from and being presumed to embrace only things or persons of the kind designated in the specific words, — and, being, therefore, restricted to houses of the nature and kind of a house of ill-fame or bawdy-house associated therewith in the said section 783 (*f*). (52)

This case is in conflict with a decision rendered in British Columbia, by a Judge of the Supreme Court of that province, to the effect that in the case of a charge of keeping a gaming-house, a police magistrate has, under sections 783 and 784, *post*, jurisdiction to hear and determine the charge summarily, without the consent of the accused, and that the exercise of the jurisdiction is, in the discretion of the magistrate, so that he may, if he thinks proper, take the other course, and hold a preliminary examination and commit the accused for trial. (53)

Before the adding (by the 58-59 Vic., c. 40) of sub-sec. 2 to section 196, *ante*, it was held, in an Ontario case, that a person could not be convicted of keeping a common gaming-house by operating, in a house in Canada, certain implements for determining the winning or losing numbers in a "policy" game upon which the stakes were laid in the United States where the paying of the money, if won, also took place. The game was played by means of a wheel, a quantity of numbers on printed slips from 1 to 78, and a board with the same numbers printed on it. The operator went twice a day to a house in Fort Erie where the wheel was kept. He had the slips containing the numbers 1 to 78 in small individual boxes, one in each box. He deposited all these boxes in a wheel, — a hollow wheel resembling a cheese box, — with glass sides. He then closed the wheel and revolved it so as to effectually shuffle the 78 boxes; after which he opened the wheel and withdrew 12 of the boxes opening these singly and calling out, as he did so, the number of each. He then closed the 12 boxes and returned them to the wheel, and went through the same operation of revolving the wheel and shuffling the whole of the boxes and again withdrawing 12 of them, and reading out their numbers. Having done this, he telegraphed the twenty four numbers thus drawn, — they being the winning numbers, — to the head office in Buffalo, where printed slips were issued and delivered to the different agencies. If a player at the time of staking his money had chosen 3 numbers which corresponded with any three of the winning numbers drawn as above, he was a winner and got $2 for every cent staked by him. The odds were in favor of the banker or person by whom the game was managed; but as the staking of the money and the payment of it, if won, took place out of Canada, all that was done in Canada being the operating of the implements by which were determined the chances on which the stakes were laid, it was held that there was no offence under sections 196 and 198 of keeping a common gaming-house, there being no gaming carried on in the defendant's house as there were no stakes put up there. (54)

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(52) R. v. France, Que. Off. Rep., 7 Q. B., 83; 1 Can. Cr. Cas., 321.
(53) Ex parte John Cook, 3 Can. Cr. Cas., 72.
(54) R. v. Wittman, 14 C. L. T., 447; 25 O. R., 459; 1 Can. Cr. Cas., 287.

The addition of sub-section 2 to section 196, *ante*, has, however, extended the law so as to make a case of this kind an offence under sections 196 and 198.

**197. Common betting-house.** — A common betting-house is a house, office, room or other place —

(*a*) opened, kept or used for the purpose of betting between persons resorting thereto and

(i) the owner, occupier, or keeper thereof ;

(ii) any person using the same :

(iii) any person procured or employed by, or acting for or on behalf of any such person :

(iv) any person having the care or management, or in any manner conducting the business thereof ; or

(*b*) opened, kept or used for the purpose of any money or valuable thing being received by or on behalf of any such person as aforesaid, as or for the consideration

(i) for any assurance or undertaking, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race or other race, fight, game or sport ; or

(ii) for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency; or

(*c*) opened, or kept for the purpose of recording or registering bets upon any contingency or event, horse race or other race, fight, game or sport, or for the purpose of receiving money or other things of value to be transmitted for the purpose of being wagered upon any such contingency or event, horse race, or other race, fight, sport or game, whether any such bet is recorded or registered there, or any money or other thing of value is there received to be so transmitted or not; (Added by 58-59 Vic., c. 40); or

(*d*) opened, kept or used for the purpose of facilitating, or encouraging or assisting in, the making of bets upon any contingency or event, horse race or other race, fight, game or sport, by announcing the betting upon, or announcing or displaying the results of, horse races or other races, fights, games or sports, or in any other manner, whether such contingency or event, horse race or other race, fight, game or sport, occurs or takes place in Canada or elsewhere. (Added by 58-59 Vic., c. 40).

By section 1 of the *English Betting Act, 1853*, (16-17 Vic., c. 119), it is enacted that no house, office, room or place shall be opened, kept or used *for the purpose* of the owner, occupier or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conduct-

ing the business thereof *betting with persons resorting thereto*, or *for the purpose* of any money or valuable thing being received by or on behalf of such owner, etc., as or for the consideration for any assurance, undertaking, promise or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race, fight, game, sport or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency; and that every house, office, room or other place opened, kept, or used for any of the said purposes is a common nuisance and contrary to law. By the second section of the Act, every such house office, room or other place is declared to be a common gaming-house; and, by section 3, it is enacted that any person who, being the owner or occupier of any house office, room or other place, or a person using the same, — shall open, keep or use the same for any of the above purposes, and any person who, being the owner or occupier of any house, office, room or other place, shall knowingly and wilfully permit the same to be opened, kept or used by any other person for any of the above purposes, and any person having the care or management of or in any way assisting in conducting the business of any house, office, room or place, opened, kept or used for any of the said purposes, shall on summary conviction be liable to a fine and costs and to imprisonment in default of payment.

While the law does not sanction betting, it does not declare it to be criminal. All it does is to condemn betting as carried on under certain specified conditions. (55) Nor is the business or avocation of a bookmaker necessarily illegal. (56)

It has been held, in Englanxd, that the resorting to a house for the purpose of betting must be actual and physical, and that sending letters and telegrams is not "resorting thereto" within section 1 of the *English Betting Act*. The English Court of Crown Cases Reserved quashed a conviction on a count for keeping and using a house for the purpose of betting with persons resorting thereto, — there being no evidence that any person had actually gone to the house for the purpose of betting; but it upheld a conviction upon a second count, (the jury having given separate verdicts), the accused being, by such second count, charged with having used the house for the purpose of money being received by and on his behalf on an undertaking to pay money on a contingency, etc., and there being evidence of the defendant having used the house for receiving bets by letters. (57)

It has been held that the *English Betting Act* does not apply to betting between the members of a *bona fide* club, not established for the purpose of betting, although betting is one of the main features of the institution, and members use the club premises for the purpose of betting with each other. (58)

The manager of a place where a lawful business is carried on, but in which illegal betting may be proved to have taken place, to his knowledge, is not made liable by section 3 of the *English Betting Act*. (59)

Two separate and distinct offences are created by section 1 of the *English Betting Act*, first, opening, keeping or using a house or other place for the purpose of betting with persons resorting thereto, and, second, opening.

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(55) Remarks of Russell, L. C. J., in R. v. Brown, [1894] 1 Q. B., 119; 64 L. J., M. C., 1.
(56) Thwaites v. Coulthwaite, [1896] 1 Ch. D., 496.
(57) R. v. Brown, [1894] 1 Q. B., 119; 64 L. J., M. C., 1.
(58) Downes v. Johnson, [1895] 2 Q. B., 203; 64 L. J., M. C., 238.
(59) R. v. Cook, 13 Q. B. D., 377.

keeping or using a house or other place for the purpose of receiving money, etc., as deposits on bets. (60)

A person who habitually resorts to the bar of a public house with a view to meet persons coming there in the character of customers to bet with him upon the contingency of horse racing may be convicted of using such place for the purpose of betting with persons resorting thereto whether the money staked with him upon the results of such races is received by him inside the room or he merely goes outside to take the bets and then comes back into the room to be ready for more,—the evidence shewing that the usual practice was that a person desiring to bet after writing the name of the horse and wrapping up the stake would go outside the public house and there hand over the slip containing the name of the horse with the stake wrapped up in it, and then after thus receiving the stake outside the defendant would go back into the room. (61)

A bookmaker was charged with using the bar of a public house for the purpose of betting with persons resorting thereto. The evidence shewed that the bookmaker went to the public house on several days at the same hour, and persons, who had made bets with him elsewhere and had won, came to the publis house to receive their winnings, and he paid them in the bar. On a case stated by the magistrate it was held that paying bets previously made elsewhere was not using the bar for the purpose of betting with persons resorting thereto, and that the defendant could not be convicted. (62)

The organizer of a sweepstake on a horse race to be subscribed for and drawn at his house commits no offence against the *English Betting Act*, because the subscriptions he receives are not moneys payable on the contingency of a horse race, but on the contingency of the drawing of the sweepstake. (63)

In an action brought to restrain a racecourse company from opening or keeping an enclosure on their racecourse contrary to the provisions of the *English Betting Act*, by allowing it to be used by professional betting men or bookmakers in carrying on their operations therein, it was held by the English Court of Appeal that the owners of the racecourse were not guilty, and that the words "other place" must be construed to mean a definite place analagous in its character and use to a betting house, that there must be some exclusive right to the use of the place as against others,—that, in other words, to constitute such a place as the Act forbids there must be a business of betting conducted, there, by an owner, occupier, manager, keeper or other person vested with the authority of an owner, etc.

The owners of the racecourse and enclosure in question had fenced off the enclosure from the racecourse, the enclosure being uncovered, except that on the side furthest from the course there were raised tiers of seats covered with a roof. To the enclosure, when race meetings were held, the public were admitted on payment of an entrance fee, the number of persons admitted on race days varying from 500 to 2000, and among the frequenters were always a number of professional bookmakers,—100 to 200,—admitted on the same terms as the general public.

These bookmakers had no control over the enclosure or any part of it, nor had they any special rights in it. The greater number of the other

(60) Bond v. Plumb, 17 Cox C. C., 749; [1894] 1 Q. B., 160.
(61) R. v. Worton, 18 Cox C. C., 70; 64 L. J., Q. B., 74; [1895] 1 Q. B., 227.
(62) Bradford v. Dawson, [1897] 1 Q. B., 307; 18 Cox C. C., 473; 66 L. J., Q. B., 191.
(63) R. v. Hobbs, 67 L. J. Q. B., 928.

members of the public who frequented the enclosure went there to back horses with the bookmakers, but there were some who did not bet at all. The bookmakers had their clerks assisting them, but they did not confine themselves to any fixed spot nor use any apparatus,—such as a desk, stool, umbrella or tent,—though any particular bookmaker was to be found usually in or near the same part of the enclosure. The bookmakers called out the odds to attract attention, and the businesses of the different bookmakers were rival and competing.

In rendering their judgment, some of the Judges in Appeal remarked that betting *per se* is not a criminal offence and is only made criminal if carried on in prohibited places, that it cannot be said that "place" or "other place" was intended to include *all* places, because, if so, it would amount to this, that the Act was passed to suppress betting, as no person can bet without occupying a place, if only the place where he stands when betting, that the doctrine of "*noscitur a sociis*" or "*ejusdem generis*" must be applied so as to limit the general words "other place" to places of the same kind as are referred to in the specific words "house, office, room," which precede the general words, and that it cannot be held that an open enclosure,—with no appropriation of any fixed spot, and to which the public are indiscriminately admitted,—is *ejusdem generis* with the house, office or room of an owner, an occupier, etc. (64)

Where a bookmaker uses a box or a stool with his name or other words upon it, not merely to indicate that he is a betting man prepared to bet, but in order to indicate that he is using the place for carrying on his business at which persons may find him, there is a definite localization of the business of betting, and he is thus using a "place" within the meaning of the *Betting Act*. (65)

It has been held that an archway in a street habitually resorted to by a bookmaker for the avowed purpose of betting with all comers upon certain events and contingencies of and relating to horse races is a "place" within the *English Betting Act* and is distinguishable from a racecourse enclosure such as the one forming the subject matter of the Kempton Park case. (66)

In a certain village in Ontario, the defendant occupied a tent open to and frequented by the public, in which tent there was a telegraph wire communicating with an incorporated race track in the United States, where horse racing and betting were legalized. In the defendant's tent there was a blackboard on which were marked the names of the horses and jockeys taking part in the races with the weights and the track quotations, and as a race was being run a telegraph operator called out the progress of the race giving at the end of it, the names of the winning horse and of the second and third horses, which were marked also on the blackboard. Duplicate tickets were furnished in the tent to each applicant each of which tickets requested the defendant to telegraph one B. at the race track in the United States to place a certain amount of money at track quotations on a horse named by the applicant and, by the ticket, the applicant agreed to pay to the defendant for the transmission of his money the sum of ten cents and that all liability on the part of the defendant should cease. The aggregate amount of the moneys so received by the defendant from the applicants for duplicate tickets was notified by telegraph to B, and placed by him with bookmakers on the race track before the beginning of the race, B paying the defendant a percentage on the moneys received. In another part of the village in Ontario, B had an

(64) Powell v. Kempton Park Racecourse Co., [1897] 2 Q. B., 242; 68 L. J. Q. B., 392; [1899] A. C., 143.
(65) Brown v. Patch, [1899] 1 Q. B., 892; 68 L. J. Q. B., 588.
(66) R. v. Humphrey, 67 L. J. Q. B., 534.

agent whom he furnished with money to pay any winnings. *Held*, that the defendant was properly convicted under sections 197 and 198 of keeping a common betting house, the place in question being opened and kept for the reception of money by the defendant on behalf of B as the consideration for an undertaking to pay money thereafter to the depositor on the events of horse races. (67)

A bank, a telegraph office and another office were opened simultaneously in a certain town. Moneys were deposited in the bank by various persons who were given receipts therefor in the name of a person in the United States. These receipts were taken to the telegraph office where information as to horse races being run in the United States was furnished to the holders of the receipts, who telegraphed instructions to the person there on whose behalf the receipts were given to place and who placed, on horses running in the races, bets equivalent to the amounts deposited in the bank by the receipt holders, and on their winning, the amounts of their winnings were paid to the receipt holders at the third office, under telegraphic instructions from the person in the United States making the bets. *Held*, upon evidence and admissions to the above effect, that the defendant who kept the telegraph office was properly convicted of keeping a common betting house under sections 197 and 198. (68)

See the cases of Stoddart v. Sagar & Sagar, and of R. v. Stoddart, *cit.* under section 205, *post*.

**198. Keeping a disorderly house.** — Every one is guilty of an indictable offence and liable to one year's imprisonment who keeps any disorderly house, that is to say, any common bawdy-house, common gaming-house or common betting-house, as hereinbefore defined.

2. Any one who appears, acts, or behaves as master or mistress, or as the person having the care, government or management, of any disorderly house shall be deemed to be the keeper thereof, and shall be liable to be prosecuted and punished as such, although in fact he or she is not the real owner or keeper thereof.

Section 575, *post*, (as amended by the 58-59 Vic., c. 40), provides for the searching of any house, room or place believed to be kept or used as a common gaming-house or betting-house or for the purpose of carrying on a lottery or for selling lottery tickets.

**199. Playing or looking on in gaming-house.** — Every one who plays or looks on while any other person is playing in a common gaming-house is guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty not exceeding one hundred dollars, and not less than twenty dollars and in default of payment to two months' imprisonment. R. S. C., c. 158, s. 6.

As to *prima facie* evidence of a place being a common gaming-house and that persons found therein were playing there, see sections 702 and 703, *post*, (as amended by the *Criminal Code Amendment Act, 1900*).

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(67) R. v. Giles, 15 C. L. T., 178; 26 O. R., 586.
(68) R. v. Osborne, 16 C. L. T., 47; 27 O. R., 185.

**200. Obstructing peace officer entering gaming-house.** — Every one is guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty not exceeding one hundred dollars, and to six months' imprisonment with or without hard labour who —

(*a*) wilfully prevents any constable or other officer duly authorised to enter any disorderly house, as mentioned in section one hundred and ninety-eight, from entering the same or any part thereof ; or

(*b*) obstructs or delays any such constable or officer in so entering ; or

(*c*) by any bolt, chain or other contrivance secures any external or internal door of, or means of access to, any common gaming-house so authorised to be entered ; or

(*d*) uses any means or contrivance whatsoever for the purpose of preventing, obstructing or delaying the entry of any constable or officer, authorized as aforesaid, into any such disorderly house or any part thereof. R. S. C., c. 158, s. 7.

**201. Gaming in stocks, &c.** — Every one is guilty of an indictable offence and liable to five years' imprisonment, and to a fine of five hundred dollars, who, with the intent to make gain or profit by the rise or fall in price of any stock of any incorporated or unincorporated company or undertaking, either in Canada or elsewhere or of any goods, wares or merchandise —

(*a*) without the *bonâ fide* intention of acquiring any such shares, goods, wares or merchandise, or of selling the same, as the case may be, makes or signs, or authorises to be made or signed, any contract or agreement, oral or written, purporting to be for the sale or purchase of any such shares of stock, goods, wares or merchandise ; or

(*b*) makes or signs, or authorises to be made or signed, any contract or agreement, oral or written, purporting to be for the sale or purchase of any such shares of stock, goods, wares or merchandise in respect of which no delivery of the thing sold or purchased is made or received, and without the *bonâ fide* intention to make or receive such delivery.

2. But it is not an offence if the broker of the purchaser receives delivery, on his behalf, of the article sold, notwithstanding that such broker retains or pledges the same as security for the advance of the purchase money or any part thereof.

3. Every office or place of business (70) wherein is carried on the business of making or signing, or procuring to be made or

(70) These p'a es are popularly called *Bucket-Shops.*

signed, or negociating or bargaining for the making or signing of such contracts of sale or purchase as are prohibited in this section is a common gaming-house, and every one who as principal or agent occupies, uses, manages or maintains the same is the keeper of a common gaming-house. 51 V., c. 42, ss. 1 and 3.

By section 704, *post*, the onus of proving a *bona fide* intention is thrown upon the accused.

It has been held that a contract for the sale or purchase of stocks or shares, which, *in effect*, is a bargain for differences only, is a contract by way of gaming under the *English Gaming Act*, and that it is none the less so because there is superadded to it a proviso that the dealer will deliver the stock sold by him if the purchaser chooses to pay him an additional one-eighth or will accept the stock bought by him subject to a discount for cash, the other party not being bound either to take up or deliver the stock. So, that where a dealer in stocks and shares sent to a customer a contract note in this form, — I beg to advise having sold to you," — (there being here given the description and amount of the shares sold, the amount of "cover" and the price,—" plus one-eighth if stock is taken up... subject to the conditions at the back," the conditions being relative to the "cover," and to "contangoes," and "backwardations," and containing this clause: — "It is to be distinctly understood that I am prepared to deliver the stock and shares to which this contract refers, if demanded, but require cash on the first day of the account for securities I have to deliver customers," it was held by Lindley, M. R., and Rigby, L. J., that the contract on the face of it was a gaming transaction, because it was plain from its terms that the parties did not contemplate the stock being taken up and it was not a bargain for the purchase and sale of stock, and it was held by Vaughan Williams, L. J., that, although it might not *on the face of it* be a gaming contract, the inference he drew from the transaction was that the parties intended to treat it as one of differences only and that no stock was to be delivered or received. (69)

**202. Frequenting bucket shops.** (71) — Every one is guilty of an indictable offence and liable to one year's imprisonment who habitually frequents any office or place wherein the making or signing, or procuring to be made or signed, or the negociating or bargaining for the making or signing, of such contracts of sale or purchase as are mentioned in the section next preceding is carried on. 51 V., c. 42, s. 1.

**203. Gambling in public conveyances.** — Every one is guilty of an indictable offence and liable to one year's imprisonment who—

(*a*) in any railway car or steamboat, used as a public conveyance for passengers, by means of any game of cards, dice or other instrument of gambling, or by any device of like character, obtains from any other person any money, chattel, valuable security or property ; or

(69) In re Gieve, Ex parte Trustee, 68 L. J. Q. B., 509; [1899] 1 Q. B., 724. And see the Universal Stock Exchange v. Strachan, 65 L. J. Q. B., 429; [1896] A. C., 166, to the same effect.

(71) See section 201, sub-section 3, (*ante*), under which every bucket-shop is a common gaming-house.

(*b*) attempts to commit such offence by actually engaging any person in any such game with intent to obtain money or other valuable thing from him.

2. Every conductor, master or superior officer in charge of, and every clerk or employee when authorised by the conductor or superior officer in charge of, any railway train or steamboat, station or landing place in or at which any such offence, as aforesaid, is committed or attempted, must, with or without warrant, arrest any person whom he has good reason to believe to have committed or attempted to commit the same, and take him before a justice of the peace, and make complaint of such offence on oath, in writing.

3. Every conductor, master or superior officer in charge of any such railway car or steamboat, who makes default in the discharge of any such duty is liable, on summary conviction, to a penalty not exceeding one hundred dollars and not less than twenty dollars.

4. Every company or person who owns or works any such railway car or steamboat must keep a copy of this section posted up in some conspicuous part of such railway car or steamboat.

5. Every company or person who makes default in the discharge of such duty is liable to a penalty not exceeding one hundred dollars and not less than twenty dollars. R.S.C., c. 160, ss. 1, 3 and 6.

**204. Betting and pool-selling.** — Every one is guilty of an indictable offence, and liable to one year's imprisonment, and to a fine not exceeding one thousand dollars, who —

(*a*) uses or knowingly allows any part of any premises under his control to be used for the purpose of recording or registering any bet or wager, or selling any pool ; or

(*b*) keeps, exhibits, or employs, or knowingly allows to be kept, exhibited or employed, in any part of any premises under his control, any device or apparatus for the purpose of recording any bet or wager or selling any pool ; or

(*c*) becomes the custodian or depositary of any money, property, or valuable thing staked, wagered or pledged ; or

(*d*) records or registers any bet or wager, or sells any pool, upon the result —

(i) of any political or municipal election ;

(ii) of any race ;

(iii) of any contest or trial of skill or endurance of man or beast.

2. The provisions of this section shall not extend to any person by reason of his becoming the custodian or depositary of any money, property or valuable thing staked, to be paid to the winner of any lawful race, sport, game, or exercise, or to the owner of any horse engaged in any lawful race, or to bets between individuals

or made on the race course of an incorporated association during the actual progress of a race meeting. R. S. C., c. 159, s. 9.

**205. Lotteries.** — Every one is guilty of an indictable offence and liable to two years' imprisonment and to a fine not exceeding two thousand dollars, who —

(*a*) makes, prints, advertises or publishes, or causes or procures to be made, printed, advertised or published, any proposal, scheme or plan for advancing, lending, giving, selling or in any way disposing of any *property*, by lots, cards, tickets, or any mode of chance whatsoever ; or

(*b*) sells, barters, exchanges or otherwise disposes of, or causes or procures, or aids or assists in, the sale, barter, exchange or other disposal of, or offers for sale, barter or exchange any lot, card, ticket or other means or device for advancing, lending, giving, selling, or otherwise disposing of any *property*, by lots, tickets or any mode of chance whatsoever ; or

(*c*) *(Added by 58-59 V., c. 40)* conducts or manages any scheme, contrivance or operation of any kind for the purpose of determining who, or the holders of what lots, tickets, numbers, or chances, are the winners of any property so proposed to be advanced, loaned, given, sold, or disposed of.

2. Every one is guilty of an offence and liable on summary conviction to a penalty of twenty dollars, who buys, takes or receives any such lot, ticket or other device as aforesaid.

3. Every sale, loan, gift, barter or exchange of any property, by any lottery, ticket, card or other mode of chance depending upon or to be determined by chance or lot, is void, and all such property so sold, lent, given, bartered or exchanged, is liable to be forfeited to any person who sues for the same by action or information in any court of competent jurisdiction.

4. No such forfeiture shall affect any right or title to such property acquired by any *bonâ fide* purchaser for valuable consideration, without notice.

5. *(As amended by the 58-59 V., c. 40).* This section includes the printing or publishing, or causing to be printed or published, of any advertisement, scheme, proposal or plan of any foreign lottery, and the sale or offer for sale of any ticket, chance or share, in any such lottery, or the advertisement for sale of such ticket, chance or share, and the conducting or managing of any such scheme, contrivance or operation for determining the winners in any such lottery.

6. (As amended by the *Criminal Code Amendment Act 1900*). This section does not apply to —

(*a.*) the division by lot or chance of any property by joint tenants or tenants in common, or persons having joint interests (*droits indivis*) in any such property; or

(*b*.) raffles for prizes of small value at any bazaar held for any charitable or *religious* object, if permission to hold the same has been obtained from the city or other municipal council, or from the mayor, reeve or other chief officer of the city, town or other municipality, wherein such bazaar is held and the articles, raffled for thereat, have first been offered for sale and none of them are of a value exceeding fifty dollars ; or

(*c*) the Crédit Foncier du Bas-Canada, or the Crédit Foncier Franco-Canadien.

This last paragraph (*c*) is identical with paragrapn (*d*) of the section before it was amended at the last session of Parliament, the clause previously embodied in paragraph (*c*) being by the amendment entirely eliminated. By the clause thus eliminated certain distributions of paintings and works of art by lot among the members or ticket holders of any incorporated society established for the encouragement of art were specially excepted from the operation of section 205 ; but it was found that several so-called art societies were in reality lotteries for money prizes; and it was in order to eradicate this evil that the exception in favor of art societies was struck out.

Section 575, *post*, contains special provisions for searching gaming-houses, betting houses and lottery houses.

See section 3 (*r*), *ante*, as to the meaning of the expression "property."

According to the decisions in English cases on the subject, there must, in order to constitute a lottery, be some contrivance or device for obtaining money by chance.

The proprietor of a sporting newspaper issued, in connection with the paper, at the price of one penny, a weekly handicap book or racing record containing general information as to horse races past and to come. The last page of this weekly handicap book was a coupon in which six races to come were selected, and money prizes were offered to any purchaser of the book who filled up, and returned to the newspaper office within a limited time and under specified conditions, a coupon with the names of six, five or four winning horses. *Held* that this was not a proposal and scheme for the sale of chances in a lottery, under the Lottery Act, nor an invitation to take a share in connection with a bet under the Betting Acts. (72)

In another case, the defendants had published and sold a newspaper containing 25 coupons to be filled up, by purchasers, with the names of the horses to be selected by them as likely to be placed in a race. For every coupon filled up after the first, (which was free), a penny was charged, and a money prize of £100 was promised for the placing of the first four horses correctly. *Held*, that this competition was not a lottery, that the selling of the newspapers containing the coupons did not constitute the selling of chances in a lottery, and that the defendants could not be convicted of any offence either against the Lottery Acts or the Betting Acts. (73)

In a more recent case, the defendant, — who was the occupier of an office and the proprietress and part manager of a sporting newspaper pub-

(72) Caminada v. Hulton, 60 L. J. M. C., 116; 17 Cox C. C., 307.
(73) Stoddart v. Sagar & Sagar, 64 L. J. M. C., 234; [1895] 2 Q. B., 474; 18 Cox C. C., 165.

lished weekly at such office, — was indicted and tried, under the *English Betting Act*, 1853, section 1, (which is similar in effect to section 197, subsections *a* and *b* of our Code, *ante*), on a charge of having unlawfully kept and used the said office for the purpose of money, etc., being received as and for the consideration for undertakings and promises to pay and give, thereafter, money and valuable things on events and contingencies of and relating to horse races; and, upon the following facts, she was convicted. For several weeks each number of the newspaper contained conditions of a coupon competition, the subject of which was a horse race. A prize usually of £1000 was offered to those who succeeded in placing the names of the winning horses in some future specified horse race. The newspaper contained 49 coupons and an intended competitor might fill up with the names of the horses which he selected and send to the office one or more of these coupons. The first of the coupons was free of charge but a penny was charged upon each subsequent coupon. If more than one coupon was successful the prize was equally divided. A large number of persons took part in the competition. Large sums were received by the defendant at the office in respect of coupons; and the prizes were paid by her to the successful competitors. *Held*, that the defendant was rightly convicted, even if the transactions between her and the competitors did not amount to betting; and *held*, further, (by some of the Judges), that the transactions did amount to betting; the cases of *Caminada v. Hulton*, and *Stoddart v. Sagar*, (above cited), and the case of *R. v. Hobbs* (cited at page , *ante*), being all distinguished; the principal ground upon which the case of *Caminada v. Hulton* was distinguished being that, in that case, the facts shewed that the competitors paid nothing extrr (beyond the price of the book) for extra chances of winning the prize, the principal ground upon which the case of *Stoddart v. Sagar* was distinguished being that the trial judge in that case did not draw the same conclusion of fact, (although he might have done) as was drawn by the trial judge in the present case, namely, that the money received from the competitors was paid in consideration of a promise to pay a prize on the event of a horse race, and the principal ground on which the case of *R. v. Hobbs* was distinguished being that, in that case, the person there charged was not shewn to have entered into any such promise as is made, by the statute, the essence of the offence, and that he made no promise except to distribute the money received by him as holder of the sweepstake. (73*a*)

Where the competition is such that what the competing persons do depends upon mere chance, as, for instance, the filling in of missing words in the case of the missing word competition, the transaction is a lottery, the question really being whether a person who competes has to exercise any skill or is driven to take his chance. (74)

Where the proprietor of a newspaper by advertisement therein offered to the readers of the paper a money prize for a correct prediction of the number of male and female births and the number of deaths in London during a specified future week, it was held that the offer did not constitute a lottery. (75)

In a prosecution (prior to the passing of the Criminal Code), of an offence against the R. S. C., c. 159, section 2, respecting lotteries, etc., it was established that the defendant's mode of operation was as follows: — He held in an hotel a kind of concert, and proceeded to sell what he called "Parker's Pacific Pens." Prior to making a sale he placed in an empty box, 100 envelopes, each containing a one dollar bill, 10 envelopes, each

(73*a*) R. v. Stoddart, 70 L. J., Q. B., 189.

(74) Barclay v. Pearson, 62 L. J., Ch., 636; 68 L. T. Rep., 709; [1893] Ch., 154. See, also, Taylor v. Smetton, 11 Q. B. D., 207.

(75) Hall v. Cox, 68 L. J. Q. B., 167; [1899] 1 Q. B., 198.

containing a five dollar bill, 5 envelopes with a ten dollar bill in each, and one envelope with a fifty dollar bill in it, thus making $250 in 116 envelopes. He also placed in the box 116 other envelopes containing only blank sheets of paper. Every person paying one dollar for a box of pens was entitled to draw one envelope, and any person paying $5 for a box of pens could draw eight envelopes but he would not take more than $5 from any one person. He said he did not sell the envelopes but that he sold the pens, and that he distributed the money contained in the envelopes in order to advertize the pens. A box of the pens was worth not more than ten cents. The defendant was convicted; and an application to quash the conviction was dismissed, it being held that the defendant was offering for sale and selling a means or device for disposing of his pens by a mode of chance, or was selling his pens as a means or device for disposing of the money contained in the envelopes by a mode of chance, both parties to the transaction, — the defendant as seller and each purchaser who bought, — knowing that the $1 paid was not paid for the pens, — these being only the device, — but that the $1 was for the chance of getting one of the prizes contained in the envelopes. It was held, further, that the sale of lottery tickets or chances would be equally an offence whether a profit, — direct or indirect, — be intended, or no profit be sought or expected. (76)

**206. Misconduct in respect to human remains.** — Every one is guilty of an indictable offence and liable to five years' imprisonment who —

(*a*) without lawful excuse, neglects to perform any duty either imposed upon him by law or undertaken by him with reference to the burial of any dead human body or human remains ; or

(*b*) improperly or indecently interferes with or offers any indignity to any dead human body or human remains, whether buried or not.

It is an offence at common law to dig up a dead body from a grave ; and it is no defence to such a charge that the motives of the defendant were laudable. (77) And a person who without lawful authority disposes of a dead body for dissecting purposes and for gain and profit is indictable at common law. (78)

Taking up dead bodies, even though for the purpose of dissection, is an indictable offence. (79)

The neglect to decently bury a dead human body by a person who has undertaken to do so and has removed the body with that expressed intention is an indictable offence under the above section, 206, although such person was, apart from such undertaking, under no legal obligation in respect of the burial. (80)

It has been held, in England, that a parent who has not the means of providing burial for the body of his deceased child is not liable to be indicted for not providing for its burial, even though a nuisance is occasioned by allowing the body to remain unburied. (81)

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(76) R. v. Parker, 13 C. L. T., 319; 9 Man. L. R., 203.
(77) R. v. Sharp, Dears. & B., 160; 26 L. J. M. C., 47. See, also, R. v. Feist, Dears. & B., 590.
(78) R. v. Giles, R. & R., 366.
(79) R. v. Lynn, 2 T. R., 733; Warb. L. Cas., 2nd Ed., 119.
(80) R. v. Newcomb, 2 Can. Cr. Cas., 255.
(81) R. v. Vann, 2 Den. C. C., 325.

It has also been held, in England, that a person who burns a dead body, in order to prevent the coroner from holding an inquest, is guilty of a criminal offence. (82)

## PART XV.

## VAGRANCY.

**207.** Every one is a loose, idle or disorderly person or vagrant who —

(*a*) not having any visible means of subsistence, is found wandering abroad or lodging in any barn or outhouse, or in any deserted or unoccupied building, or in any cart or wagon, or in any railway carriage or freight car, or in any railway building, and not giving a good account of himself, or who, not having any visible means of maintaining himself, lives without employment. (As amended by the *Criminal Code Amendment Act 1900*, 63-64 V., c. 46, which came into force on the 1st January 1901).

(*b*) being able to work and thereby or by other means to maintain himself and family *wilfully* refuses or neglects to do so ;

(*c*) openly exposes or exhibits in any street, road, highway or public place, any indecent exhibition ;

(*d*) without a certificate signed, within six months, by a priest, clergyman or minister of the Gospel, or two justices of the peace, residing in the municipality where the alms are being asked, that he or she is a deserving object of charity, wanders about and begs, or goes about from door to door, or places himself or herself in any street, highway, passage or public place to beg or receive alms ;

(*e*) loiters on any street, road, highway or public place, and obstructs passengers by standing across the footpath, or by using insulting language, or in any other way ;

(*f*) causes a disturbance in or near any street, road, highway or public place, by screaming, swearing, or singing or by being drunk, or by impeding or incommoding peaceable passengers ;

(*g*) by discharging fire arms, or by riotous or disorderly conduct in any street or highway, wantonly disturbs the peace and quiet of the inmates of any dwelling-house near such street or highway ;

(*h*) tears down or defaces signs, breaks windows, or doors or door plates, or the walls of houses, roads or gardens, or destroys fences;

(*i*) being a common prostitute or night walker, wanders in the fields, public streets or highways, lanes or places of public meeting or gathering of people, and does not give a satisfactory account of herself ;

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(82) R. v. Stephenson, 15 Cox C. C., 679. And see R. v. Price, 12 Q. B. D., 247.

(*j*) is a keeper or inmate of a disorderly house, bawdy-house or house of ill-fame, or house for the resort of prostitutes ; (1)

(*k*) is in the habit of frequenting such houses and does not give a satisfactory account of himself or herself ; or

(*l*) having no peaceable profession or calling to maintain himself by, for the most part supports himself by gaming or crime, or by the avails of prostitution. R. S. C., c. 157, s. 8.

2. The expression "public place" in this section includes any open place to which the public have or are permitted to have access and any place of public resort. (Added by 57-58 V., c. 57).

**208.** Every loose, idle or disorderly person or vagrant is liable, on summary conviction, to a fine not exceeding fifty dollars or to imprisonment, with or without hard labour, for any term not exceeding six months, or to both. R. S. C., c. 157, s. 8. (As amended by 57-58 V., c. 57).

Provided that no aged or infirm person shall be convicted as a loose, idle or disorderly person or vagrant for any reason coming within paragraph (*a*) of section 207, in the county of which he has for the two years immediately preceding been a resident. (Added by the *Criminal Code Amendment Act 1900*, 63-64 V., c. 46, which came into force on the 1st January 1901).

Under the common law of England, a vagrant, as such, was not indictable, but an idle and loose person could be apprehended and bound to his good behaviour: (2) and there are many early statutes authorizing summary proceedings against idlers, vagabonds and rogues, and against wandering mariners and soldiers, and against gypsies. (3)

The law as to vagrants does not warrant an arrest, much less a conviction, on mere suspicion of dishonest intentions or upon suspicion of vagrancy.

A person who had registered at an hotel in Toronto was arrested on the same day at the Union Railway station, he having been pointed out, by some of the railway officials, as a suspicious character. Upon him were found $8 in cash, a railway mileage ticket (nearly used up) in favor of another person, and two cheques sworn to be such as confidence men use. He offered no explanation and gave no information about himself. Upon proof of these facts, it was held that the Act relative to vagrants did not warrant the defendant's arrest much less his conviction under the provision of law rendering a person a vagrant who, having no visible means of maintaining himself, lives without employment, (see the latter part of sub-section (*a*) of the above section, 207), but that, before a person can be convicted under such a provision of the law, he must have acquired in some degree a character which brings him within it. (4)

(1) See section 198, *ante*, as to bawdy-houses.
(2) R. v. King's Langley, 1 Str., 631; R. v. Egan, 1 Crawf. & Dix., C. C., 338; R. v. Talbot, 11 Mod., 415; 4 Bl. Com., 169.
(3) 4 Bl. Com., 165.
(4) R. v. Bassett, 10 Ont. P. R., 386.

Where a person is charged with being a vagrant in being able to work and maintain himself and family and in wilfully refusing or neglecting to do so, an obligation to maintain must be established against him. For instance, a man is not bound to support his wife who has left him and is living in adultery; (5) and where, on a similar charge, the magistrates found that the defendant refused to maintain his wife because of his *bona fide* belief that she had committed adultery, — he having offered under certain conditions to support his children, the charge was dismissed, the magistrates deciding that the defendant had not *wilfully* refused or neglected, the word *wilfully* importing a *mens rea*, which must be established on such a charge before the defendant can be convicted of being an idle and disorderly person; and it was held, in appeal, that the decision of the magistrates was right. (6) Nor can a person who has offered to take back his wife be convicted on such a charge. (7)

It has been held, that a person, who is able to work and to thereby or by other means maintain his wife and who is charged with vagrancy for wilfully refusing or neglecting to do so, cannot be convicted when it appears that his wife had left the matrimonial abode without his consent and without judicial authorization or other valid reacon, and if he was willing and offered to receive her while she on her part refused to return and live with him. (8)

Where a woman who, being deserted by her husband, and having no means of maintaining her children, left them so that they became chargeable to the parish, it was held that she could not be convicted, under the English Vagrant Act, 5 Geo. IV, c. 83, s. 4. (9)

It seems that in order to convict a person under the provisions of subsection (*d*) of the above section, 207, it must be shewn that it is the person's habit and mode of life to wander about and beg. So, that, where Collier on strike, who were householders in a colliery district and had wives and families, were prosecuted and convicted as vagrants, under a section of the English Vagrancy Act, similar in effect to the above subsection (*d*), for having gone from house to house in the streets of a town four miles distant from their homes, with a wagon marked "Children's Bread Wagon," and begged for assistance in money and kind, it was held that the conviction was wrong, it not being the habit and mode of life of the defendants to wander abroad and beg, the law being aimed at persons who make it their habit and mode of life to wander abroad or place themselves in public places to gather alms, and that if persons, — not as a regular course of living, but for some object not in itself unlawful, — go from house to house and solicit subscriptions, they are not vagrants within the meaning of the Act. (10)

A licensed carter who, contrary to a city ordinance, loiters on the street near the entrance of a hotel and solicits passengers to hire his cab, but who does not obstruct passengers, is not within clause (*e*) of the above section. (11)

Being drunk in a public street is not an offence under clause (*f*) of the above section. The offence consists in causing a disturbance by being drunk. (12)

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(5) R. v. Flinton, 1 B. & Ad., 227.
(6) Morris v. Edmonds, 18 Cox C. C., 627.
(7) Flanagan v. Bishop Wearmouth, 8 E. & B., 451.
(8) R. v. Leclair, Que. Jud. Rep., 7 Q. B., 287; 2 Can. Cr. Cas., 297.
(9) Peters v. Cowie, 2 Q. B. D., 131.
(10) Pointon & Boot (Appellants), v. Hill, (Respondent), 12 Q. B. D., 306.
(11) Smith v. R., 4 M. L. R., 325; Burb. Dig. Cr. Law, 188.
(12) Ex parte Despatie, 9 L. N., 387; R. v. Daly, 24 C. L. J., 157.

Sub-section (*i*) of the above section, 207, does not mean that being a prostitute or a night walker makes such a person liable to punishment as such, but only those prostitutes who when found wandering about and when requested to give an account of themselves are unable to give a satisfactory account of themselves. So that where under a section of the Canadian Vagrancy Act (32-33 Vic., c. 28) similar in effect to sub-section (*i*) of section 207 of the Code, a woman was convicted of being a common prostitute and of wandering in the public streets and not giving a satisfactory account of herself, the conviction was held illegal, because it did not allege that the woman was asked, before being taken, or when she was being taken, to give an account of herself; and it was held further that an allegation "she giving no satisfactory account" does not shew that any prior demand was made upon her to give an account of herself. (13)

Upon a conviction and fine for keeping a house of ill-fame, the powers of a magistrate for enforcing payment of the fine are limited by section 872 (*b*), *post*, to directing imprisonment for a period not exceeding three months, although he might, in the first instance, impose imprisonment for six months instead of or in addition to a fine. Section 208 only applies to authorize six months imprisonment when imposed as the substantive punishment for the offence and not as a means of enforcing payment of a fine. *Semble* that section 788, *post*, only applies to authorize six months imprisonment in default of payment of a fine imposed when a fine and imprisonment are conjointly imposed in the first instance. (14)

There may be a joint conviction against a husband and wife for keeping a house of ill-fame. The keeping has nothing to do with the ownership of the house but with the management of it. (15)

Where a prisoner was charged with keeping a bawdy-house for the resort of prostitutes, it was held, upon habeas corpus, that, although "keeping a bawdy-house" is in itself a substantive offence, and although "keeping a house for the resort of prostitutes" is also a substantive offence, still there was in this case only one offence charged and that the conviction and commitment thereon were good. (16)

Upon a charge of keeping or being an inmate of a bawdy-house, a conviction should not be made upon evidence of the house's general reputation, alone, without proof of acts or conduct from which the character of the house may be inferred. (17)

The offence under sub-section (*k*) of the above section, 207, consists in a person being an habitual frequenter of a house of ill-fame and not giving a satisfactory account of himself; and a conviction on such a charge must shew that the accused is an habitual frequenter; or it will be void. (18)

Where a defendant was convicted of being a vagrant in having no peaceable profession or calling to support himself by and in supporting himself for the most part by crime, and the evidence shewed that he had no peaceable profession or calling and that he consorted with thieves or reputed thieves, but the witnesses did not say that he supported himself by crime, it was held that it was not to be *inferred* that he supported himself by crime, although from the evidence there was reason to *suspect* that he

(13) R. v. Levesque, 30 U. C. Q. B., 509. See, also, R. v. Arscott, 9 O. R., 541, and Arscott v. Lilley, 11 O. R., 153.
(14) R. v. Stafford, 1 Can. Cr. Cas., 239.
(15) R. v. Warren & Ux., 16 O. R., 590. See, also, R. v. Williams, 10 Mod., 63.
(16) R. v. MacKenzie, 2 Man. L. R., 168.
(17) R. v. St. Clair, 3 Can. Cr. Cas., 551.
(18) R. v. Clark, 2 O. R., 523. And see Arscott v. Lilley, 11 O. R., 153.

supported himself by some irregular course of life and that to sustain a conviction there should have been evidence that he got his living by thieving or by aiding and acting with thieves or by such means as shewed that he was pursuing crime. (19)

Where a person was convicted before a police magistrate of being a vagrant in having no peaceable profession or calling to maintain himself by, but for the most part supported himself by gaming, it was held, on *habeas corpus*, that to support such a conviction there must be evidence of four distinct propositions, namely (*a*), that the accused had no peaceable profession or calling to support himself by, (*b*), that he practised gaming, (*c*), that from this practice he derived some substantial profits, and (*d*), that these profits constituted the larger part of his means of support, and that inasmuch as there was no reasonable evidence to warrant a finding of either the third or fourth of these propositions it could not be assumed that, because the accused had no visible occupation and because he was greatly addicted to gambling, the gambling contributed mainly to his support, as it might be that he was possessed of means to enable him to live in affluence or that he was supported by others and that his means or the means supplied to him by others were to some extent dissipated by him in gambling. (20)

The evidence on a charge of vagrancy under section 207 (*l*), must shew that the gaming or crime took place during the time within or for which he is charged in the information with having been a vagrant; and, where a son has for a portion of the year lived with his parents at their request, they being willing and able to provide for his support, the fact of his living without employment does not constitute an offence, and although it may appear that the money by which the accused is supported while living with his parents had been previously, (that is prior to the time of the alleged vagrancy), acquired by him by gaming, etc., and that the accused while resident with his parents idled away his time in places of public resort, such does not justify a conviction for vagrancy. (21)

A woman who is kept by a married man, and who surrenders herself to sexual intercourse with him alone, does not come within the provisions of the above section 207 (*l*). (22)

See sub-section 4 of section 8 of the R. S. C., section 157, (unrepealed), which provides for the imprisonment of a vagrant in a work-house or other such place where such a place is provided by provincial laws.

**Search warrants.**—Section 576, *post*, provides that, —"Any stipendiary or police magistrate, mayor or warden, or any two justices of the peace, upon information before them made, that any person described in Part XV as a loose, idle or disorderly person, or vagrant, is or is reasonably suspected to be harboured or concealed in any disorderly house, bawdy-house, house of ill-fame, tavern or boarding-house, may, by warrant, authorize any constable or other person to enter at any time such house or tavern, and to apprehend and bring before them or any other justices of the peace, every person found therein so suspected as aforesaid."

(19) R. v. Organ, 11 Ont. P. R., 497.
(20) R. v. Davidson, 8 Man. L. R., 325.
(21) R. v. Riley, Que. Jud. Rep., 7 Q. B., 198.
(22) R. v. Rehe, Que. Jud. Rep., 6 Q. B., 274; 1 Can. Cr. Cas., 63.

# TABLE OF OFFENCES UNDER TITLE IV.

## INDICTABLE OFFENCES.

| No. | Sec. | Offence. | Punishment. | Tribunal. |
|---|---|---|---|---|
| 1 | 170 | Blasphemous libels | One year | Either Sup. Ct. Cr. Juris. or General or Quarter Sessions. |
| 2 | 171 | Obstructing officiating clergyman | Two years | do |
| 3 | 172 | Violence to officiating clergyman | Two years | do |
| 4 | 174 | Unnatural offence | Life | do |
| 5 | 175 | Attempt to commit sodomy | Ten years | do |
| 6 | 176 | Incest | Fourteen years and whipping | do |
| 7 | 178 | Acts of gross indecency | Five years | do |
| 8 | 179 | Publishing obscene matters | Two years | do |
| 9 | 180 | Posting immoral books, etc | Two years | do |
| 10 | 181 | Seduction of girls under sixteen | Two years | do |
| 11 | 182 | Seduction under promise of marriage | Two years | do |
| 12 | 183 | Seduction of a ward or a servant, factory girl, etc | Two years | do |
| 13 | 184 | Seduction of female passengers on vessels | $400 fine or one year | do |
| 14 | 185 | Unlawfully defiling women | Two years with hard labor | do |
| 15 | 186 | Parent or guardian procuring defilement of girl | Fourteen years and five years | do |
| 16 | 187 | Householders permitting defilement of girls | Ten years and 2 years | do |
| 17 | 188 | Conspiracy to defile | Two years | do |
| 18 | 189 | Carnally knowing idiots | Four years | do |
| 19 | 190 | Prostitution of Indian women | $100 fine or six months | do |
| 20 | 192 | Common nuisance | One year, or fine. (See Sec. 934) | do |
| 21 | 194 | Selling things unfit for food | One year | do |
| 22 | 198 | Keeping disorderly house (bawdy-house, gaming house(1) | One year | do |
| 23 | 201 | Gaming in stocks, etc | Five yrs and $500 fine | do |
| 24 | 202 | Frequenting bucket-shops | One year | do |
| 25 | 203 | Gambling in public conveyances (railways, steamers, etc.) (2) | One year | do |
| 26 | 204 | Betting and pool-selling | One year and $1000 fine | do |
| 27 | 205 | Lotteries | Two yrs and $2000 fine | do |
| 28 | 206 | Misconduct towards human remains | Five years | do |

On refcrence to sections 538, 539 and 540, *post*, it will be seen that all the indictable offences mentioned in Title IV, and here tabulated, are triable by a Court of General or Quarter Sessions, which has concurrent jurisdiction, over them, with the Superior Courts of Criminal Jurisdiction.

See comments, (under the Table of Indictable Offences at the end of Title II, *ante*), on the Summary Trial of Indictable Offences, Fines, Sureties, Suspension of sentence, Restitution, Compensation, and Costs.

(1) The offence of keeping a bawdy-house, as well as being indictable, may also be tried summarily under sections 783 and 784, *post* (which see).

(2) Under this section, railway conductors, steamboat officers, station masters, etc., are obliged to arrest and prosecute offenders and are liable to $100 fine, for neglect to do so.

Every company or other owner of a railway car or steamboat must keep a copy of the section posted up conspicuously in their railway car or steamboat, and are liable, for neglect to do so, to $100 penalty.

## NON-INDICTABLE OFFENCES.

| No | Sec. | Offence. | Punishment. | Tribunal. |
|---|---|---|---|---|
| 1 | 173 | Disturbing public worship. ... ..... | $50 fine, or one month in default. ..... | Summary. |
| 2 | 177 | Indecent acts..... .... ..... | $50 fine, or six months, — with or without hard labor,—or both fine and imprisonment..... | Summary (2 justices) |
| 3 | 199 | Playing or looking on in gaming-house. | $100 penalty, *or* two months in default... | do do |
| 4 | 200 | Wilfully preventing obstructing or delaying officer entering disorderly house..... ..... ..... | $100 fine *and* 6 months with or without h. l. | do do |
| 5 | 203[3] | Railway or steamboat officer neglecting to arrest persons gambling in their conveyances..... ..... | $100 penalty..... | Summary. |
| 6 | 203[5] | Neglect of railway or steamboat company, etc., to post up in their conveyances section 203 against gambling ..... ..... | $100 penalty..... | Civil Court. (See sec. 929, *post*). |
| 7 | 207, 208 | Vagrancy, including: not having any visible means of subsistence and being found wandering abroad, etc., and not giving a good account of himself; not having any visible means and living without employment; being able to work and wilfully refusing to maintain his family; publicly exposing indecent show; begging; loitering; swearing, being drunk and disorderly, etc., in street; defacing signs, breaking windows, etc.; common prostitution, night-walking, etc.; keeping or being inmate of a disorderly house, or frequenting disorderly houses; living by gaming or crime or by the avails of prostitution..... | $50 fine, or six m'ths (with or without h. labor), or both.. | Summary. |

# TITLE V.

## OFFENCES AGAINST THE PERSON AND REPUTATION.

### PART XVI.

### DUTIES TENDING TO THE PRESERVATION OF LIFE.

**209. Duty to provide necessaries of life.** — Every one who has charge of any other person unable, by reasons either of detention, age, sickness, insanity or any other cause, to withdraw himself from such charge and unable to provide himself with the necessaries of life, is, whether such charge is undertaken by him under any contract, or is imposed upon him by law, or by reason of his unlawful act, under a legal duty to supply that person with the necessaries of life, and is criminally responsible for omitting, without lawful excuse, to perform such duty if the death of such person is caused, or if his life is endangered, or his health has been or is likely to be permanently injured, by such omission.

Neglect by parents to call in medical aid to their sick child, in consequence of which neglect the child dies, amounts to manslaughter; and it is no defence to such a charge for the parents to say they have conscientious objections, — based upon certain religious views, — to call in medical aid. (1)

Where a woman who lived with her sick and helpless aunt neglected to give the latter necessary assistance to enable her to obtain food and medical aid and where such negligence was found to have accelerated the aunt's death, the woman was held rightly convicted of manslaughter. The prisoner, who was of full age and without means of her own, lived with and was maintained by the deceased, her aunt, who was a woman of 73 years of age. No one else lived with them. For the last ten days of her life, the deceased suffered from a disease which prevented her moving or doing any thing to procure assistance. During this time the prisoner lived in the house and took in the food supplied by tradesmen but gave none of it to the deceased ond procured for her no medical nor nursing aid and informed no one of the deceased's condition, although she had abundant opportunity of doing so. No one but the prisoner had any knowledge of the condition of the deceased prior to her death, which was accelerated by want of food, nursing and medical attendance. *Held* that a duty was im-

(1) R. v. Cook, 62 J. P., 712. See, also, R. v. Senior, 68 L. J. Q. B., 175; [1899] 1 Q. B., 283, R. v. Downes, 1 Q. B. D., 25, R. v. Morby, 15 Cox, 35.

posed upon the prisoner to supply the deceased with sufficient food to maintain life, and that the deceased's death having been accelerated by the neglect of such duty, the prisoner was properly convicted of manslaughter. (2)

See section 215, *post*, for the punishment of neglect or refusal to perform any of the duties specified in the above section 209 and in sections 210 and 211, when the neglect or refusal causes an injury short of death. If the neglect or refusal causes death and amounts to culpable homicide, it would be punishable as such. (3)

**210. Duty of head of family to provide necessaries.** — Every one who as parent, guardian or head of a family is under a legal duty to provide necessaries for any child *under the age of sixteen years*, is criminally responsible for omitting, without lawful excuse, to do so while such child remains a member of his or her household, whether such child is helpless or not, if the death of such child is caused, or if his life is endangered or his health is or is likely to be permanently injured, by such omission.

2. Every one who is under a legal duty to provide necessaries for his wife, is criminally responsible for omitting, without lawful excuse, so to do, if the death of his wife is caused, or if her life is endangered, or her health is or is likely to be permanently injured by such omission.

3. In this section the word "guardian" has the same meaning as, under section 186a, it has in sections 183 and 186. (Added by the *Criminal Code Amendment Act 1900*).

On the trial of an indictment under sub-section 2 of this section, it was held that, in order to shew a lawful excuse, evidence is admissible on behalf of the prisoner of there having been at the time of the marriage an agreement made between him and his intended wife that after marriage they were to live at their respective homes and that she should be supported as before the marriage and not by the prisoner until he obtained a situation where he could earn sufficient for the maintenance of both. (4)

Where a defendant was convicted on a charge of neglecting to support his wife, and the evidence shewed that the parties were married in 1890 but that the wife was married previously to another man in 1886, although she had never lived with her first husband, and it appeared that, in 1888, she had received a letter stating that he was dying in the United States, and that about a year after her marriage to the defendant she heard that her first husband was dead. *Held* that there was evidence to go to the jury of the death of the first husband before the second marriage and that the defendant was properly convicted. (5)

A defendant was tried and convicted by a County Court Judge of having omitted without lawful excuse to provide his wife with necessaries, in consequence of which her health was likely to be permanently injured. The evidence shewed that the defendant who was in receipt of regular weekly

(2) R. v. Instan, 62 L. J. M. C., 86; [1893] 1 Q. B., 450; 17 Cox C. C., 602. And see R. v. Nicholls, 13 Cox C. C., 75.
(3) As to culpable homicide, see section 220, *post*.
(4) R. v. Robinson, 17 C. L. T., 216; 28 O. R., 407; 1 Can. Cr. Cas., 28.
(5) R. v. Holmes, 29 O. R., 362; 2 Can. Cr. Cas., 131.

wages refused to make any provision for his wife at a time when she was pregnant and incapacitated for work. *Held* that there was evidence upon which the Judge could properly find against the defendant, that the words "likely to be permanently injured" have no technical meaning, and that it is purely a question of fact in such a case whether the acts proved are such that the health of the wife is likely by reason thereof to be permanently injured. (6)

In the case of a conviction on a charge of failing to supply necessaries to a wife whereby her health is likely to be permanently injured, the conviction ought to be affirmed, where there is some evidence from which it may be inferred that such permanent injury was likely to result from the non supply of necessaries, this being a question depending upon the facts or the weight of evidence, and one which cannot properly be made the subject of a reserved case. (7)

**211. Duty of Masters to provide necessaries.** — Every one who, as master or mistress, has contracted to provide necessary food, clothing or lodging for any servant or apprentice *under the age of sixteen years* is under a legal duty to provide the same, and is criminally responsible for omitting, without lawful excuse, to perform such duty, if the death of such servant or apprentice is caused, or if his life is endangered, or his health has been or is likely to be permanently injured, by such omission.

The Royal Commissioners in referring to the provisions of sections of their draft code nearly identical with the three foregoing sections, say: "As homicide and the infliction of bodily injury may be effected as well by an omission to discharge a legal duty as by an illegal act, it is necessary to begin by defining the legal duties tending to the preservation of life, the neglect of which is criminal. This is the subject of Part XV of the Draft Code and of chapter 8 of the Bill. We believe that this part of the Draft Code will be found to state, in a clear and compendious form, the unwritten law upon the subject to which it relates. Section 161 (8) is a re-enactment of 24 and 25 Vic., c. 100, s. 26, which was itself a re-enactment of 14 and 15 Vic., c. 11. That statute was passed in the excitement consequent on the case of R. v. Sloane, (9) and was framed so as to embrace all cases where there was a contract to supply a servant of whatever age with food, clothing, and lodging. It has been thought better to limit it to servants and apprentices under the age of sixteen, but it is right to point out that this is not the existing law. Section 160, (10) puts the head of a family under the same criminal responsibility towards members of his household under the age of sixteen as a master is to a servant of the same age."

A person who engages the services of a child under sixteen years of age, placed out with him by its legal guardian under a contract for the child's services for a fixed period, whereby the party with whom the child is placed, engages to furnish the child with board, lodging, clothing and necessaries is not as to such child "a guardian or head of family" so as

(6) R. v. Bowman, 31 N. S. R., 403; 3 Can. Cr. Cas., 410.
(7) R. v. McIntyre, 31 N. S. R., 422; 3 Can. Cr. Cas., 413.
(8) Section 161 of the English Draft Code corresponds with section 211 of our Code.
(9) R. v. Sloane, Ann. Reg., vol. 92, p. 144.
(10) Section 160 of the English Draft Code corresponds with section 210 of our Code.

to become criminally responsible as such under the above section, 210, for omitting to provide "necessaries" to such child while a member of his household. The relationship in such a case is that of master and servant and comes within the provisions of section 211, under which the master is criminally responsible only in respect of a failure to provide necessary food, clothing or lodging. (11)

**212. Duty of persons doing dangerous acts.** — Every one who undertakes (except in case of necessity) to administer surgical or medical treatment, or to do any other lawful act the doing of which is or may be dangerous to life, is under a legal duty to have and to use reasonable knowledge, skill and care in doing any such act, and is criminally responsible for omitting, without lawful excuse, to discharge that duty if death is caused by such omission.

Any person, whether a licensed medical practitioner or not, who deals with the life or health of an individual is bound to treat his or her patient with care, attention and assiduity; and, if the patient dies for want of either, the person is guilty of manslaughter. (12)

See section 57, *ante*.

See also comments upon NECESSITY, *ante*, pp. 23, 24.

**213. Duty of persons in charge of dangerous things.** — Every one who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes or maintains anything whatever which, in the absence of precaution or care, may endanger human life, is under a legal duty to take reasonable precautions against, and use reasonable care to avoid, such danger, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty.

Three young men took a rifle which would have been deadly at a mile, and began practising firing with it at a target, which they erected in a field near to roads and houses, from a distance of about 100 yards. One of the shots thus fired (it was not proved by which man) killed a boy in a tree in a neighboring garden at a spot 393 yards from the firing point. It was held that all three were guilty of manslaughter, firing a rifle under the above circumstances being a very dangerous act and all three having united to fire at the spot in question and all omitting to take any precautions to prevent danger to human life. (13)

A prisoner was indicted for manslaughter in causing the death of an infant child by negligently delivering laudanum for paregoric. The facts were these. The child being very ill, its mother sent her son to a neighboring chemist for a penny worth of paregoric. The prisoner, who was the chemist's apprentice, delivered a vial labelled "paregoric" but containing laudanum. The son (who was told by the prisoner that the number of drops to be given to a child of nine weeks old was ten), took the vial home to his mother, who, supposing it to be paregoric, gave her infant, who was only nine weeks old, six or seven drops of it in a little sugar and water;

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(11) R. v. Coventry, 3 Can. Cr. Cas., 541.
(12) R. v. Spiller, 5 C. & P., 333.
(13) R. v. Salmon and others, 6 Q. B. D., 79; 14 Cox C. C., 494; Warb. L. Cas., 2nd Ed., 99.

and the infant died, in consequence. The presiding judge told the jury that if a party is guilty of negligence and death results, therefrom, he commits manslaughter; and the jury found the prisoner guilty. (14)

Where a chemist, by mistake, put a poisonous liniment into a medicine bottle instead of a liniment bottle, in consequence of which the liniment was taken by his customer internally, with a fatal result, it was held,—without saying whether there might or might not be evidence of negligence to support a civil action,—that the mistake was not so gross as to be reckless, and, therefore, did not amount to such criminal negligence as would warrant a conviction for manslaughter, inasmuch as the mistake was made under circumstances which rather threw the prisoner off his guard. It appeared that the deceased had been accustomed to send to the prisoner for aconite,—a deadly poison,—as a liniment, and that the prisoner was in the habit of using bottles of a particular make and color to contain poison, but, on the occasion in question, had sent his own bottles. The deceased had been ordered to take thirty drops of henbane and also to use aconite as a liniment, and he had sent to the prisoner two bottles, one for the henbane and the other for the aconite; both being bottles of the ordinary kind. The bottle for the henbane had on it a label bearing that word. The prisoner himself filled the bottles, and, through some mistake, put the aconite into the henbane bottle. (15)

A corporation cannot be guilty of manslaughter, but it may be indicted under section 252, *post*, for having caused grievous bodily injury by omitting to maintain in a safe condition a bridge which it was its duty to maintain, and this notwithstanding that death ensued at once to the person injured. (16)

**214. Duty to avoid omissions dangerous to life.** — Every one who undertakes to do any act, the omission to do which is or may be dangerous to life, is under a legal duty to do that act, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform that duty.

The captain and pilot of a steamboat were both indicted for the manslaughter of a person who was on board a small smack, by running down the smack, the running down being attributed by the prosecution to improper steering of the steamboat arising from there not being, at the time of the accident, a man at the bow to keep a look out. It was proved that there was a man on the look out when the vessel started, about an hour previous to the accident. According to one witness the captain and pilot were both on the bridge between the paddle boxes, and according to another witness the pilot was alone on one paddle box. It was held that, under these circumstances, there was not such personal misconduct on the part of either of the prisoners as to make them guilty of manslaughter. (17)

See section 252, *post*, as to causing grievous bodily injury by any unlawful act or by doing negligently or omitting to do any act which it is his duty to do.

**215. Neglecting duty to provide necessaries.** — Every one is guilty of an indictable offence and liable to three years' imprison-

(14) Tessymond's Case, 1 Lew. C. C., 169, 170.
(15) R. v. Noakes, 4 F. & F., 920.
(16) R. v. Union Colliery Co., 3 Can. Cr. Cas., 523; 21 C. L. T., 153.
(17) R. v. Allen & Clarke, 7 C. & P., 153. See, also, R. v. Green, 7 C. & P., 158.

ment who, being bound to perform any duty specified in sections two hundred and nine, two hundred and ten and two hundred and eleven without lawful excuse neglects or refuses to do so ; *unless the offence amounts to culpable homicide.* (As amended by 56 V., c. 32).

The punishment provided by this section is for cases in which the injury caused is an injury short of death. When the injury caused results in death, the offender will be guilty of culpable homicide, (18) and be punishable accordingly.

It will be readily seen that in a prosecution under this section for neglecting or refusing to perform any of the duties specified in sections 209, 210 and 211, it must be alleged in the indictment and established in evidence that the neglect or refusal was without lawful excuse and that thereby the life of the person neglected or omitted to be provided with necessaries is endangered or his or her health permanently injured or likely to be permanently injured.

**216. Abandoning children under two years old.** — Every one is guilty of an indictable offence and liable to three years' imprisonment who unlawfully abandons or exposes any child under the age of two years, whereby its life is endangered, or its health is permanently injured.

2. The words "abandon" and "expose" include a wilful omission to take charge of the child on the part of a person legally bound to do so, and any mode of dealing with it calculated to leave it exposed to risk without protection. R. S. C., c. 162, s. 20.

Section 27 of the Imperial Statute (24 and 25 Vic., c. 100) on this subject, is as follows:

"Whosoever shall unlawfully abandon or expose any child, being under the age of two years, whereby the life of such child shall be endangered, or the health of such child shall have been or is likely to be permanently injured, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be kept in penal servitude for the term of three years."

In an English case, the prisoners were charged by an indictment framed under this section with having abandoned and exposed a child under two years of age, whereby its life was endangered and the following facts were established against them.

One of the defendants was the mother of a weakly bastard child, which, — when it was about five weeks old, — both prisoners put in a hamper, at S., the child, when so put in the hamper, being wrapped up in a shawl and being then packed in the hamper with shavings and cotton wool. The mother then took the hamper containing the child from S., to the booking office of the railway station at M. (a distance of about four miles), and there left it, having paid the carriage of the hamper to G. The hamper was addressed to the lodging of the child's father at G., and he had told the mother, previous to the child's birth, that if she sent it to him he would keep it. The mother told the railway clerk to be careful of the hamper and to send it by the next train which was due to leave the station at M., in ten minutes from the time of her depositing it there. Upon the address were the words, "with care: to be delivered immediately." The hamper was duly sent by train and delivered at its address in G., in

(18) As to culpable homicide, see section 220, *post*.

a little less than an hour from its being despatched from M. On the hamper being opened the child was alive, and lived for three weeks afterwards, when it died from causes not attributable to the conduct of either of the prisoners. Upon these facts it was held that there was an abandonment and exposure endangering the life of the child; and the prisoners were found guilty. On the point being reserved, the conviction was affirmed. (19)

In another case, a woman, who was living apart from her husband, and who had the custody of their child, brought it and left it outside the father's door, telling him she had done so. The father knowingly allowed the child to remain outside his door from 7 p. m., till 1 a. m., when it was found, cold and stiff, by a constable who removed it. It was held that, although the father had not the actual custody and possession of the child yet as he was legally bound to provide for it, his allowing it to remain where he did was an abandonment and exposure by him whereby the child's life was endangered within the meaning of 24-25 Vic., c. 100, sec. 27. (20)

An indictment charging a woman with having unlawfully left in the highway a child a month old, of which she had the care, with intent to burden the parish with its maintenance, was held bad for not alleging any injury done to the child by her act. (21)

**217. Causing bodily harm to apprentices or servants.** — Every one is guilty of an indictable offence and liable to three years' imprisonment who, being legally liable as master or mistress to provide for any apprentice or servant, unlawfully does, or causes to be done, any bodily harm to any such apprentice or servant so that the life of such apprentice or servant is endangered or the health of such apprentice or servant has been, or is likely to be, permanently injured. R. S. C., c. 62, s. 19.

The reference under this section is evidently a clerical error. It should be R. S. C., c. 162.

The corresponding Imperial enactment on this subject is the 24 and 25 Vic., c. 100, sec. 26, which is as follows:

"Whosoever being legally liable either as master or mistress to provide for any apprentice or servant necessary food clothing or lodging, shall wilfully and without lawful excuse refuse or neglect to provide the same, or shall unlawfully and maliciously do or cause to be done any bodily harm to any such apprentice or servant, so that the life of such apprentice or servant shall be endangered, or the health of such apprentice or servant shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to be kept in penal servitude for the term of three years."

Upon this clause, Archbold makes the following remarks: "Whether it be necessary to prove that, by such *refusal or neglect to provide*, the prosecutor's life was endangered or his health was or was likely to be permanently injured, depends upon the construction which is to be put upon the statute. If the words '*so that the life of such person shall be endangered*,' etc., apply to all the preceding matter, such proof will be necessary:

(19) R. v. Falkingham, L. R., 1 C. C. R., 222; 39 L. J. (M. C.), 47.
(20) R. v. White, L. R., 1 C. C. R., 311; 40 L. J., (M. C.), 134; Arch. Cr. Pl. and Ev., 21st Ed., pp. 792, 793.
(21) R. v. Cooper, 1 Den., 459; 2 C. & K., 876.

if only to the branch of the section which relates to the actual doing of bodily harm to the apprentice or servant, such proof will be unnecessary. Until there has been some decision on the subject it will be safer to introduce, into the indictment, the allegation, '*so that the life of the said was thereby endangered*,' and to be prepared with evidence to sustain it. It would seem indeed to be the better opinion that the words '*so that the* life of such person shall be endangered, etc.,' override all the preceding matter, otherwise a mere single wilful refusal to provide a dinner would be within the clause. Upon an indictment for unlawfully and maliciously assaulting an apprentice or servant it is clear that such allegation and proof are necessary."

It will be observed that the uncertainty which Archbold seems to find in the English enactment arises from the fact of two offences, *neglecting to provide necessaries* and *doing bodily harm* to an apprentice or servant, being included in one section. In the present code this possible uncertainty has been avoided, by separating and dealing with the two offences in different sections, the offence or offences of a parent or a master neglecting the duties imposed upon them by sections 210 and 211 respectively being dealt with under section 215, *ante*, and the offence of a master doing bodily harm to an apprentice or servant being dealt with by the above section 217. So that, with us, whether the charge against the master be for neglecting to provide necessaries to his apprentice or for doing such apprentice or servant bodily harm, there can be no doubt that the indictment must allege, and it must be proved that the life of the apprentice is endangered, or that his or her health has been, or is, or is likely to be permanently injured.

## PART XVII.

## HOMICIDE.

**218.** Homicide is the killing of a human being by another, directly or indirectly, by any means whatsoever.

Upon this part of the law, as contained in the English Draft Code, the Royal Commissioners report as follows:

"The Draft Code deals next with murder, manslaughter, and some other offences to which we will refer specifically.

"Many of the doctrines of the common law bearing upon this subject relate equally to murder and manslaughter. Both the Draft Code and the Bill accordingly deal with homicide generically, and ascertain the cases in which it is culpable, before dealing specifically with murder and manslaughter. The Draft Code preserves the rule, of the common law, that to render the homicide culpable, death must take place within a year and a day of the injury. It was thought desirable to fix some limit, and no sufficient reason occurred to us for departing from the ancient rule.

"Having defined culpable homicide, the Draft Code proceeds to the problem of defining murder and manslaughter.

"The common law definition of murder is 'unlawfully killing with *malice* aforethought;' and manslaughter may, in effect, be defined as 'unlawful killing *without* malice aforethought.' The objection to these definitions is that the expression 'malice aforethought' is misleading. This expression, taken in a popular sense, would be understood to mean that in order that homicide may be murder the act must be premeditated to a greater or less extent, the jury having in each case to determine whether such a degree of premeditation existed as deserved the name.

"This definition if so understood would be obviously too narrow, as, without what would commonly be called premeditation, homicide might

be committed which would involve public danger and moral guilt in the highest possible degree. Of course it can be pointed out that every intentional act may be said to be done aforethought, for the intention must precede the action. But even with this explanation the expression is calculated to mislead any one but a trained lawyer.

"The inaccuracy of the definition is still more apparent when we find it laid down that a person may be guilty of murder who had no intention to kill or injure the deceased or any other person, but only to commit some other felony, and the injury to the individual was a pure accident. This conclusion was arrived at by the doctrine of constructive or implied malice. In this case, as in the case of other legal fictions, it is difficult to say how far the doctrine extended. We do not propose on the present occasion to enter upon a discussion of this subject. It was carefully considered before a committee of the House of Commons sitting on a Bill for the definition of homicide, introduced by the late Mr. Russell Gurney, in 1874. It was also considered by the Commission on Capital Punishments, which reported in 1866. Each of these bodies reported that the present condition of the law was unsatisfactory, though neither arrived at a definition which was considered satisfactory.

"The present law may, we think, be stated with sufficient exactness for our present purpose somewhat as follows: — Murder is culpable homicide by any act done with malice aforethought. Malice aforethought is a common name for all the following states of mind: —

"(*a.*) An intent, — preceding the act, — to kill or to do serious bodily injury to the person killed or to any other person;

"(*b.*) Knowledge that the act done is likely to produce such consequences, whether coupled with an intention to produce them or not;

"(*c.*) An intent to commit any felony;

"(*d.*) An intent to resist an officer of justice in the execution of his duty.

"Whether (*c*) is too broadly stated or not is a question open to doubt, but Sir Michael Foster, perhaps the highest authority on the subject, says (p. 258), 'A. shooteth at the poultry of B. and by accident killeth a man. If his intention was to steal the poultry, which must be collected from the circumstances, it will be a murder, by reason of that felonious intent; but if it was done wantonly and without that intention, it will be barely manslaughter.'

"It seems to us that the law upon this subject ought to be freed from the element of fiction introduced into it by the expression 'malice aforethought,' although the principle that murder may, under certain circumstances, be committed, in the absence of an actual intention to cause death, ought to be maintained. If a person intends to kill and does kill another, or if, without absolutely intending to kill, he voluntarily inflicts any bodily injury known to be likely to cause death, being reckless whether death ensues or not, he ought in our opinion to be considered a murderer, if death ensues.

"For practical purposes we can make no distinction between a man who shoots another through the head expressly meaning to kill him, a man who strikes another a violent blow with a sword, careless whether he dies of it or not, and a man who, intending for some object of his own, to stop the passage of a railway train, contrives an explosion of gunpowder or dynamite under the engine, hoping indeed that death may not be caused, but determined to effect his purpose whether it is so caused or not.

"This is the general object kept in view both in the Draft Code and in the Bill, but there is some difference in the extent to which they go. There is no difference as to the cases in which the death of the person killed or of some other person is intended. The Bill included in the definition of

murder all cases in which the offender *intended* to cause, or knew that he probably would cause '*grievous bodily harm*' to any person. The Draft Code includes all such cases, substituting the expression '*bodily injury known to the offender to be likely to cause death*' for '*grievous bodily harm;*' which to some extent narrows the definition given in the Bill. On the other hand the Draft Code includes all cases in which death is caused by the infliction of 'grievous bodily injury' for the purpose of facilitating the commission of certain heinous offences. All these cases would fall within the definition of murder given in the Bill, according to which it is murder to kill by the intentional infliction of grievous bodily harm irrespectively of the purpose for which it is used. Lastly, it is provided (by the Draft Code) that killing by the administration of stupefying things or by wilfully stopping the breath for the purpose, in either case, of committing any of the specified offences, (1) shall be murder *whether the offender knows or not that death is likely to ensue*. According to the provisions of the Bill these cases would amount to murder only if the offender knew their danger.

"The difference between the Draft Code and the Bill upon the whole comes to this. A, in order to facilitate robbery, pushes something into B's mouth to stop his breath and thus prevent him from crying out; the death of B results. This is murder according to the Draft Code. According to the Bill it is murder if A knew that such an act would probably cause death; manslaughter if he did not.

"A few years ago a case occurred in the Western Circuit (2) which illustrates the principle on which this portion of the Draft Code is framed better than any hypothetical case. An innocent girl on her way to church had to pass over a stile into a narrow wooded lane and then go out of it by a stile on the other side. A ruffian who knew this lay in wait for her, muffled her head in a shawl to stifle her cries and proceeded to drag her down the lane towards a wood. She died before she reached it. He was executed for the murder. It is plain he did not mean to kill her; indeed his object was frustrated in consequence of her not reaching the wood alive, and he probably was not aware that stifling her breath for so short a time was dangerous to life; but as the law at the time was and now is, the death having been occasioned by violence used to facilitate the commission of a rape, the offence was murder. And we believe there are few who would not think the law defective if such an offence was not murder.

"Again, A stabs B in the leg, not intending to kill him; B dies. According to the Bill this would be murder if the jury thought the act showed an intent to do grievous bodily harm, or if without such intent it was done with knowledge that it would probably cause death or grievous bodily harm. According to the Draft Code it would be murder if the jury thought the act was meant to cause B an injury known to A to be likely to cause death, he being reckless whether it caused death or not. It will thus be seen that the Bill and the Draft Code approach each other very closely." (3)

**219. When a child becomes a human being.** — A child becomes a human being within the meaning of this Act when it has *com-*

(1) The specified offences are the same as those specified, in the same connection, by the present Code (see section 227, *post*), namely, Treason. Treasonable offences, Assaults on the Queen, Inciting to Mutiny, Piracy. Piratical Acts, Escapes, Rescues, Resisting lawful Apprehension, Murder. Rape, Forcible Abduction, Robbery, Burglary, Arson.

(2) R. v. Gilbert, known as the Fordingbridge murder. See "The Times," 19 July 1862.

(3) See pp. 23 and 24 of the Report of the Royal Commissioners.

*pletely proceeded in a living state from the body of its mother*, whether it has breathed or not, whether it has an independent circulation or not, and whether the navel string is severed or not. The killing of such child is homicide when it dies in consequence of injuries received before, during, or after birth.

This seems to be a statement of the common law on the subject, (4) in accordance with which it has been held that a child within its mother's womb is not a being upon whom culpable homicide can be committed. It must be born. (5) That is to say, in order to be the subject of homicide it must, if an injury be inflicted upon it while in its mother's womb, have afterwards *completely proceeded in a living state from its mother's body*, and then if it afterwards die through the injury previously received, the injury so inflicted and the subsequent death would constitute homicide.

Coke says: "If a woman be quick with child, and by a potion or otherwise killeth it in her womb, or if a man beat her whereby the child dieth in her body and she is delivered of a dead child, this is a great misprision, and no murder; but if the child be born alive and dieth of the potion, battery, or other cause, this is murder." (6)

But section 271, *post*, provides for the offence of killing a child in the act of birth and before it is fully born.

**220. Culpable homicide.** — Homicide may be either culpable or not culpable. Homicide is culpable when it consists in the killing of any person, either by an *unlawful act* or by an *omission without lawful excuse to perform or observe any legal duty*, or by both combined, or by causing a person, by *threats or fear of violence*, or by *deception*, to do an act which causes that person's death, or by *wilfully frightening* a child or sick person.

2. Culpable homicide is either murder or manslaughter.

3. Homicide which is not culpable is not an offence.

To constitute culpable homicide under the terms of this section there must be:

1. An unlawful act done; or

2. An omission, *without lawful excuse*, to perform or observe a legal duty; or

3. (*a*) A threatening of violence, (*b*) an arousing of fear of violence, or (*c*) the use of deception, causing the person, so *threatened*, or *put in fear*, or *deceived*, as the case may be, to do an act causing his or her death; or

4. A wilful frightening of a child or sick person.

In an English case tried before *Denman*, J., a man who had frightened a child to death was convicted of manslaughter. (7)

The following case, (although the injury caused did not result in loss of

(4) R. v. Crutchley, 7 C. & P., 814; R. v. Sellis, 7 C. & P., 850; R. v. Poulton, 5 C. & P., 329; R. v. Reeves, 9 C. & P., 25; R. v. Trilœ, C. & M., 650; 2 Moo., 260.

(5) R. v. Brain, 6 C. & P., 349; 2 Bish. New Cr. L. Com., ss. 632, 633.

(6) 3 Inst., 50; *See*, also, R. v. West, 2 Car. & K., 784; R. v. Senior, 1 Moo., 346; 2 Bish. New Cr. L. Com., s. 633.

(7) R. v. Towers, 12 Cox C. C., 530.

life) is an illustration of the principle upon which is based that part of the above section which makes it culpable homicide in a person who either by threatening violence towards, or by creating fear of violence in another, causes that other to do an act resulting in his or her death.

A woman, in order to escape from the violence of her husband, who had used threats against her life, got out of a window, and in so doing fell to the ground and broke her leg. The husband was convicted of having wilfully and maliciously inflicted grievous bodily harm on his wife. Held, correct. Lord Coleridge, C. J., said: "I am of opinion that the conviction in this case is correct, and that the sentence should be affirmed. The principle seems to me to be laid down quite fully in *Reg.* v. *Martin*. (8) There, this court held that a man who had either taken advantage of or had created a panic in a theatre, and had obstructed a passage, and had rendered it difficult to get out of the theatre, in consequence of which a number of people were crushed, was answerable for the consequences of what he had done. Here, the woman came by her mischief by getting out of the window — I use a vague word on purpose — and in her fall broke her leg. Now, that might have been caused by an act which was done accidentally or deliberately, in which case the prisoner would not have been guilty. It appears from the case however that the prisoner had threatened his wife more than once, and that on this occasion he came home drunk, and used words which amounted to a threat against her life, saying, 'I'll make you so that you can't go to bed;' that she, rushing to the window, got half out of the window, when she was restrained by her daughter. The prisoner threatened the daughter, who let go, and her mother fell. It is suggested to me, by my learned brother, that supposing the prisoner had struck his daughter's arm without hurting her, but sufficiently to cause her to let go, and she had let her mother fall, could any one doubt but that that would be the same thing as if he had pushed her out himself? If a man creates in another man's mind an immediate sense of danger which causes such person to try to escape, and in so doing he injures himself, the person who creates such a state of mind is responsible for the injuries which result. I think that in this case there was abundant evidence that there was a sense of immediate danger in the mind of the woman, caused by the acts of the prisoner, and that her injuries resulted from what that sense of danger caused her to do." The other judges concurred. (9)

Where, — on a trial for manslaughter, — the evidence shewed that the deceased was riding on horseback, that the prisoner struck him with a small stick, whereupon the deceased rode away and the prisoner rode after him, and that thereupon the deceased, from a well grounded apprehension of a further attack, which would have endangered his life, spurred his horse which became frightened and threw him giving him a mortal fracture, it was held that this evidence sufficiently supported the charge of manslaughter. (10)

A corporation cannot be guilty of manslaughter. (11) But it may be indicted, under section 252, *post*, for having caused grievous bodily injury by omitting to maintain in a safe condition a bridge or structure which it was its duty to so maintain, and this, notwithstanding that death ensued at once to the person sustaining the grievous bodily injury. (12)

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(8) R. v. Martin, 8 Q. B. D., 54; 14 Cox C. C., 633.

(9) R. v. Halliday, 51 L. J. Rep. (N. S.), 701. See, also, R. v. Evans, 1 Russ. Cr., 5th Ed., 651; R. v. Pitts, C. & M., 284, and R. v. Dugal, 4 Q. L. R., 350.

(10) R. v. Hickman, 5 C. & P., 151.

(11) R. v. Great West Laundry Co., 3 Can. Cr. Cas., 514; R. v. Union Colliery Co., 3 Can. Cr. Cas., 523; 20 C. L. T., 289.

(12) R. v. Union Colliery Co., 3 Can. Cr. Cas., 523.

**Non-culpable homicide.** — Besides the above divisions of homicide into *culpable* and *non-culpable*, and of culpable homicide into *murder* and *manslaughter*, homicide which is not culpable may be divided into that which is (*a*) *justifiable*, and that which is (*b*) *excusable*. (13)

**Justifiable homicide.** — Blackstone subdivides justifiable homicide into two classes, (14) namely: —

1. Homicide which is done under the necessity which arises in the exercise of an office, which makes it compulsory, — in executing public justice, under judicial command, — to put to death a malefactor who has forfeited his life by the laws and verdict of his country (15). In this case, however, the law must *require* it; it must be done by authority of a judicial sentence, or it is not justifiable, and, therefore, wantonly to kill the greatest of malefactors deliberately, uncompelled and extra-judicially, is murder.

2. The other class of justifiable homicide is, according to Blackstone, that which occurs in the advancement of public justice, and in which the act, though not commanded, is permitted; as where the killing happens in preventing crime, (16) or in the arrest of persons guilty or accused of crimes, (17) or in preventing escapes or rescues from arrest or from custody, (18) or in suppressing riots, etc. (19)

As already remarked (20) the general rule allowing the use of necessary force to prevent the commission of a criminal offence is, by section 44, *ante*, made to include the prevention of any offence for which under the present Code an arrest may be made without warrant. As the ground of justification of homicide committed in preventing a criminal offence, accompanied with violence, is that of necessity, the necessity must continue to the time of the killing, or it will not justify it; and the killing of an offender, for instance, after being properly secured, and after all apprehension of danger has ceased, would not be justifiable but it would be murder, unless, — when it was done, — the blood was still hot from the contest or pursuit; and then, on that account, it might be held to be only manslaughter. (21)

**Excusable homicide.** — Blackstone divides excusable homicide into, 1, Homicide *per infortunium* or misadventure; and 2, Homicide in self-defence, or *se defendendo*.

Homicide *per infortunium*, or misadventure, is such as occurs where a man, in the doing of a lawful act, without any negligence and with no intention to injure, unfortunately kills another.

(13) Broom's Com. L., 910.

(14) 4 Bl. Com., 178, 179.

(15) See sections 15, 18, 19 and 31, *ante*, pp. 27, 28, 29, 30 and 39, (and comments), as to justification and powers of ministerial officers in the execution of judicial sentences, etc.

(16) R. v. Huntley, 3 Car. & K., 142. See section 44, (and comments), *ante*, p. 46, as to justification of force used in preventing the commission of offences.

(17) See section 31, *ante*, p. 39, as to justification of force used in making arrests, etc.

(18) See sections 33, 34, 35, 36 and 37, *ante*, p. 40, as to justification of force used in preventing escapes and rescues.

(19) See sections 40, 41, 42, 43, 83 and 84 (and comments), *ante*, pp. 43, 44-46, and pp. 89 and 90, as to suppression of riots.

(20) See *ante*, p. 46.

(21) 1 East P. C., c. 5, s. 60, p. 293; 4 Bl. Com., 185; 1 Hale, 485. See, also, R. v. Scully, 1 C. & P., 319.

ILLUSTRATIONS.

A is at work with a hatchet, the head of which flies off and kills B, a bystander. This is excusable homicide by misadventure. (22)

A, a person qualified to keep a gun, is shooting at a mark, and undesignedly kills B. A is excused.

A parent or a master who, in moderately correcting his child, or his apprentice or servant, happens to occasion his death, is excused, on the ground that the killing is only misadventure. For the act of correction is lawful; but if he exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensues, it is manslaughter at least, and in some cases (according to the circumstances) murder; for the act of immoderate correction is unlawful. For instance, where an apprentice, on being chided by his master for neglecting some work, made a sharp answer, and the master struck and killed the apprentice with a bar of iron which he had in his hand, it was held murder. (23)

.. whips a horse upon which B is riding, in consequence of which the horse takes fright and before B can check him runs over and kills C, a child. This is accidental as to B, for he has done nothing unlawful; but it is manslaughter in A, for his act, being a trespass, was unlawful. (24)

**Self-defence.** — Homicide in self-defence, (sometimes also called *chance-medley*), is such as occurs where a man being violently attacked, is obliged to kill his assailant in order to save his own life. The right of self-defence proceeds from and is limited by necessity. It begins where necessity begins, and ends where necessity ends; and therefore the defending party in order to be excused must exercise only such power and apply only such instruments as will simply prove effectual; nothing more. For instance, one, on whom another is making a mere assault with his fist, must not instantly stab him. Even where another is meditating the taking of one's life, this extreme defence cannot lawfully be resorted to until some overt act is done in pursuance of the meditation; in other words, till the danger becomes immediate. (25) Still, a person, assaulted by another who has threatened to kill him, is not, as a matter of course, required to run, and thus increase his danger by exposing himself to a repetition of his assailant's attempt when, with his back turned, he cannot so well resist or protect himself. And where an attack is made, with murderous intent, evinced by a sufficient overt act, the person attacked is under no duty to fly; but may stand his ground, and kill his adversary, if such killing become necessary in order to save himself. (26)

On this subject, the Royal Commissioners in their report make the following remarks:

"We take one great principle of the common law to be that, though it sanctions the defence of a man's person, liberty and property against illegal violence, and permits the use of force to prevent crimes, to preserve the public peace, and to bring offenders to justice, yet all this is subject to the restriction that *the force used is necessary;* that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which might reasonably be anticipated from the force used is not disproportioned to the injury or mischief which it is intended to prevent. This last principle will explain and justify many

(22) 1 Hawk. P. C., c. 29, s. 2.
(23) R. v. Grey, Kel., 64; Fost., 262. See section 55, *ante*, p. 54.
(24) 4 Bl. Com., 182, 183; 1 Hawk. P. C., c. 29, s. 3.
(25) 1 East, P. C., 272.
(26) Fost., 273; 3 Inst., 56; 1 East, P. C., 271.

of our suggestions. It does not seem to have been universally admitted; and we have therefore thought it advisable to give our reasons for thinking that it not only ought to be recognsied as the law in future, but that it is the law at present." (27)

In an elaborate note at the end of their Report, the Royal Commissioners have the following further remarks by way of argument on the subject:

"The proposition that the force used in defence of person, liberty or property must be proportioned to the injury or mischief which it is intended to prevent, is, in our opinion, one of great importance, yet it seems not to have commended itself to the minds of highly respectable authorities. We think it right, first, to call attention to the mode in which the subject was dealt with in Lord St. Leonard's Bill. The first part of section 88 of that Bill was as follows: 'Homicide shall be justifiable where one, in lawful defence of his person, repels force by force, and, using no more violence than he has reasonable cause for believing to be necessary for the purpose of self-defence, kills the assailant.' Had this been passed, unaltered, into law, it would have justified every weak lad, whose hair was about to be pulled by a stronger one, in shooting the bully if he could not otherwise prevent the assault.

"Again, section 90 says, 'Homicide shall be justifiable' (not merely reduced from murder to manslaughter) 'where one in defence of moveable property in his lawful possession, repels force by force, and, using no more force than he has reasonable cause for believing to be necessary for the defence of such property against wrong, kills the wrong-doer.' If two roughs, who each claimed a game-cock, and insisted on taking it home, quarrelled, and the weaker stabbed the stronger to the heart, this would, if made law, have justified the slayer, if he turned out to be the rightful owner of the bird, and could not otherwise have prevented its being taken away.

"And section 91 says: 'Homicide shall be justifiable where one, in defence of house or land in his lawful possession, resisting a person, endeavouring by force to enter into or upon such house or land, repels force by force, and using no more force than he has reasonable cause for believing to be necessary for the defence of his possession, kills the wrong-doer.' It is the more singular that this last clause should have been drawn as it is, because Lord Tenterden in a case which at the time attracted much attention laid down law directly opposed to it. It was the case of R. v. Moir, tried before Lord Tenterden at Chelmsford. (28) Mr. Moir, having ordered some fishermen not to trespass on his land, took a short cut, and found the deceased and others persisting in going across. He rode up to them and ordered them back. They refused to go, and there was evidence of angry words and some slight evidence that the deceased threatened to strike Mr. Moir with a pole. Mr. Moir shot him in the arm and the wound ultimately proved fatal. Before the man died, or indeed was supposed to be in danger, Mr. Moir avowed and justified his act, and said that in similar circumstances he would do the same again. This land, he said, was his castle and as he could not without the use of fire-arms prevent the fishermen from persisting in their trespass, he did use them, and would use them again. Lord Tenterden took a very different view of the law. He told the jury that the prevention of such a trespass could not justify such an act, and he seems to have left to them as the only justification which on these facts could arise, the question whether the prisoner was in *reasonable apprehension of danger to his life*, from the threats of the deceased. Mr. Moir was found guilty of murder and executed.

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(27) See p. 11 of the Report of the Royal Commissioners.
(28) R. v. Moir, Ann. Reg. for 1830, vol. 72, p. 344.

"It seems to us strange that these startling provisions (in Lord St. Leonard's Bill) passed without observation through the Select Committee, and were unnoticed by any of the judges, except Mr. Justice Coleridge, who, however, did not dwell on them, but merely made them the subject of a passing remark.

"It would, of course, follow that if homicide, under the circumstances mentioned in these three sections, (of Lord St. Leonard's Bill) was justifiable, any less degree of violence however great, would be justifiable also; and such appears to have been the view of the law taken by the Commissioners who framed the first draft of the Indian Code, and who, in an eloquent passage directed to another purpose, say: 'That a man who deliberately kills another in order to prevent that other from pulling his nose should be allowed to go absolutely unpunished, would be most dangerous. The law punishes and ought to punish such killing. But we cannot think that the law ought to punish such killing as murder.' In this, we agree: the provocation would be sufficient, generally, to reduce the crime to manslaughter. But they proceed: 'For the law itself has encouraged the slayer to inflict on the assailant any harm short of death which may be necessary for the purpose of repelling the outrage, — to give the assailant a cut with a knife across the fingers, which may render his right hand useless to him for life, or to hurl him down stairs with such force as to break his leg. And it seems difficult to conceive that circumstances, which would be a full justification of any violence short of homicide, should not be a mitigation of the guilt of homicide. That a man should be merely exercising a right by fracturing the skull and knocking out the eye of the assailant, and should be guilty of the highest crime in the code if he kills the same assailant, — that there should be only a single step between perfect impunity and liability to capital punishment seems unreasonable. In a case in which the law itself empowers an individual to inflict any harm short of death, it ought hardly, we think, to visit him with the highest punishment if he inflicts death.'

"If we thought that the common law was such as is here supposed, we should without hesitation suggest that it should be altered. But we think that such is not and never was the law of England. The law discourages persons from taking the law into their own hands. Still the law does permit men to defend themselves. *Vim vi repellere licet modo fiat moderamine inculpatæ tutelæ, non ad sumendam vindictam, sed ad propulsandam injuriam.* (29) And when violence is used for the purpose of repelling a wrong, the degree of violence must not be disproportioned to the wrong to be prevented, or it is not justified.

"There is no case that we are aware of in which it has been held that homicide to prevent mere trespass is justifiable. The question raised has always been, whether it was murder, or reduced by the provocation to manslaughter. And when death has not ensued, the forms of pleading, which had the advantage of bringing the principles of law to a precise issue, show what the principle was. In an appeal of Mayhem, the form of plea of *son assault demesne* was that 'the appellant made an assault upon the appellee and him then and there would have beaten, wounded and maimed unless he had forthwith defended himself, against the appellant, and so the ill which the appellant suffered was from his own proper assault and in defence of the appellee:'(30) Less than this was not a defence.(31) In Handcock v. Baker, (32) a plea justifying the breaking of the plaintiff's dwelling house, assaulting him therein, beating him and imprisoning

(29) Co. Lit., 162 a.
(30) Coke's Entries, 526.
(31) Cook v. Beale, 1 Ld. Ray., 176.
(32) Handcock v. Baker, 2 Bos. & P., 260.

him, on the ground that plaintiff was about to kill his wife, and that all that was done was for the purpose of and necessary to prevent his doing so, was held good after verdict. And we take it to be clear that, even killing the intruding criminal, if necessary to prevent a crime of this magnitude, would be justifiable; but not if it were to prevent a common assault.

"But the defence of possession either of goods or land against a mere trespass, not a crime, does not, strictly speaking, justify even a breach of the peace. The party in lawful possession may justify gently laying his hands on the trespasser and requesting him to depart. If the trespasser resists, and in doing so assaults the party in possession, that party may repel the assault and for that purpose may use any force which he would be justified in using in defence of his person. As is accurately said in 1 Rolle's Abt. Trespass G., 8, 'a justification of a battery in defence of possession, though it arose in the defence of the possession, yet in the end it is the defence of the person.'

"Some misapprehension may have arisen from the numerous cases decided, on the 9 Geo. 4, c. 31, s. 11, in which persons indicted for wounding with intent to do grievous bodily harm were held entitled to an acquittal, on its coming out in evidence that there was an illegality or informality in an arrest, or some other provocation disproportioned to the degree of violence used. (33) And it may have been supposed that these are authorities that the violence was absolutely justified. But this is from not observing that the effect of the enactment then in force, was that, if wounding was inflicted under such circumstances that, if death had ensued therefrom the offence would not have amounted to murder, the person indicted should be acquitted of felony. That provision was repealed in 1838, and since that time the course of practice has, we believe, been to leave it to the jury, with proper explanations and directions, to say whether the wounding was disproportionate to the injury which it was intended to prevent. The cases in which this doctrine has been acted on seem not to have been reported, with the exception of R. v. Hewlett, (34) in which the point only incidentally arose. We think that it is good sense, and that it is the law; and if it is not the law, we submit that it ought to be made so." (35)

The principle above contended for in relation to self-defence has been fully kept in view in sections 45 and 46 of the present Code. (36)

Where it was proved that the prisoner was attacked by the deceased who took off his coat and challenged the prisoner to fight and that at first the prisoner shewed reluctance but afterwards took off his coat, whereupon blows of the fists were exchanged, the result being that, after four or five rounds, the deceased received from the prisoner a blow which killed him, the presiding judge in charging the jury told them that if they thought the death was caused in legitimate self-defence, as distinguished from a fighting, they should acquit the prisoner, but that if they found that he dealt the blow while engaged in fighting, as distinguished from mere self-defence, he was doing what was unlawful and guilty of manslaughter. (37)

Where several persons attack another intending only to frighten and beat him but not to do him any severe bodily harm, and where, from the nature of the attack and the surrounding circumstances, the person as-

(33) See R. v. Hood, 1 Moo., C. C., 281.
(34) R. v. Hewlett, 1 F. & F., 91.
(35) See pp. 44-46 of the Report of the Royal Commissioners.
(36) See illustrations, comments and authorities on sections 45 and 46 at pp. 48 and 49, *ante*.
(37) R. v. Knock, 14 Cox C. C., 1. And see R. v. Bond, 14 Cox C. C., 2.

sailed has reasonable ground to believe that there is a design to kill him or to commit a felony on his person, and he shoots and kills one of the assailants, the homicide is excusable. (38)

On an application to quash a conviction for manslaughter, it was shewn that, at the trial, evidence was adduced on the part of the defence establishing that when the defendant shot and killed the deceased, the latter was one of a party who had invaded the defendant's house and were committing a wholly unprovoked assault upon the defendant, and destroying his goods, his wife and family being present, and that this feature of the case was not commented on by the Judge in addressing the jury. It was held that there was evidence that the defendant might have had reasonable apprehension of immediate danger of bodily harm to his wife and family, and, that, as this question had not been left to the jury, the defendant was granted a new trial. (39)

**221. Procuring death by false evidence.** — Procuring by false evidence the conviction and death of any person by the sentence of the law shall not be deemed to be homicide.

Section 146 (see *ante*) punishes perjury with imprisonment for life, when it is committed in order to procure the conviction of a person for any crime punishable by death or imprisonment for life.

**222. Death must be within a year and a day.** — No one is criminally responsible for the killing of another unless the death take place within a year and a day of the cause of death. The period of a year and a day shall be reckoned inclusive of the day on which the last unlawful act contributing to the cause of death took place. Where the cause of death is an omission to fulfil a legal duty the period shall be reckoned inclusive of the day on which such omission ceased. Where death is in part caused by an unlawful act and in part by an omission, the period shall be reckoned inclusive of the day on which the last unlawful act took place or the omission ceased, whichever happened last.

**223. Killing by influence on the mind.** — No one is criminally responsible for the killing of another by any influence on the mind alone, nor for the killing of another by any disorder or disease arising from such influence, *save* in either case by *wilfully frightening a child or sick person.*

See section 220, *ante.*

**224. Acceleration of death.** — Every one who, by any act or omission, causes the death of another kills that person, although the effect of the bodily injury caused to such other person be merely to accelerate his death while labouring under some disorder or disease arising from some other cause.

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(38) S. v. Lima, (La.), 20 So. Rep., 737; 18 Cr. L. Mag., 614.
(39) R. v. Theriault, 14 C. L. T., 346; 32 N. B. Rep., 504; 2 Can. Cr. Cas., 444.

**225. Killing, when death might have been prevented.** — Every one who, by any act or omission, causes the death of another kills that person, although death from that cause might have been prevented by resorting to proper means.

**226. Death following treatment of injury inflicted.** — Every one who causes a bodily injury, which is of itself of a dangerous nature to any person, from which death results kills that person, although the immediate cause of death be treatment proper or improper applied in good faith.

These three sections, 224, 225 and 226, embody the principles of the common law on the subjects thereof.

Thus, where A struck B, who when so struck was already so ill that she could not have lived many weeks, if she had not been struck, but who through being struck dies earlier than she otherwise would have done, it was held that A, having, by striking B, accelerated her death, killed her. (40)

Again, where A injured B's finger and B, being advised by a surgeon to allow the finger to be amputated, refused to do so, and died of lockjaw resulting from the injury, it was held that, although B's death might have been prevented if he had allowed the finger to be amputated, A had killed him. (41)

And where A wounded B in a duel, and competent surgeons performed on B an operation which they in good faith considered necessary, but of which operation B died, the surgeons being mistaken as to the necessity of the operation, it was held that B, was killed by A; one of the Judges, (Erle, J.), saying: "I am clearly of opinion, and so is my brother Rolfe, that where a wound is given, which, in the judgment of competent medical advisers, is dangerous, and the treatment which they *bona fide* adopt is the immediate cause of death, the party who inflicted the wound is criminally responsible." (42)

## PART XVIII.

## MURDER, MANSLAUGHTER, &c.

**227. Murder.** — Culpable homicide is murder in each of the following cases :

(*a*) *If the offender means to cause the death of the person killed ;*

(*b*) *If the offender means to cause* to the person killed any *bodily injury* which is *known* to the offender *to be likely to cause death*, and is reckless whether death ensues or not ;

(*c*) If the offender means to cause death or, being so reckless as

(40) R. v. Fletcher, Burb. Dig. Cr. L., 213. And see R. v. Murton, 3 F. & F., 492.
(41) R. v. Holland, 2 M. & R., 351.
(42) R. v. Pym, 1 Cox C. C., 339; R. v. McIntyre, 2 Cox C. C., 379; R. v. Davis, 15 Cox C. C., 174.

aforesaid, means to cause such bodily injury as aforesaid to one person, and by accident or mistake *kills another person*, though he does not mean to hurt the person killed ;

(*d*) If the offender, *for any unlawful object*, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one.

**228.** Culpable homicide is also murder in each of the following cases, *whether the offender means or not death to ensue, or knows or not that death is likely to ensue :*

(*a*) If he means to inflict grievous bodily injury for the purpose of facilitating the commission of any of the offences in this section mentioned, or the flight of the offender upon the commission or attempted commission thereof, and death ensues from such injury ; or

(*b*) If he administers any stupefying or overpowering thing for either of the purposes aforesaid, and death ensues from the effects thereof ; or

(*c*) If he by any means wilfully stops the breath of any person for either of the purposes aforesaid, and death ensues from such stopping of the breath.

2. The following are the offences in this section referred to :— *Treason* and the other offences mentioned in Part IV of this Act, *piracy* and offences deemed to be piracy, *escape* or *rescue* from prison or lawful custody, *resisting lawful apprehension*, *murder*, (1) *rape*, *forcible abduction*, *robbery*, *burglary*, *arson*.

See section 231, *post*, for the punishment for murder.

See the Report of the Royal Commissioners on the subject of homicide set out at p. 223, *ante*.

It will be seen, by section 642, *post*, that no one can be tried upon a coroner's inquisition. And see section 568, *post*, as to the course to be pursued by the Coroner in case of any person being affected by the finding of the Coroner's jury.

The coroner's inquest is practically restricted to an enquiry into the cause of death; although the duty is imposed upon the coroner by section 568, *post*, of causing the arrest of any persons affected by the finding of the inquisition and of bringing them before a magistrate for prosecution, when they are not already charged before one.

**Two classes of murder.** — The effect of the above sections 227 and 228 is to divide murder into two classes. One class includes cases in which the offender *means* either to cause death or to cause bodily injury likely, to

(1) In the English Draft Code the Royal Commissioners have opposite to this word, "murder" in a corresponding section to the above, a marginal note in which they say. "This offence is inserted here to cover the case when the grievous bodily harm is done to some person other than the person intended to be murdered, etc."

his knowledge, to result in death; and the other class includes cases in which, in order to facilitate the commission of any of the offences specified in sub-section 2 of section 228, the offender,—(whether *meaning or not meaning* to cause death, and whether knowing or not knowing that death is likely to ensue),—inflicts (*a*) grievous bodily injury upon, (*b*) administers drugs to, or (*c*) stops by any means, the breath of any one, and thereby causes death.

The principle upon which these sections are based is fully discussed by the Royal Commissioners whose remarks thereon are already set out at pages 223-225, *ante*, (which see).

ILLUSTRATIONS.

A, with a revolver, deliberately shoots B through the head, killing him, and meaning to kill him. A commits murder.

A meaning to maim or do bodily injury to B, but reckless whether he kills him or not, takes up an axe and chops off A's hand, knowing that such an injury is likely to cause death. B dies of the injury. A, is guilty of murder.

A shoots at B meaning to kill him, and kills C instead. A commits murder. (2)

A meaning to do bodily injury to B and reckless whether he kills him or not, strikes at him with a sword-stick, meaning to wound his right arm, but B avoids the thrust, by slipping away, and the weapon enters the body of and kills C. A, is guilty of murdering C. (3)

A commits arson by burning the house of B but does not mean to hurt anyone, and does not know that there is any one in the house. C who happens to be in the house, is burnt to death. A is guilty of murder; arson being a crime which A ought to have known to be likely to cause death either to some one in the house, or to the occupants of adjoining premises or to those engaged in the dangerous work of extinguishing fires. (4)

A in order to rob B does him some grievous bodily injury which results in his death. A commits murder, although he did not intend to kill B and although he was not aware that the injury inflicted was likely to cause death.

A having committed a burglary strikes at and inflicts grievous bodily injury on B who intercepts his flight; B dies of the injury thus received. A is guilty of murder.

A to facilitate the commission of rape upon B administers to her a stupefying drug which kills her. A commits murder, although he did not mean to cause death and did not know that the drug was likely to cause death.

A in order to rob B stops his breath by gagging him. B dies in consequence. A is guilty of murder, although he did not intend to kill B and did not know that gagging was likely to cause death.

Any killing, to be homicide must be the killing of one human being by another, either directly or indirectly and by any means whatsoever; that is, either by acts of omission, such as the neglect of the legal duties imposed by the sections of Part XVI, or by acts of commission, as by poisoning, stabbing, shooting, choking, striking, kicking, starving or

(2) *Fost*, 261.
(3) R. v. Hunt, 1 Moo. C. C., 93.
(4) R. v. Serne & Goldfinch, 16 Cox C. C., 311.

drowning, or in any of the other numerous ways in which human life may be taken; but, — outside of the exceptions made by section 220, in reference to the wilful frightening of a child or sick person, and the causing a person by threats or fear of violence or by deception, to do something occasioning his own death, — no one (as stated by section 223), is criminally responsible for killing another by influence on the mind alone: as, where a man either by working upon the fancy of another or by unkindness, puts him in such grief that he suddenly dies or contracts some sickness which brings on his death. (5)

The following are some instances of killing indirectly. Where A carried B, his sick father against his will, in a severe season, from one town to another, by reason whereof he died, A was held guilty of murder, on the ground that he must be presumed to have known that the probable consequence of his actions would be his father's death. (6) Where a harlot being delivered of a child left it in an orchard covered only with leaves, in which condition it was killed by a kite, she was held guilty of murder. (7) If A lays a trap or pitfall for B, whereby B is killed, A is guilty of murder. (8)

**Duelling.** — As to duelling we have already seen that the parties to a prearranged fight with deadly weapons will be guilty of murder, as also their seconds, etc. (9)

**229. Provocation.** — Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.

2. Any wrongful act or insult, of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, may be provocation if the offender acts upon it on the sudden, and before there has been time for his passion to cool.

3. Whether or not any particular wrongful act or insult amounts to provocation, and whether or not the person provoked was actually deprived of the power of self-control by the provocation which he received, shall be questions of fact. No one shall be held to give provocation to another by doing that which he had a legal right to do, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person.

4. An arrest shall not necessarily reduce the offence from murder to manslaughter because the arrest was illegal, but if the illegality was known to the offender it may be evidence of provocation.

The Royal Commissioners (at page 24 of their Report), say, in reference to section 176 of their Draft Code, (which is the same as the above section 229), that it "introduces an alteration of considerable importance

(5) 1 Hale, 427, 428; 1 East P. C., c. 5, s. 13, p. 225.
(6) 1 Hale, 432; 1 Hawk P. C., c. 31, s. 5.
(7) 1 Hale, 431.
(8) 4 Bl. Com., 35.
(9) See cases cited under section 91, *ante*.

into the common law. By the existing law the infliction of a blow, or the sight by the husband of adultery, committed with his wife may amount to provocation which would reduce murder to manslaughter. (10) It is possible that some other insufferable outrages might be held to have the same effect. There is no definite authoritative rule on the subject, but the authorities for saying that words can never amount to a provocation are weighty. We are of opinion that cases may be imagined where language would give a provocation greater than any ordinary blow. The question whether any particular act falls or not within this line appears to us to be pre-eminently a matter of degree for the consideration of the jury."

We have seen that, although under the common law mere words, as a general rule, were not a sufficient provocation, it has been held that, in certain exceptional cases, the words used might be such as to amount to a provocation sufficient to reduce what would otherwise be murder to manslaughter; as in the case of a husband astounded by the sudden and unexpected announcement from his wife that she had committed adultery. (11) By the law, however, as it now stands, under the above section 229 and the provisions of sections 45 and 46, *ante*, there can be no longer any doubt that words will be a sufficient provocation if it is found by the jury, (whose province it is to decide), that they are of so insulting a character as to deprive the person provoked of the power of self-control.

As already shewn, (12) the question of whether a provocation will reduce the killing from murder to manslaughter will depend upon the nature and extent of the provocation, the nature, extent and violence of the retaliation, and the weapon, if any, used, and also upon whether the killing has been done immediately upon the giving of the provocation, before there has been sufficient cooling time for passion to subside and for the party provoked to regain the power of self-control.

A prisoner was tried for murder, and it was not denied that he had killed the deceased, but it was urged that the offence was reduced to manslaughter as having been committed in the heat of passion caused by sudden provocation. There was evidence that just before the killing the prisoner had called at the deceased's house to see the deceased, who ordered him out and immediately laid hands on him and put him out, when the prisoner drew a revolver and shot him. At the trial the judge directed the jury that the deceased at the time he was killed was doing what he had a legal right to do and that there was therefore no provocation. This was held to be a misdirection, because, although by section 229, sub-section 3, no one shall be held to give provocation to another by doing that which he had a legal right to do, it is for the jury and not for the judge to determine any preliminary question of fact upon which the alleged legal right depends, and the question of whether the deceased was at the time he was shot, doing what he had a legal right to do depended upon whether,—if the jury accepted as true the defendant's statement given in evidence, as to the circumstances attending the shooting,—the deceased had before laying hands upon him ordered the defendant to leave the house, and whether, if he did so, the defendant had refused to leave, and whether, if violence was used by the deceased in putting him out, it was greater than was necessary, and the deceased was clearly not doing what he had a legal right to do if the facts were found by the jury in favor of the prisoner's version on these points; and, upon an appeal under section 744, *post*, a new trial was directed. (13)

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(10) See Pearson's Case, 2 Lew., 216, and other authorities cited, *ante*, p. 49. And see R. v. Fisher, 8 C. & P., 182.

(11) See the remarks of Mr. Justice Blackburn in Rothwell's case, 12 Cox C. C., 145, quoted at p. 49, *ante*.

(12) See pages 49 and 50, *ante*.

(13) R. v. Brennan, 16 C. L. T., 316; 27 O. R., 659; 4 Can. Cr. Cas., 41.

Where a person had killed another with a deadly weapon even upon sudden provocation, it was held that the question of the sufficiency of the provocation to reduce the crime to manslaughter was not merely whether there *was* passion *in point of fact*, but whether there was such provocation as might naturally kindle ungovernable passion in the mind of any *ordinary* and *reasonable* man. (14)

**Circumstantial evidence.** — In murder cases, — more so than in any other, — the evidence is, very often, circumstantial, the crime being usually committed in secret.

Circumstantial evidence, though always admissible, should be received and acted on, especially in murder cases, with the greatest caution: for it is well known that on many occasions persons have been convicted and executed for crimes, of which they have been afterwards found to have been innocent; and there are some instances of conviction and punishment for the murder of persons who afterwards turned out to be still alive, though they have been missing under circumstances of strong suspicion against the accused. Sir Mathew Hale gives two instances of this kind; and it was on this account that he laid down the rule, *never to convict any person of murder or manslaughter, till at least the body be found.* (15)

Although this rule has been and should be generally acted upon, it is not altogether inflexible; as, when the direct evidence brought before the jury is sufficiently strong to satisfy them that murder has really been committed. (16)

Common observation shows that certain circumstances give rise to certain presumptions; and it is upon the common observation of what is natural and of what is usually happening and being done in the ordinary affairs of life that the principal rules of evidence, and especially of presumptive evidence, are based. Certain acts are seen and known to lead to certain results; and the fact of the existence of certain circumstances leads to the conclusion that certain other circumstances, which generally accompany the former, also exist.

We thus take it for granted that, as a matter of nature, a mother has a strong affection for her child, that people in general are influenced by their interest, and that youth is susceptible of the passion of love. Therefore, the fact that A is the mother of B, leads to the presumption that A has a strong affection for B. And so it was that, of the two women who contended for their right to a child which each claimed as her offspring, that one was declared to be the mother who would not consent to its being cut in two and divided between them.

The principles of evidence being based upon the common observation of what is seen and believed to be passing around us, they depend to a considerable extent, upon the place where and the manners and habits of the times in which we live. For instance, when the King of Siam was told by a European ambassador that the rivers and seas of northern Europe were occasionally made so hard by the cold that people could walk on them, he positively refused to credit the truth of such a story, as being a description of something entirely repugnant to everything which he had ever seen or heard of.

On a similar principle we readily give our belief to acts of common occurrence; but we are slow to give credence to those which are new and unlooked for.

Presumptions are of two kinds; one being the presumption or conclu-

(14) R. v. Welsh, 11 Cox C. C., 336.
(15) 2 Hale, 290. See particulars of one of these cases at p. 241, *post*.
(16) R. v. Hindmarsh, 2 Leach C. C., 569; R. v. Hopkins, 8 C. & P., 591.

sion which the law attaches to certain kinds of guilt; as, where one kills another, the law draws the conclusion that he meant to kill. This is a presumption of law. The other kind of presumption is the presumption or conclusion of fact drawn by the judge, juror, or trier from the circumstances, as proved. For instance, how far the fact of a man being found, with a sword in his hand, by the prostrate body of a man just slain, leads to the conclusion that the man thus found with the sword is tne man who dealt the fatal blow, is a presumtion for the jury to make.

No presumption can be made except upon some facts already known and ascertained. Thus if stains of blood on the coat of one tried for murder are to be presumed as evidence of guilt, the fact that the stains are actually stains of blood,—and not stains which may have been occasioned by something else than blood,—must be first distinctly ascertained.

Presumptions of fact are usually divided into three kinds or degrees, namely; *violent presumptions*, which are such as arise when the facts and circumstances proved *necessarily* attend the fact presumed; *probable presumptions*, which are such as arise when the facts and circumstances proved *usually* attend the fact presumed: and *light or rash presumptions*, which in reality have no weight at all. (17)

The facts in the case already alluded to, of the man found with a drawn sword, standing over the body of another man just killed, would be sufficient to give rise to that kind of presumption of his guilt, called a *violent* presumption.

If upon an indictment for stealing in a dwelling house, the stolen goods were found in the defendant's lodging some little time after being stolen, and if the defendant refused to account for his possession of them, this, with proof of the goods being actually stolen, would amount to a *probable* presumption that he had stolen them.

If however the goods were not found recently after the loss, as for instance, not until sixteen months after, it would be but a light or rash presumption, entitled to no weight. (18)

If a man, in a sober condition, and without means of getting drunk, go into the London Docks, and come afterwards, in a drunken state, out of one of the cellars wherein are a million gallons of wine, it would be reasonable evidence that he had stolen some of the wine in that cellar, though you could not prove that any wine was stolen or missed. (19)

In contending for the certainty of circumstantial evidence, it has been argued that, in cases of crimes committed for the most part in secret, strong circumstantial evidence is perhaps the most satisfactory of any from which to draw the conclusion of guilt, that men may be seduced to perjury by many base motives to which the secret nature of the offence may sometimes afford a temptation, but that it can scarcely happen that a number of circumstances should unfortunately concur to fix the presumption of guilt upon an individual and yet such a conclusion be erroneous. (20)

It has been said, moreover, that circumstances cannot lie. This may perhaps in general be true; but witnesses can lie. And it is from the witnesses that the circumstances must be obtained. You are, therefore, liable

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(17) Gilb. Ev., 147, 157; 3 Bl. Com., 372; Co. Litt., 6 *b*.

(18) R. v. Adams, 3 C. & P., 600; R. v. Cooper, 3 C. & K., 318. Arch. Cr. Pl. & Ev., 21st Ed., 275.

(19) *Per Maule*, J., in R. v. Burton, Dears., 282. See, also, R. v. Mockford, 11 Cox C. C., 16.

(20) 1 East P. C., c. 5, s. 9, p. 223.

to two forms of error, or, it may be deception; *first*, in the story told by the witnesses, in giving the circumstances; and, *secondly*, in the application to be made of the circumstances, when so obtained. Where the fact itself is one positively sworn to, as having been seen by the witnesses, the conclusion to be drawn is generally obvious; but where the actual fact forming the offence charged has not been seen, but has to be inferred or presumed from a train of circumstances, the drawing of the conclusion depends, for its correctness, not only upon whether the witnesses, who give the circumstances, have told the truth, and have forgotten nothing, and are free from mistake in every essential particular, but also upon whether the conclusion is reached by proper reasoning upon the circumstances as proved; for as all men do not understand alike, very opposite conclusions may be drawn from the same circumstances and the same shades of probability.

Mascardus, an eminent writer on the general theory of proof, says: "Proof by evidence of the thing is superior to every other; and of all different kinds none is so great as that which is made by witnesses deposing to what they have seen;" and in another place he says; "Proof by presumption and conjectures cannot be called a true and proper proof."

Menochius, a writer whose work is entirely devoted to presumptions, or circumstantial evidence, says, at the very beginning of his work, that: "the proof or credence which arises from the testimony of witnesses is superior to any other."

One of the cases given by Lord Hale illustrates the fallacy of such a doctrine as that which asserts that circumstantial evidence is the best and most convincing kind of proof. The case is as follows: "An uncle who had the bringing up of his niece, to whom he was heir at law, had corrected her for some offence, and she was heard to say, "Good uncle, do not kill me;" after which time she could not be found; whereupon the uncle was committed upon suspicion of murder, and admonished, by the justices of the assize, to find out the child by the next assizes; against which time he could not find her, but brought another child, as like her in years and person as he could find, and apparelled her like the true child; but on examination she was found not to be the true child. Upon these presumptions, (which were considered to be as strong as facts that appear in the broad face of day), he was found guilty and executed; but the truth was, the child, being beaten, ran away, and was received by a stranger; and, afterwards, when she came of age to have her land, came and demanded it, and was directly proved to be the true child." (21)

Suspicion is to be distinguished from proof. In common language the term *suspicion* is the imagining of something wrong, without proof that it is wrong: and therefore it can never be a proper ground for conviction.

A suspicion is merely an impression upon a person's mind: but an inference is based upon and drawn from some fact.

"The wisdom and goodness of our law appears in nothing, more remarkably, than in the perspicuity, certainty, and clearness of the evidence it requires to fix a crime upon any man, whereby his life, his liberty, or his property can be concerned: herein we glory and pride ourselves, and are justly the envy of all our neighbor nations. Our law, in such cases, requires evidence so clear and convincing, that every bystander, the instant he hears it, must be fully satisfied of the truth and certainty of it. It admits of no surmises, innuendoes, forced consequences, or harsh constructions, nor anything else to be offered as evidence, but what is real and substantial, according to the rules of natural justice and equity." (22)

(21) 2 Hale, P. C., 290.
(22) Lord Cowper's speech on the Bishop of Rochester's case.

Circumstantial evidence is in its very nature merely supplemental. It is only resorted to for the want of original and direct proof; and, surely, it can never be said that what is secondary is equal to that which is original, or that the thing which is substituted is equal to that which it is meant to supply. As Lord Chief Baron Gilbert, in his work upon evidence, says:

"When the fact itself cannot be proved, that which comes nearest to the proof of the fact, is the proof of the circumstances that necessarily and usually attend such fact, and called presumptions; and not proof, for they stand instead of the proofs of the fact, till the contrary be proved." (23)

Philips, in his Work on Circumstantial Evidence says: "A regard to the peace and good order of society certainly requires that crimes shall be liable to be proved by circumstantial evidence. But a regard to the well being of society likewise demands that the mode of proof should be regulated by some fixed rules."

He then goes on to give the following as the chief of such rules: —

"1. *The actual commission of the crime itself (the corpus delicti) shall be clearly established.*

2. *Each circumstance shall be distinctly proved.*

3. *The circumstance relied on shall be such as is necessarily or usually incidental to the fact charged.*

4. *When the number of circumstances depends on the testimony of one witness, that number shall not increase the strength of the proof.* For, as the whole depends on the veracity of the witness, when that fails the whole fails.

5. *Direct evidence shall not be held refuted from being opposed to circumstances incongruous with that evidence.* Because a certain degree of incongruity is incident to every man's conduct.

6. *The judge, in summing up, shall assume no fact or circumstance as proved; but shall state the whole hypothetically and conditionally; leaving it entirely to the jury, to determine how far the case is made out to their satisfaction.*

7. *The difficulty of proving the negative shall in all cases be allowed due weight.* But the silence of the prisoner as to facts, which, if innocent, he might have explained, shall be held an argument against him. This, of course, proceeds upon the supposition, that he stood fully apprized, before his trial, of all that was intended to be produced.

8. *The counsel for the prisoner shall be allowed to object freely to the production of any evidence, as not proper to go to the jury, or as not being of legal credence.*

9. *The jury shall be as fully convinced of the guilt of the prisoner, from the combination of the circumstances, as if direct proof had been brought.*

10. *Where the body of the act is distinctly sworn to, a variation in the circumstances does not destroy the proof.*

The following rule is the converse of the preceding one:

11, *Where the leading fact or crime is only to be collected from circumstances, a material variation in these will defeat the effect of the whole.*

12. *There being no repugnance in the chain of circumstances is a proof that a thing may be; not that it is: though, there being a repugnance is a proof that it cannot be.* Whatever does not involve a contradiction, is possible; whatever involves one, is impossible.

13. *The absence of the proof, naturally to be expected, is a strong argument against the existence of any fact alleged.* This applies particularly to cases where violence is charged."

(23) 1 Gilb. Ev., 142.

It is very important to consider whether the circumstances proved necessarily involve the prisoner's guilt, or only probably so, — whether these circumstances might not all exist and yet the accused be innocent.

We sometimes hear a judge, in summing up, say, that the evidence is the best that the nature of the case can be supposed to afford; but this is, surely, no reason why the jury should be satisfied with it; for it is only by the evidence that the nature of the case can be known; and the case of an innocent man must always be of a nature to afford very little evidence.

In a criminal case, the impression on the mind of the jury, — in order to convict, — ought to be, not that the prisoner is *probably* guilty, but, that he *really* and *absolutely* is so; — where they doubt, it is their duty to acquit.

The jury, — in order to enable them to return a verdict of guilty, — must be satisfied, by the evidence beyond any reasonable doubt, of the prisoner's guilt, and this as a conviction created in their minds not merely as a probability; and if it is only an impression of probability their duty is to acquit. (24)

In a murder case supported by circumstantial evidence, and in which there was no fact which taken alone amounted to a presumption of guilt, the jury were told by Alderson, B, that, before they could find the prisoner guilty, they must be satisfied not only that the circumstances were consistent with his having committed the act but that they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person; and he went on to point out to them the proneness of the human mind to look for and often slightly to distort the facts in order to establish such a proposition and its proneness to forget that a single circumstance which is inconsistent with such a conclusion is of more importance than all the rest, inasmuch as it destroys the hypothesis of guilt. (25)

**Indictments in murder and manslaughter cases.** — In an indictment for murder no other count can be joined with the one charging the murder. This is provided for by section 626, *post*.

Sub-section 2 of section 633, *post*, provides that a previous conviction or acquittal shall be a bar to any second indictment for the same homicide whether the first indictment is for murder and the second for manslaughter or *vice versa*.

It is also provided, — by section 713, — that if on a charge of murder the evidence is not sufficient to establish murder but only manslaughter, a verdict of manslaughter may be found.

By section 714, *post*, it is further provided that upon an indictment for child murder, the conviction may, if the jury finds that the evidence warrants it, be for concealment of birth instead of murder.

**230. Manslaughter.** — Culpable homicide, not amounting to murder is manslaughter.

See section 236, *post*, for the punishment of manslaughter.

In order that culpable homicide shall not amount to murder but be only manslaughter, the following conditions are necessary:

1. The slayer must *not* have meant to cause death;

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(34) R. v. White & anor., 4 F. & F., 383.
(25) Hodge's Case, 2 Lew., 227; 1 Stark. Ev., 841 *et seq.*, 859 *et seq.*

2. If in the doing of the act which has occasioned death, the offender's intention was to cause any bodily injury to any one, the bodily injury intended must *not* be such as the offender knew to be likely to cause death;

3. If the act by which the killing has been caused was an act done for an unlawful object, it must *not* have been such an act as the offender knew or ought to have known to be likely to cause death;

4. If in the doing of the act which has occasioned death the offender meant to inflict grievous bodily injury, it must *not* have been an act done to facilitate the commission of any of the offences mentioned in sub-section 2 of section 228, nor to facilitate flight upon the commission or attempted commission of any such offence;

5. If the act which has caused death is an act of administering some stupefying or overpowering thing, it must *not* have been done to facilitate the commission of any of the said offences mentioned in sub-section 2 of section 228, nor to facilitate flight upon the commission or attempted commission of any of such offences; and

6. If the act which has caused death is an act by which the offender has by any means stopped the breath of any person, it must *not* have been done to facilitate the commission of any of the said offences mentioned in sub-section 2 of section 228, nor to facilitate flight upon the commission or attempted commission of any of such offences.

As, by section 220, *ante*, homicide is made culpable in cases where the killing is either by an *unlawful act*, or by an *omission*, without lawful excuse, *to perform or observe a legal duty*, any such unlawful act or any such omission will be *murder* or *manslaughter* according as it *does* or *does not* come within the terms of sections 227 and 228.

For instance, if, by an unlawful act or by an omission to perform some legal duty, one causes the death of another, *meaning* to cause death, it will be murder. If, however, in doing the unlawful act or in omitting to perform or observe the legal duty, one kills another, *not meaning* to kill any one, it will, in general, be manslaughter only. It may, however, even then,—notwithstanding the absence of intention to kill,—be murder, under some circumstances; as, where the offender's intention is to cause some bodily injury which he knows to be likely to cause death, and he is reckless whether death ensues or not. And, so, if a person, without intending to hurt any one, proceed, for some unlawful object,—say, with the object of robbing a bank,—to do an act, (such as the blowing open, by explosives, of a safe or vault), whereby the watchman, who happens to be in an adjoining office, is killed, the question would arise whether the act of blowing open the safe or vault was an act which the accused knew or ought to have known to be likely to cause death. If, under the circumstances of the case, as proved, the answer to this question were in the affirmative, the offender would be guilty of murder; if in the negative, he would be guilty of manslaughter only. Or, if, in order to facilitate resistance to lawful apprehension, or to facilitate the commission of robbery, or burglary, or rape, or forcible abduction, or any of the other offences mentioned in sub-section 2 of section 228, a person were to cause death, meaning to inflict some grievous bodily injury, or were to administer to another some stupefying drug or other overpowering thing, or were to stop the other's breath, by gagging, or by any other means, and if death were to ensue to the person so drugged, or so gagged, the offence would, in any of these cases, amount to murder, whether the offender meant death to ensue or not, and whether he knew or not that death was likely to ensue. But, if the bodily injury were inflicted or the drugging and stupefying of the gagging and stopping of breath were done to facilitate the commission of some offence other than any of those mentioned in sub-section 2 of section 228, and if the offender did not mean to cause death and did not know that

death was likely to ensue, and, if, under the circumstances the act was not such or so done that he ought to have known it to be likely to cause death, he would be guilty of manslaughter only.

It will be seen, therefore, that, outside of those cases in which the plain test,—of killing, *meaning* to kill, or killing *not meaning* to kill,—can be applied, the dividing line between murder and manslaughter is uncertain and very much dependent upon and liable to be varied by circumstances.

ILLUSTRATIONS.

For example, in each of the following illustrations, the act,—that of striking with a stick,—is the same; but the striker's guilt is varied, in degree, by the different circumstances.

1. A strikes B with a stick, and, *meaning* to cause his death, thereby kills him. A is guilty of murder.

2. A, *not meaning* to cause death, strikes B, with a stick, and kills him. A is guilty of manslaughter; unless, of course, there are circumstances of justification or excuse.

3. A strikes and kills B, with a stick, meaning to cause B some bodily injury, which he, A, knows to be likely to cause death, A being reckless whether death ensues or not. A is guilty of murder.

4. A strikes B, with a stick, and thereby kills him, A's intention being to cause B some bodily injury which is not known to A to be likely to cause death. A is guilty of manslaughter.

Persons in charge of dangerous things, animate or inanimate, and persons engaged in erecting or making anything which, in the absence of due precaution or care, may endanger human life are under a legal duty to guard against danger, (26) and are criminally responsible for the consequences of omitting their duty, without lawful excuse.

For instance, if a workman throw stones or other materials from a house in course of being erected or repaired, and thereby kill a person passing underneath, on the street, it is murder, manslaughter, or homicide by misadventure, according to whether there is an entire absence of care, or according to the degree of the precautions taken and of the necessity of any such precautions. If the workman threw the stones, etc., without giving any previous warning to persons passing beneath, and at a time when it was likely for persons to be passing, it would be murder; (27) if it were done at a time when it was not likely that any persons would be passing, it would be manslaughter; (28) and if done in a retired place, where no persons are in the habit of passing or likely to pass, it would be misadventure merely. (29) Or, if the workman previously gave warning to persons beneath,—then, if it happened in a country village, where few persons pass, it would in that case also be misadventure only; (30) but if it were in some large and populous city or town and at a time when the streets were full, it would be manslaughter, even if he gave previous warning. (31)

If a man breaking an unruly or vicious horse, ride him into a crowd of people, and the horse kick and kill one of the persons in the crowd, this

(26) See section 213, *ante*.
(27) 3 Inst. 57.
(28) Fost., 262.
(29) 1 Hale, 472, 475.
(30) 1 Hale, 475.
(31) Kel., 40; Fost., 268; Arch. Cr. Pl. & Ev., 21st Ed., 730.

would be murder, if the rider, in bringing the horse into the crowd, meant to do mischief, or even if he meant to divert himself by frightening the crowd; (32) for, by reason of his intention to do mischief, or to frighten people, he would be doing an unlawful act, which he knew or ought to have known to be likely to cause some one's death. If his riding into the crowd were done, not intentionally, but carelessly and incautiously only, he would be guilty of manslaughter. (33)

If a man driving a cart or other vehicle drive it over another man and kill him, it would be murder, if he saw or had timely notice of the probable mischief, and yet drove on. (34)

Upon an indictment for manslaughter, it appeared that the deceased was walking in the road, and was in a drunken condition, when the prisoner, who was in a cart and driving two horses, without reins, and going at a furious pace, ran over him and killed him. It appeared that the prisoner had called out twice to the deceased, who, from, his drunken condition, and the pace of the horses, could not get out of the road. This was held to be manslaughter. (35)

In another case, the prisoner drove the deceased (a friend of his) in a trap to the races. At the races the prisoner became intoxicated: and the deceased, who noticed this, before commencing the homeward journey, proposed to drive; but the prisoner declined, and insisted upon doing the driving himself. They then started off, the prisoner standing up and flogging the horse, and driving at a furious rate, until finally the trap was upset, and the deceased was thrown out and killed. *Lush*, J., directed the jury to find the prisoner guilty of manslaughter, if they thought the carriage was overturned by the prisoner's culpably negligent driving and that that caused the death of the deceased. (36)

If a man have a beast, which he knows to be accustomed to do mischief, and he, through want of due care, allows it to go abroad, and it kills some one, this is manslaughter in the owner who thus allows it to get abroad. If he turned it loose purposely, though merely to frighten people, and to make what is called sport, it would then be as much murder as if he incited a bear or a vicious dog to worry people. (37)

A, B and C went into a field in proximity to certain roads and houses, taking with them a rifle, which would be deadly at a mile. They all three practised firing, with the rifle, at a target, which they erected in the field, at a distance of about one hundred yards; and they took no precautions of any kind to prevent danger from the firing. One of the shots killed a boy in a tree in a garden, at a spot 393 yards distant from the firing-point. It was held that, although there was no proof as to which of the three fired the fatal shot, A, B and C were all guilty of a breach of duty in firing at the place in question, without taking proper precautions to prevent injury to others, and they were found guilty of manslaughter. (38)

A cannon, which had burst and had been returned to an iron founder, was sent back by him in so imperfect a state that on being fired it burst again and killed a person; and it was held to be manslaughter. (39)

A, having the right to the possession of a gun which was in the hands

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(32) 1 Hawk., c. 31, s. 68.
(33) 1 East. P. C., 231.
(34) 1 Hale, 475; Fost., 263.
(35) R. v. Walker, 1 C. & P., 320.
(36) R. v. Jones, 11 Cox C. C., 544; Arch. Cr. Pl. and Ev., 21st Ed., 731.
(37) 1 Hale, 431; 4 Bl. Com., 197.
(38) R. v. Salmon, 6 Q. B. D., 79; 50 L. J., (M. C.), 25.
(39) R. v. Carr, 8 C. & P., 163.

of B and which he, A, knew to be loaded, attempted to take it by force. In the struggle which ensued, the gun accidentally went off and caused the death of B. A, was held guilty of manslaughter, inasmuch as the discharge of the gun was the result of his unlawful act in attempting to retake the gun *by force*. (40)

This last case approaches very closely to the idea of murder, as defined in section 227 (*d*), which makes it murder if the offender, *for any unlawful object*, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person. A distinction, however, may be drawn from the fact that in the above case the object of the accused,—that of obtaining possession of the gun which was his own property,—was not an unlawful object, although the means used, attempting to regain possession of it by force, were unlawful; and, besides, in order to bring the case within the terms of section 227 (*d*), the circumstances established in evidence would have to be such as to shew that the accused was doing an act which he knew or ought to have known was likely to cause death.

Homicide committed by a pagan Indian,—under a mistaken belief that the object shot at and killed was not a human being but an evil spirit called a "Wendigo" which had assumed human form and would according to the belief of the defendant's tribe, attack and eat human beings,—is manslaughter. (41)

**Contributory negligence of deceased no defence.**—If the drivers of two carriages race with each other and urge their horses to so rapid a pace that they cannot control them, it is manslaughter in both drivers, if, in consequence, one of the carriages upsets and a passenger is killed. (42)

In Swindall's case it was held to be no defence to shew that the death of the deceased was due in part to the contributory negligence of the deceased. In summing up *Pollock*, C. B., said, "it matters not whether he (the deceased) was deaf, or drunk, or negligent, or in part contributed to his own death; for in this consists a great distinction between civil and criminal proceedings. If two coaches run against each other, and the drivers of both are to blame, neither of them has any remedy for damages against the other. But, in the case of loss of life, the law takes a totally different view; for, there, each party is responsible for any blame that may ensue, however large the share may be; and so highly does the law value human life that it admits of no justification wherever life has been lost, and the carelessness or negligence of any one person has contributed to the death of another person."

The same rule, that contributory negligence on the part of the deceased is no defence to an indictment for manslaughter, was laid down by Eyles, J., in Hutchison's case, (43) and in Kew's case; (44) by *Lush*, J., in Jones' case, already cited *supra*, and by *Mellor*, J., in Dant's case. (45) In the latter case, the prisoner, having a right of common, had turned out upon a common, across which there were public footpaths, a horse which he knew to be vicious, and the horse had kicked and killed a child. The

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(40) R. v. Archer, 1 F. & F., 351.

(41) R. v. Machekequonabe, 17 C. L. T., 118; 28 O. R., 309; 2 Can. Cr. Cas., 138. The case of R. v. Mawgridge, Kel., 167, and Levet's Case, 1 Hale, 474, were referred to in this case and distinguished.

(42) R. v. Timmins, 7 C. & P., 499; R. v. Swindall, 2 C. & K., 230.

(43) R. v. Hutchison, 9 Cox C. C., 555.

(44) R. v. Kew, 12 Cox C. C., 355.

(45) R. v. Dant, L. & C., 567; 34 L. J., (M. C.), 119; Arch. Cr. Pl. & Ev., 21st Ed., 732.

prisoner was held liable to be convicted of manslaughter, even though the child had strayed on to the common a little off the path.

**Immoderate correction.** — Where a parent is moderately correcting his child, a teacher his scholar, or a master his servant, and death happens to ensue, it is only misadventure; but, if the bounds of moderation be exceeded, either in the manner, the instrument, or the quality of punishment, and death ensue, it is either manslaughter or murder, according to the circumstances. (46) And so, where, in a case already referred to, *supra*, (47) a master corrected his servant by striking him, with an iron bar, and where, in another case, a schoolmaster stamped on his scholar's belly, so that in each case the sufferer died, these were both held to be murders; because the correction, being excessive and such as must have proceeded from a bad heart, it was equivalent to a deliberate act of killing. (48) And in all cases where the correction is inflicted with a deadly weapon, and the party dies of it, it will be murder; if with an instrument which is not likely to kill, though not proper for the purpose of correction, it will, then, be manslaughter. (49)

Where a master struck his servant with one of his clogs because he had not cleaned them, and death unfortunately ensued, it was held to be manslaughter only, because the clog, although an improper instrument to use for the purpose of correction, was very unlikely to cause death, and therefore the master could have had no intention of taking life when he used it. (50)

When a mother, being angry with one of her children, took up a poker, and, as the child ran to the door which was open, threw it after him, and struck and killed another child who happened at the time to be coming in at the open doorway, it was held that, although she did not intend to hit the child at whom she threw the poker, but merely meant to frighten him, it was manslaughter. (51)

In another case, where the father of a child, two and a half years old, chastised it, for some childish fault, by beating it with a strap on the lower part of its back and on its thighs, and the death of the child was thereby accelerated, he was held guilty of manslaughter. For the defence it was contended that, as the father had a right to correct his child, there was no case to go to the jury; but *Martin*, B., after consulting with *Willes*, J., ruled that the law of correction had no reference to an infant of two and a half years old, but only to those capable of appreciating correction, and that, although a slight slap might be lawfully given to an infant by its mother, more violent treatment, of an infant, so young, by her father, would not be justifiable. (52)

Where there has been a summary conviction for assault, and the person assaulted subsequently dies of injuries caused by the acts constituting the assault, a plea of *autre fois convict* is no defence by the person so summarily convicted, to an indictment for the manslaughter of the person assaulted. (53)

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(46) 1 Hale, 473, 474.
(47) R. v. Grey, Kel., 64.
(48) Fost., 262.
(49) Fost., 262; R. v. Hopley, 2 F. & F., 201.
(50) R. v. Turner, Comb., 407, 408. See, also, R. v. Wigg, 1 Leach, 378*n*; R. v. Leggett, 8 C. & P., 191; Arch. Cr. Pl. & Ev., 21st Ed., 727, 728.
(51) R. v. Conner, 7 C. & P., 438.
(52) R. v. Griffin, 11 Cox C. C., 402.
(53) R. v. Friel, 17 Cox C. C., 325.

**231. Punishment of murder.** — Every one who commits murder is guilty of an indictable offence and shall, on conviction thereof, be sentenced to death. R. S. C., c. 162, s. 2.

**232. Attempts to murder.**— Every one is guilty of an indictable offence and liable to imprisonment for life, who does any of the following things with intent to commit murder ; that is to say —

(*a*) administers any poison or other destructive thing to any person, or causes any such poison or destructive thing to be so administered or taken, or attempts to administer it, or attempts to cause it to be so administered or taken ; or

(*b*) by any means whatever wounds or causes any grievous bodily harm to any person ; or

(*c*) shoots at any person, or, by drawing a trigger or in any other manner, attempts to discharge at any person any kind of loaded arms ; or

(*d*) attempts to drown, suffocate, or strangle any person ; or

(*e*) destroys or damages any building by the explosion of any explosive substance ; or

(*f*) sets fire to any ship or vessel or any part thereof, or any part of the tackle, apparel or furniture thereof, or to any goods or chattels being therein ; or

(*g*) casts away or destroys any vessel ; or

(*h*) by any other means attempts to commit murder. R. S. C., c. 162, s. 12.

As to wounding with intent to maim, disfigure or disable any person or to do some other grievous bodily harm, see section 241, *post*. As to wounding or inflicting any grievous bodily harm, see section 242, *post*. And as to administering poison, etc., so as to endanger the life of any person or to inflict upon such person any grievous bodily harm, or with intent to injure aggrieve or annoy such person, see sections 245 and 246, *post*.

Section 713, *post*, provides that, when the commission of an offence charged in an indictment includes the commission of any other offence, the accused may, if the whole offence charged be not proved, be convicted of any other offence so included therein, if proved. Therefore, if upon the trial of an indictment for wounding or causing grievous bodily harm with intent to murder, the intent to murder be not proved, the jury may, according to the evidence, find the accused guilty of unlawfully wounding or of unlawfully inflicting grievous bodily harm or of a common assault, each of these offences being included in the higher offence of wounding with intent to murder.

Section 712, *post*, provides that, when, upon a charge of attempt, the evidence establishes the commission of the full offence, the accused may either be convicted of the attempt, (for an attempt to commit a crime must necessarily precede and be included in the actual perpetration of a crime), or the court may, instead of taking any verdict on the attempt, direct the accused to be indicted for the complete offence; but after being convicted of the attempt the accused cannot be tried for the offence which he was charged with attempting to commit.

It is also provided,—by section 711, *post*,—that, when the complete commission of the offence charged is not proved, but only an attempt to commit the offence, the accused may be convicted of the attempt.

**Administering poison.**—Where a female servant, put arsenic into coffee which she prepared in a coffee pot for breakfast, and afterwards told her mistress that she had prepared the coffee for her, whereupon the mistress took up the coffee pot and poured out and drank the coffee, it was held by *Parke*, J., that this was an administering of the poison by the servant. (54)

Where A, knowingly, gave poison to B to administer as a medicine to C, but, B, neglecting to do so, it was accidently given to C, by a child, this was held to be an administering by A, just as much as if she had given it with her own hands to C. (55)

A, having mixed corrosive sublimate with sugar, put it in a parcel, directing it to *Mrs. Daws*, at Townhope, and left it on the counter of B a tradesman, who sent it to *Mrs. Davis*, who used some of the poisoned sugar. *Gurney*, B., held this to be an administering by A; for, although the parcel was intended for Mrs. Daws, yet, as it found its way to Mrs. Davis, it was the same in its effect as if it had been intended for Mrs. Davis. (56) In another case, however, *Parke*, B., after consulting with *Alderson*, B., expressed the opinion that an indictment for causing poison to be taken by A, with intent to murder A, could not be sustained by evidence shewing that the poison, though taken by A, was intended for another person, and he doubted the propriety of the decision of *Gurney*, B., in the above case of R. v. Lewis. He accordingly directed a fresh indictment to be preferred charging the intent to be generally "*to commit murder*;" upon which the defendant was again tried, convicted, and sentenced. (57) But see R. v. Smith, *post*, p. 253, *note* 78.

A, administered to B, a child, two *cocculus indicus* berries entire in the pod, with intent to murder. The kernel of this berry is poison, but the pod is not, and will not dissolve in the stomach. The two berries thus administered were, therefore, as it happened, quite harmless. It was, nevertheless, held that there was an administering of poison with intent to murder. (58)

Evidence of administering at different times may be given to shew the intent. (59)

**Wounding or causing grievous bodily harm with intent to murder.**—It will be seen that the above section 232 (*b*) is aimed at wounding or causing grievous bodily harm *by any means;* and therefore, upon the trial of an indictment for wounding with intent to murder, the instrument or means by which the wound was inflicted need not be stated. (60)

It was formerly considered that, to constitute a wound, the continuity of the skin must be broken, that there must be an injury which divided the true skin; (61) in other words, that the outer covering of the body, (that is, the whole skin, not the mere *cuticle*, or upper skin). (62) must

(54) R. v. Harley, 4 C. & P., 369.
(55) R. v. Michael, 2 Moo. C. C., 120; 9 C. & P., 356.
(56) R. v. Lewis, 6 C. & P., 161.
(57) R. v. Ryan, 2 M. & R., 213.
(58) R. v. Cluderoy, 1 Den., 514; 2 C. & K., 907; 19 L. J. (M. C.), 119.
(59) R. v. Mogg, 4 C. & P., 364.
(60) R. v. Briggs, 1 Moo. C. C., 318.
(61) R. v. Wood, 1 Moo. C. C., 278.
(62) R. v. McLoughlin, 8 C. & P., 635.

be divided; (63) a division of the internal skin, — for instance, within the cheek or lip, — being held sufficient to constitute a wound. (64)

But this limited meaning would leave out of the category injuries with such weapons as would not cut or divide the skin, and which nevertheless would cause death.

The following remarks, on the meaning of the word "wound," are taken from Woodman & Tidys' Forensic Medecine:

"RICHARD WISEMAN, who lived in the reigns of Kings Charles I, and Charles II, and was Sergeant-Surgeon to the latter, defines a *Wound* as '*a solution of continuity in any part of the body suddenly made by anything that cuts or tears, with a division of the skin.*' He goes on to say that by *skin* he understands 'not only the *external cutis*, but also the inward membranes of the gullet, ventricle, guts, bladder, urethra, and womb, all of which are capable of wounds from sharp instruments, either swallowed or thrust into them.' (65)

"In other words, the solution of continuity may affect either the skin and subjacent parts or mucous membranes, and the parts lined by them. But this definition excludes so many mechanical injuries, that it has been proposed to use the word *lesion* for the general term. Beck states that 'the term *wound* in *legal medecine* comprehends all *lesions* of the body, and in this differs from the meaning of the word when used in surgery. The latter only refers to a solution of continuity, while the former comprises not only these, but also every other kind of accident, such as bruises, contusions, fractures, dislocations,' etc.

"Lord Lyndhurst, Chief Baron, said — 'The definition of a *wound* in criminal cases, is an injury to the person, by which the skin is broken. If the skin is broken, and there was a bleeding, that is a wound.' (66)

"On this, Beck properly remarks, that a man may have a bone fractured from a blow, without any breaking of the skin. (67)

"Dr. Taylor remarks, that Wiseman's definition would include ruptures of internal organs, such as the liver and spleen, and burns and scalds, as well as simple fractures and dislocations. On applying to three eminent surgeons, he obtained the three following definitions: —

'A wound is —

1. A solution of continuity, from violence, of any naturally continuous parts;
2. An external breach of continuity directly occasioned by violence;
3. An injury to the organic textures by mechanical or other violence.'

"The want of a legal definition formerly allowed the collar bone to be broken by a hammer or otherwise, provided the skin were not broken, and similar injuries to be inflicted, and yet the prisoner to escape, because this was not considered a wound. (68)

"Now, however, these lesions would be included in the second clause of the sentence, 'shall, by any means whatever, wound, or *cause any grievous bodily harm to any person*, and by any means other than those specified,' etc., etc., 'with or without any weapon or instrument.' [*See* the Acts 1

(63) R. v .Becket, 1 M. & Rob., 526.
(64) R. v. Smith, 8 C. & P., 173; R. v. Warman, 1 Den., 183; 2 C. & K., 195.
(65) Wiseman, "Chirurg. Treat." Book 5, chap. 1.
(66) Lord Lyndhurst's Rem. in Moriarty v. Brooks, 6 C. & P., 684.
(67) Beck Med. Jur., 600.
(68) R. v. Wood, Mathew's Dig., 415; 4 C. & P., 381.

Vic., c. 85; 14 and 15 Vic., c. 100; and §§ 11, 15 and 20 of 24 and 25 Vic., c. 100]. * * * As Dr. Taylor remarks, it may be reasonably supposed that ruptures of internal organs, as well as simple fractures and dislocations, will be considered as wounds." (69)

The word "wound" includes incised wounds, punctured wounds, lacerated wounds, contused wounds and gunshot wounds; (70) and, in short, every kind of wound no matter how or by what produced. The nature of the instrument by which it was effected is immaterial. It makes no difference whether it was done with a kick from a shoe, (71) or with a hammer thrown at and striking a person, (72) or by striking a man's hat violently with an air-gun and thereby causing the hat to wound the man. (73)

For the meanings of incised wounds, punctured wounds, lacerated wounds, contused wounds and gunshot wounds, see comments under section 241, *post*.

It is not necessary, under the foregoing section 232 (*b*), that the wound should be in a vital part; for the real question is not what is the wound actually given but what was the wound intended to be given. (74)

To constitute GRIEVOUS BODILY HARM it is not necessary that the injury should be either permanent or dangerous. If it be such as seriously to interfere with health or comfort, it is sufficient. (75)

Upon a charge of attempt to murder by causing grievous bodily harm to a child (below the age of sixteen) under the care of the defendants, (namely, the daughter of the male defendant and the step-daughter of the female defendant), the Crown, after making proof of acts of cruelty by the defendants towards the child in question, sought to fortify the case by adducing evidence of the defendants having committed acts of cruelty to another child, — a son of the male defendant, — under their care. The Court ruled that the proposed evidence was inadmissible as irrelevant to the issue, and when, in the course of cross-examining the female defendant, the Crown Counsel questioned her as to her treatment of her step-son, the Court, in allowing the questions, notified the Crown Counsel that the female defendant's answers would be conclusive, inasmuch as, the subject being foreign to the issue, her answers must be accepted as final. In answer to the questions put to her in cross-examination, the female defendant swore that she had never acted cruelly towards her step-son. In rebuttal, the Crown put the step-son in the box to contradict the female defendant, and the Court refused to allow his evidence. (76)

Where an indictment was multifarious in that it combined a charge (under sections 210 and 215), of failure to provide necessaries, with a charge (under section 232) of an attempt to murder the child, it was held that it was sufficient upon which to base a conviction for the latter offence (attempt to murder) without any formal amendment of the indictment, the presiding judge having withdrawn from the jury the portion of the charge based upon sections 210 and 215. (77)

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(69) Woodman & Tidy, For. Med., 1044, 1045. See, also, Hamilton & Godkin's Leg. Med., vol. 1, pp. 243, 244.
(70) Shea v. R., 3 Cox C. C., 141.
(71) R. v. Briggs, 1 Moo. C. C., 318.
(72) R. v. Withers, 1 Moo. C. C., 284; R. v. Payne, 4 C. & P., 558.
(73) R. v. Sheard, 2 Moo. C. C., 13; 7 C. & P., 846.
(74) R. v. Hunt, 1 Moo. C. C., 93; R. v. Griffith, 1 C. & P., 298.
(75) R. v. Ashman, 1 F. & F., 88.
(76) R. v. Lapierre, 1 Can. Cr. Cas., 413. See Taylor on Evid., 9th Ed., vol. 1, section 326, p. 235, and vol. 2, section 1435, p. 947.
(77) R. v. Lapierre, 1 Can. Cr. Cas., 413.

**Shooting with intent to murder.**—Where a defendant was charged with wounding T., with intent to murder him, and the evidence shewed that the defendant's intention was to murder M., and that he shot at and wounded T., supposing him to be M., and the jury found that he intended to murder the man at whom he shot, supposing that he was M., the court held the conviction right. (78)

A person, who fired a loaded pistol into a group of people, not aiming at any particular one, and who hit one of such group, was held guilty of shooting at the person he hit, with intent to do grievous bodily harm to that person. (79)

If A draw a loaded pistol from his pocket for the purpose of murdering S, but, before he can do anything further in pursuance of his purpose, some one snatches the pistol from his hand, it seems that he would be guilty of an attempt; (80) and, at all events, if he put his finger on the trigger, and tried to pull it, and was only prevented from doing so by forcible interference of bystanders he would be guilty of the attempt. (81)

Under sec. 3 (*o*), *ante*, the expression "*loaded arms*" means and includes "any gun, pistol or other arm loaded with gun powder, or other explosive substance, and ball, shot, slug or other destructive material, or charged with compressed air and ball, shot, slug or other destructive material."

For the definition of an *attempt*, *see* section 64, and full comments thereon, *ante*, pp. 70-73.

Sub-section (*h*) of section 232, (which is a provision similar to section 15 of the Imperial Act, 24-25 Vic., c. 100), embracing as it does all attempts, *by any other means*, to commit murder, will include all those cases where machinery used in lowering miners into mines is injured with intent that it shall break and precipitate the miners, who may be passing up or down, to the bottom of the pit; and also all cases where steam engines are injured for the purpose of killing any one, as well as the cases of sending or placing infernal machines with intent to murder. (82)

A defendant was charged before justices of the peace with the indictable offence of shooting with intent to murder, and the justices, not finding sufficient evidence to warrant a committal for trial, took, of their own motion, the following course, namely, that of summarily convicting the defendant for that he did "procure a revolver with intent therewith unlawfully to do injury to one J. S." It appeared from the evidence that the weapon was bought and carried and used by the defendant; and, by section 108, *ante*, it is an offence triable summarily for one to have in his possession a pistol with intent therewith unlawfully to do any injury to any other person. The return to a writ of *habeas corpus* showed the detention of the defendant under a warrant of commitment based upon the above conviction; and, upon motion for the defendant's discharge, it was held that the detention was for an offence unknown to the law, and although the evidence shewed an offence against section 108, the magistrates ought not to be allowed to substitute a proper conviction of an offence under that section, inasmuch as it was unwarrantable to convict on a

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(78) R. v. Smith, Dears, 559; 25 L. J. (M. C.), 29; Arch. Cr. Pl. & Ev., 21st Ed., 750; *See, also*, P. v. Torres, 38 Cal., 141; *and* Callahan *v.* S., 21 Ohio St., 306; 2 Bish. New Cr. L. Com., s. 741.

(79) R. v. Fretwell, L. & C., 443; 33 L. J. (M. C.), 128.

(80) R. v. Brown, 10 Q. B. D., 381; 52 L. J. (M. C.), 49.

(81) R. v. Duckworth, [1892] 2 Q. B., 83; 17 Cox C. C., 495.

(82) R. v. Mountford, R. & M. C. C., 441; 7 C. & P., 242; Arch. Cr. Pl. & Ev., 21st Ed., 753.

charge as to which no complaint was laid and which the defendant was not called upon to defend, and that, therefore, the defendant must be released. (83)

**233. Threats to murder.** — Every one is guilty of an indictable offence and liable to ten years' imprisonment who sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or *writing* threatening to kill or murder any person. R.S.C., c. 173, s. 7.

Under section 3 (*cc*) "*writing*" includes any mode in which, and any material on which, words or figures, whether at length, or abridged, are written, printed, or otherwise expressed, or any map or plan is inscribed."

See Threatening letters, section 403, *post*.

**234. Conspiracy to murder and counselling murder.** — Every one is guilty of an indictable offence and liable to fourteen years' imprisonment, who —

(*a*.)conspires or agrees with any person to murder or to cause to be murdered any other person, whether the person intended to be murdered is a subject of Her Majesty or not, or is within Her Majesty's dominions or not ; or

(*b*) counsels or attempts to procure any person to murder such other person anywhere, although such person is not murdered in consequence of such counselling or attempted procurement. R. S. C., c. 162, s. 3.

The second paragraph of this section is the same, in effect, as the Imperial statute, 24 and 25 Vic., c. 100, s. 4, under which it was held in Most's case that the publication and circulation of a newspaper article may be an encouragement or attempt to persuade to murder, although not addressed to any person in particular. The prisoner had published and circulated an article written in German, in a newspaper published in that language in London, exulting in the recent assassination of the Czar of Russia, and commending the murder as an example to all revolutionists throughout the world; and at the trial the jury were directed that if they thought that by the publication of the article the prisoner intended to encourage and did encourage or endeavor to persuade any person to murder any other person, whether a subject of Her Majesty or not, and whether within the Queen's dominions or not, and that such encouragement and endeavoring to persuade was the natural and reasonable effect of the article, they should find him guilty. This direction was held correct. (84)

Since the accession of King Edward VII, the words "His Majesty" are to be used instead of "Her Majesty" in the above section, 234. (See section 7, sub-section 6 of the *Interpretation Act*, set out at p. 9, *ante*.)

**235. Accessory after the fact to murder.** — Every one is guilty of an indictable offence, and liable to imprisonment for life, who is an accessory after the fact to murder. R.S.C., c. 162, s. 4.

**236. Punishment of manslaughter.** — Every one who commits

(83) R. v. Mines, 14 C. L. T., 453; 25 O. R., 577.
(84) R. v. Most, 7 Q. B. D., 244; 50 L. J. (M. C.), 113.

manslaughter is guilty of an indictable offence, and liable to imprisonment for life. R.S.C., c. 162, s. 5.

**237. Aiding and abetting suicide.** — Every one is guilty of an indictable offence and liable to imprisonment for life who counsels or procures any person to commit suicide, actually committed in consequence of such counselling or procurement, or who aids or abets any person in the commission of suicide.

In reference to this subject the English Commissioners (at page 25 of their Report) have the following remarks: —

"By the present law, suicide is murder; and a person who assists another to commit suicide is an accessory before the fact to murder and liable to capital punishment. It appears to us that the abetment of suicide and attempts to commit suicide ought to be made specific offences. We provide for this in sections 183 and 184." (Identical with our sections 237 and 238.)

**238. Attempt to commit suicide.** — Every one who attempts to commit suicide is guilty of an indictable offence and liable to two years' imprisonment.

Opposite to the section of the English Draft Code corresponding with this section, the Royal Commissioners have the following note: —

"This is the existing law. *See* Reg., *v.* Burgess, L. & C., 258." (85)

**239. Neglecting to obtain assistance in childbirth.** — Every woman is guilty of an indictable offence who, with either of the intents hereinafter mentioned, being with child and being about to be delivered, neglects to provide reasonable assistance in her delivery, if the child is permanently injured thereby, or dies, either just before, or during, or shortly after birth, unless she proves that such death or permanent injury was not caused by such neglect, or by any wrongful act to which she was a party, and is liable to the following punishment:

(*a.*) If the intent of such neglect be that the child shall not live, to imprisonment for life;

(*b.*) If the intent of such neglect be to conceal the fact of her having had a child, to imprisonment for seven years.

Opposite to sections 185 and 186 of the English Draft Code, which correspond with this section 239 of our Code, the Royal Commissioners have the following note: —

"These are new. Women found guilty of concealment of birth, under the existing law, (86) have in most cases been really guilty of the acts made substantial offences by these sections. (Section 239). These sections, (section 239,) would also often afford a means for punishing child murder, where there would be a practical difficulty in obtaining a conviction for that offence."

In their report (at p. 25) the Royal Commissioners say, further: —

"The subject of child murder is one as to which the existing law seems

(85) R. v. Burgess, L. & C., 258.
(86) Meaning the law as now contained in section 240, *post*.

to require alteration. At present, no distinction is made between the murder of a new-born infant, by its mother, and the murder of an adult.

"Practically this severity defeats itself, and offences, which are really cases of child-murder, are often treated as cases of concealment of birth simply. The Bill proposed to meet this by an enactment which, (as amended by the Attorney General), would have enabled a jury to convict of manslaughter, instead of murder, a woman who caused her new-born child's death by an act done when her power of self-control was greatly weakened. On the whole, we have preferred to substitute for it the provisions contained in sections 185 and 186." (Section 239.)

**240. Concealing dead body of child.**— Every one is guilty of an indictable offence, and liable to two years' imprisonment, who *disposes* of the dead body of any child *in any manner*, with intent to *conceal* the fact that its mother was delivered of it, whether the child died before, or during, or after birth. R. S. C., c. 162, s. 49.

On a trial for child murder, the jury, if they acquit on the charge of murder, may, under section 714, *post*,—if the evidence warrants it,—convict the accused of concealment of birth.

It was held, in one case that a fœtus not bigger than a man's finger, but having the shape of a child, was a child within the meaning of the English statute against concealment of birth. (87)

Where a woman who delivered of a child whose dead body was found in a bed amongst the feathers, but there was no evidence to shew who put it there and it appeared that the mother had sent for a surgeon when she was confined, and had prepared clothes for the child, the judge directed an acquittal on the charge of endeavoring to conceal the birth. (88)

Where a woman put the dead body of her child over a wall which divided a yard from a field, she was convicted of concealing the birth of the child; and the conviction was confirmed. (89)

In another case, the mother caused the body of her child to be secretly buried with a view to conceal its birth, and although she had previously allowed the birth to be known to some persons, it was held that she might be convicted of the concealment. (90)

The mere denial of the birth is not sufficient to convict. There must be proof of some act of disposal of the body after the child's death. (91)

It was held by a majority of the judges, that the putting of the child's dead body between a bed and the mattress, or under a bolster, on which the accused lay her head, was a sufficient disposal of it to constitute the offence. (92)

It was held that a mother who placed the dead body of her child in an open box in her bedroom, and, afterwards, on enquiry from the doctor told him where it was, could not be convicted of concealment. (93)

In order to convict a woman of attempting to conceal the birth of her

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(87) R. v. Colmer, 9 Cox C. C., 506.
(88) R. v. Higley, 4 C. & P., 566.
(89) R. v. Brown, L. R., 1 C. C. R., 244.
(90) R. v. Douglass, 1 Moo. C. C., 480.
(91) R. v. Turner, 8 C. & P., 755.
(92) R. v. Goldthorpe, 2 Moo. C. C., 244; C. & Mar., 335; R. v. Perry, Dears. 471; 24 L. J. (M. C.), 137.
(93) R. v. Sleep, 9 Cox C. C., 559.

child it has been held that a dead body must be found and identified as that of the child of which she was delivered. (94)

A placed the dead body of a child of which she had been delivered between a trunk and the wall of a room in which she lived alone. Being charged with having had a child she at first denied it, but being pressed she pointed out where the body was. Held, that she might be convicted of concealing the birth of the child. (95)

## PART XIX.

## BODILY INJURIES, AND ACTS AND OMISSIONS CAUSING DANGER TO THE PERSON.

**241. Wounding with intent.**— Every one is guilty of an indictable offence and liable to imprisonment for life who, with intent to maim, disfigure or disable any person, or to do some other grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, unlawfully by any means *wounds* or *causes any grievous bodily harm* to any person, or *shoots* at any person, or, by drawing a trigger, or in any other manner, *attempts to discharge* any kind of *loaded arms* at any person. R. S. C., c. 162, s. 13.

It will be sufficient to warrant a conviction under this section if it be proved that the defendant *wounded*, or *caused grievous bodily harm to*, or *shot at*, etc., *any* person with intent to maim, disfigure, or disable *any person*, etc., so that if A struck at B, but, C interposing, received the blow, and was wounded, A could be convicted of wounding C with intent to do him grievous bodily harm. (1)

As to wounding or causing any grievous bodily harm with intent to murder, see section 232 (*b*), *ante*.

We have already noticed, under section 232, *ante*, the meaning of the word "*wound*," and that wounds may be *incised*, *punctured*, *contused* or *lacerated* wounds.

An *incised* wound is commonly called a "cut," and is generally produced by a weapon with a sharp edge, as a knife, a sword, a scythe, scissors, etc.; but some clean sharp cuts and ugly gaping wounds have been known to be produced with a square poker, or even with the fist or a blunt body, when it strikes a sharp bony ridge, such as that of the eyebrow, the cheek bone, etc.

*Punctured* wounds are caused by the penetration of some pointed weapon, or anything with a sharp point, such as a dagger, a pen-knife, a poniard, a piece of broken glass, a tobacco pipe, scissor points, arrows, darts, sharp stones, etc. These wounds are sometimes dangerous and troublesome, from the fact that the external wound may heal over too soon, and keep the *pus* confined, or injury may be done to nerves and blood vessels in the deeper parts of the wound. An instance, given by medical

(94) R. v. Williams, 11 Cox C. C., 684; Arch. Cr. Pl. & Ev., 21st Ed., 828, 829.
(95) R. v. Piche, 30 U. C. C. P., 409; Bur. Dig. Cr. L., 228.
(1) R. v. Latimer, 16 Cox C. C., 70; R. v. Stopford, 11 Cox C. C., 643.

writers, of the dangerous nature of a punctured wound, is that of a clock-maker who, while picking his ear with the wire stem of a clock pendulum, was struck on the elbow by a drunken man who thus caused the wire to pass through his ear into the brain, and occasioned his death.

A *contused* wound is one in which there is considerable bruising, with discoloration of the surrounding skin, caused by effusion of blood, from small ruptured vessels into the surrounding cellular membrane, or subcutaneous tissue. The change of color is produced by the oxidation of the effused blood; and when it takes place near the eye, it is popularly called a "black eye." After from eighteen to twenty-four hours from the commencement of the discoloration the black or dark-blue coloring begins to grow lighter, and changes gradually, from day to day, passing through different shades of green, yellow, lemon, etc., until it completely disappears. When the blood is effused in quantity, as for example by the blow of a cricket-ball, such a swelling is called *hæmatoma*, or blood tumor. The shape of a bruise may sometimes be an important item of evidence. Starkie states that, on one occasion, in a case of attempt to murder, the prosecutor had, in his own defence, struck his assailant with a house door-key, and the *marks of contusion produced by the wards of this key* became the chief means of the would-be murderer's identification and conviction.

In some cases of contused wounds it may take two or three days for the skin to appear discolored or bruised; and the time taken for the completion of these changes of color, as well as for the absorption of the blood, may vary from a few days to some weeks.

*Lacerated* wounds are torn and ragged ones, such as are produced by sawing movements of blunt or jagged instruments, as for example, stones, glass, earthenware, shots from fire-arms, etc. These wounds are generally dangerous, from often containing dirt and foreign bodies, such as fragments of wadding, powder, etc., and because they can only heal by granulation and suppuration, and not by primary union or adhesion.

Some wounds are of a mixed character. When a wound is produced with a knife, for instance, one part may be cleanly cut or incised, and another may be hacked or lacerated, and a different force or direction being given to the point of the knife may cause the wound to be at one end a punctured or pointed one. (2)

Besides the above, there are what are known as gunshot wounds, which are wounds generally produced by missiles, chiefly lead, fired from some sort of pistol or gun, the propelling force being powder. The same character of wound may be made, however, by any projectile, no matter of what it is composed, and no matter what the propelling force. As, for example, a small stone or pebble, resembling a bullet in size, thrown by a blast or any sufficient force, will give what is technically known as a gunshot wound; and it is such a wound,—only not one caused by the use of fire-arms. (3)

**242. Wounding.**— Every one is guilty of an indictable offence and liable to three years' imprisonment who unlawfully *wounds* or *inflicts* any *grievous bodily harm* upon any other person, either with or without any weapon or instrument. R.S.C., c. 162, s. 14.

**243. Shooting at Her Majesty's vessels, and wounding public officers, on duty.**— Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who wilfully —

(2) Woodman & T. For. Med., 1047, 1048.
(3) Hamilton & Godkin's Leg. Med., vol. 1, p. 252.

(*a*.) shoots at any vessel belonging to Her Majesty or in the service of Canada; or

(*b*) maims or wounds any public officer engaged in the execution of his duty or any person acting in aid of such officer. R. S. C., c. 32, s. 213; c. 34, s. 99.

"Public officer" is defined by section 3 (*w*) as "Any Inland Revenue or Customs officer, officer of the army, navy, marine, militia, North-West mounted police, or other officer engaged in enforcing the laws relating to the revenue, customs, trade or navigation of Canada."

**244. Disabling or drugging with intent to commit an indictable offence.** — Every one is guilty of an indictable offence and liable to imprisonment for life and to be whipped, who with intent thereby to enable himself or any other person to commit, or with intent thereby to assist any other person in committing any indictable offence : —

(*a*) by any means whatsoever, attempts to choke, suffocate or strangle any other person, or by any means calculated to choke, suffocate or strangle, attempts to render any other person insensible, unconscious or incapable of resistance ;or

(*b*) unlawfully applies or administers to, or causes to be taken by, or attempts to apply or administer to, or attempts or causes to be administered to or taken by, any person, any chloroform, laudanum or other stupefying or overpowering drug, matter or thing. R. S. C., c. 162, ss. 15 and 16.

As to attempting to drown, suffocate or strangle, with intent to murder, see section 232 (*d*), *ante*.

**245. Administering poison.** — Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who unlawfully administers to, or causes to be administered to or taken by any other person, any poison or other *destructive* or *noxious* thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm. R. S. C., c. 162, s. 17.

**246.** Every one is guilty of an indictable offence and liable to three years' imprisonment who unlawfully administers to, or causes to be administered to or taken by, any other person, any poison or other *destructive* or *noxious* thing, with intent to injure, aggrieve or annoy such person. R. S. C., c. 162, s. 18.

See comments, under sec. 232, *ante*, at p. 250, on ADMINISTERING POISON with intent to murder.

If the poison or destructive or noxious thing is administered merely with intent to *injure*, *aggrieve* or *annoy*, which in itself would be punishable under the above section 246, yet if it does, in fact, endanger the life of or

inflict grievous bodily harm upon the person to whom it is administered, it would amount to the higher offence covered by and punishable under section 245. (4)

To warrant a conviction under section 246, it must be proved that the defendant intended the administration of the poison, etc., to injure, aggrieve or annoy the prosecutor. (5)

Whether the thing is a noxious thing or not may depend upon the quantity administered, some drugs being innoxious in small, and noxious in large quantities. Thus, where the prisoner was indicted under section 24 of 24 and 25 Vic., c. 100, (which corresponds with the above section 246), and the evidence was that he had administered cantharides (otherwise called Spanish fly), to the prosecutrix, that a large dose of cantharides is poisonous, but that the quantity which he administered was insufficient to produce any effect upon the human system, it was held, by *Cockburn*, C. J., and *Hawkins*, J., that the prisoner could not be convicted of administering a "destructive and noxious thing," notwithstanding that he administered it with intent to injure and annoy. (6)

In Wilkins case, *supra*, the defendant had administered cantharides to a woman with intent to excite her sexual passion and desire, in order that he might obtain connection with her; and it was held that this was an administering with intent to "injure, aggrieve and annoy" her.

In another case, the prisoner was indicted for having caused to be taken a certain noxious thing, namely, half an ounce of oil of juniper, with intent to procure miscarriage, and the evidence was that oil of juniper in considerably less quantities than half an ounce might be taken without any ill effect, but that half an ounce produces ill effects, and to a pregnant woman is dangerous. *Held*, that the half ounce of juniper oil was a "noxious thing." (7)

**247. Causing bodily injuries by explosives.** — Every one is guilty of an indictable offence and liable to imprisonment for life who unlawfully and by the explosion of any explosive substance, burns, maims, disfigures, disables or does any grievous bodily harm to any person. R. S. C., c. 162, s. 21.

**248. Attempt to cause bodily injuries by explosives.** — Every one is guilty of an indictable offence and liable, in case (*a*) to imprisonment for life and in case (*b*) to fourteen years' imprisonment, who unlawfully —

(*a*) with intent to burn, maim, disfigure or disable any person, or to do some grievous bodily harm to any person, whether any bodily harm is effected or not : —

(i) causes any explosive substance to explode ;

(ii) sends or delivers to, or causes to be taken or received by, any person any explosive substance, or any other dangerous or noxious thing ;

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(4) Tulley v. Corrie, 10 Cox C. C. 640.
(5) R. v. Wilkins, L. & C., 89; 31 L. J. (M. C.), 72.
(6) R. v. Hennah, 13 Cox C. C., 547. See comments under section 272, *post*.
(7) R. v. Cramp, 5 Q. B. D., 307; 49 L. J. (M. C.), 44.

(iii) puts or lays at any place, or casts or throws at or upon, or otherwise applies to, any person any corrosive fluid, or any destructive or explosive substance ; or

(*b*) places or throws in, into, upon, against or near any building, ship or vessel any explosive substance, with intent to do any bodily injury to any person, whether or not any explosion takes place and whether or not any bodily injury is effected. R. S. C., c. 162, ss. 22 and 23.

Section 3 (*i*), *ante*, defines *explosive substance* as being and including ; — "any materials for making an explosive substance ; also any apparatus, machine, implement, or materials used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance ; and also any part of any such apparatus, machine or implement."

**249. Setting Spring Guns and Man Traps.**—Every one is guilty of an indictable offence and liable to five years' imprisonment who sets or places, or causes to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life, or inflict grievous bodily harm, with the intent that the same or whereby the same may destroy, or inflict grievous bodily harm upon, any trepasser or other person coming in contact therewith.

2. Every one who knowingly and wilfully permits any such spring-gun, man-trap or other engine which has been set or placed by some other person, in any place which is in, or afterwards comes into his possession or occupation, to continue so set or placed shall be deemed to have set or placed such gun, trap or engine with such intent as aforesaid.

3. This section does not extend to any gin or trap usually set or placed with the intent of destroying vermin or noxious animals. R. S. C., c. 162, s. 24. ,

This section applies to instruments set with an intention to destroy *human life* or to inflict grievous bodily harm upon *human beings*, or whereby grievous bodily harm is actually done to a human being, and therefore it would not apply to *dog-spears* set by a man in his own land. (8)

**250. Intentionally endangering the safety of persons on railways.** — Every one is guilty of an indictable offence and liable to imprisonment for life who unlawfully —

(*a*) with intent to injure or to endanger the safety of any person travelling or being upon any railway,

(i) puts or throws upon or across such railway any wood, stone, or other matter or thing ;

(ii) takes up, removes or displaces any rail, railway switch, sleeper or other matter or thing belonging to such railway, or

(8) Jordin v. Crump, 8 M. & W., 782; Arch. Cr. Pl. & Ev., 21st Ed., 775.

injures or destroys any track, bridge or fence of such railway, or any portion thereof ;

(iii) turns, moves or diverts any point or other machinery belonging to such railway ;

(iv) makes or shows, hides or removes any signal or light upon or near to such railway ;

(v) does or causes to be done any other matter or thing with such intent ; or

(*b*) throws, or causes to fall or strike at, against, into or upon any engine, tender, carriage or truck used and in motion upon any railway, any wood, stone or other matter or thing, with intent to injure or endanger the safety of any person being in or upon such engine, tender, carriage or truck, or in or upon any other engine, tender, carriage or truck of any train of which such first mentioned engine, tender, carriage or truck forms part. R. S. C., c. 162, ss. 25 and 26.

As to endangering *property* by mischief on railways, *see* section 489, et seq., *post*.

**251. Negligently endangering the safety of persons on railways.** — Every one is guilty of an indictable offence and liable to two years' imprisonment who, by any unlawful act, or by any wilful omission or neglect of duty, endangers or causes to be endangered the safety of any person conveyed or being in or upon a railway, or aids or assists therein. R. S. C., c. 162, s. 27.

A passenger railway line constructed and completed under the power conferred by an act of parliament, but not yet begun to be used for the conveyance of passengers, but only for the carriage of materials and workmen, was held to be within the English Act against mischief on railways. (9)

**252. Negligently causing bodily injury to any person.** — Every one is guilty of an indictable offence and liable to two years' imprisonment who, by any unlawful act, or by doing negligently or omitting to do any act which it is his duty to do, causes grievous bodily injury to any other person. R. S. C., c. 162, s. 33.

A corporation cannot be indicted for manslaughter, but it may be indicted under this section, 252, for having caused bodily injury by an omission to maintain in a safe condition a bridge which it was its duty to maintain, and this notwithstanding that death ensued at once to the person injured. (9*a*)

**253. Injuring persons by furious driving.**— Every one is guilty of an indictable offence and liable to two years' imprisonment who, having the charge of any carriage or vehicle, by wanton or furious driving, or racing or other wilful misconduct, or by wilful

(9) R. v. Bradford, Bell, 268; 29 L. J. (M. C.), 171.

(9*a*) R. v. Union Colliery Co., 3 Can. Cr. Cas., 523. See, also, R. v. Great West Laundry Co., 3 Can. Cr. Cas., 514. See other cases cited under secs. 213 and 214, at pp. 219 and 220, *ante*.

neglect, does or causes to be done any bodily harm to any person. R. S. C., c. 162, s. 28.

**254. Preventing the saving of a shipwrecked person's life.** — (As amended by 56 V., c. 32). — Every one is guilty of an indictable offence and liable to seven years' imprisonment

(*a*) who prevents or impedes, or endeavours to prevent or impede any *shipwrecked person* in his endeavour to save his life ; or

(*b*) who without reasonable cause prevents, or impedes, or endeavours to prevent or impede, any person in his endeavour to save the life of any *shipwrecked person*. R. S. C., c. 81, s. 36.

Under section 3 (*x*) the term "*shipwrecked person*" includes "any person belonging to, on board of or having quitted any vessel wrecked, stranded, or in distress at any place in Canada."

**255. Leaving holes in the ice and excavations, unguarded.** — Every one is guilty of an offence and liable, on summary conviction, to a fine or imprisonment with or without hard labour (or both) who —

(*a*) cuts or makes, or causes to be cut or made, any hole, opening, aperture or place, of sufficient size or area to endanger human life, through the ice on any navigable or other water open to or frequented by the public, and leaves such hole, opening, aperture or place, while it is in a state dangerous to human life, whether the same is frozen over or not, uninclosed by bushes or trees or unguarded by a guard or fence of sufficient height and strength to prevent any person from accidentally riding, driving, walking, skating or falling therein ; or

(*b*) being the owner, manager or superintendent of any abandoned or unused mine or quarry or property upon or in which any excavation has been or is hereafter made, of a sufficient area and depth to endanger human life, leaves the same unguarded and uninclosed by a guard or fence of sufficient height and strength to prevent any person from accidentally riding, driving, walking or falling thereinto ; or

(*c*) omits within five days after conviction of any such offence to make the inclosure aforesaid or to construct around or over such opening or excavation a guard or fence of such height and strength.

2. Every one whose duty it is to guard such hole, opening, aperture or place is guilty of manslaughter, if any person loses his life by accidentally falling therein while the same is unguarded. R. S. C., c. 162, ss. 29, 30, 31 and 32.

**256. Sending Unseaworthy Ships to Sea.** (As amended by 56 V., c. 32). — Every one is guilty of an indictable offence and liable to five years' imprisonment, who sends, or attempts to send, or is a party to sending, a ship registered in Canada to sea, or on a voyage

on any of the inland waters of Canada, or on a voyage from any port or place on the inland waters of Canada to any port or place on the inland waters of the United States, or on a voyage from any port or place on the inland waters of the United States to any port or place on the inland waters of Canada, in such unseaworthy state, by reason of overloading, or underloading or improper loading, or by reason of being insufficiently manned, or from any other cause, that the life of any person is likely to be endangered thereby, unless he proves that he used all reasonable means to insure her being sent to sea or on such voyage in a seaworthy state, or that her going to sea or on such voyage in such unseaworthy state was, under the circumstances, reasonable and justifiable. 52 V., c. 22, s. 3.

**257. Taking Unseaworthy Ships to Sea.** — Every one is guilty of an indictable offence and liable to five years' imprisonment who, being the master of a ship registered in Canada knowingly takes such ship to sea, or on a voyage on any of the inland waters of Canada, or on a voyage from any port or place on the inland waters of Canada to any port or place on the inland waters of the United States, or on a voyage from any port or place in the United States to any port or place on the inland waters of Canada, in such unseaworthy state, by reason of overloading or underloading or improper loading, or by reason of being insufficiently manned, or from any other cause, that the life of any person is likely to be endangered thereby, unless he proves that her going to sea or on such voyage in such unseaworthy state was, under the circumstances, reasonable and justifiable. 52 V., c. 22, s. 3.

Section 546, *post*, provides that no person shall be prosecuted for any offence under the above two sections, 256 and 257, without the consent of the Minister of Marine and Fisheries.

## PART XX.

## ASSAULTS.

**258. Definition.** — An assault is the act of intentionally applying force to the person of another, directly or indirectly, or attempting or threatening, by any act or gesture, to apply force to the person of another, if the person making the threat has, or causes the other to believe, upon reasonable grounds, that he has, present ability to effect his purpose, and in either case, without the consent of the other or with such consent, if it is obtained by fraud.

The following are given as examples of what amounts to an assault, namely: striking at another with a cane, stick or the fist, although the person striking misses his aim; (1) drawing a sword or bayonet, or throw-

(1) 2 Roll. Abr., p. 554, pl. 45.

ing a bottle or glass with intent to strike; presenting a loaded gun at a man who is within the distance to which the gun will carry; (2) pointing a pitchfork at him when within reach of it. A person, who presents a firearm, which he knows to be unloaded, at another, who does not know that it is unloaded, and so near that it might produce injury, if it were loaded and went off, commits an assault. (3) (See section 109, *ante*, which makes this a substantive offence punishable by $100 fine).

It has been held that a magistrate has no right to order the medical examination of the person of a prisoner, and that, therefore, such an examination, pursuant to such an order, of the person of a female, in custody, charged with concealment of birth, and made against her consent, was an assault. (4)

If a medical man unnecessarily strip a female patient naked, under pretence that he cannot otherwise judge of her illness, it is an assault. (5)

If A advance, in a threatening attitude, towards B, to strike him, and he is stopped just before he is near enough for his blow to take effect, it is an assault. (6)

The following are also examples of what, under the above section, would be an assault, and what, under the common law, would amount to a battery, namely; any touching or laying hold (however trifling) of another's body or clothes, in an angry, revengeful, rude, insolent or hostile manner; (7) as for instance, thrusting or pushing him, in anger; holding him by the arm; spitting in his face; jostling him out of the way; pushing another man against him; (8) throwing a squib at him; striking a horse upon which he is riding, whereby he is thrown. (9)

A blow struck in anger or which is intended or likely to do corporal hurt is a criminal assault, notwithstanding the consent to fight of the person struck. (10)

By consenting to commit a breach of the peace, persons cannot take away the criminal nature of the act, as their consent can in no way affect the rights of the public, and an assault being a breach of the peace the consent of the person struck is immaterial. (11)

It is a good defence to prove that the alleged assault happened by misadventure. Thus, if a horse run away with his rider and run against a man, it would be no assault and the rider would not be punishable, unless he were guilty of some culpable negligence. (12)

It is also a good defence to prove that the alleged assault happened whilst the defendant was engaged in an amicable contest, as, some sport or game which was not unlawful nor dangerous. (13)

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(2) R. v. St. George, 9 C. & P., 483; R. v. Baker, 1 C. & K., 254; Osborn v. Veitch, 1 F. & F., 317; Read v. Coker, 15 C. B., 850; 1 Hawk, c. 62, s. 1.

(3) R. v. St. George, *supra*.

(4) Agnew v. Jobson, 13 Cox C. C., 625.

(5) R. v. Rosinski, 1 Moo. C. C., 12.

(6) Stephens v. Myers, 4 C. & P., 660.

(7) 1 Hawk., c. 62, s. 2; Rawlings v. Till, 3 M. & W., 28; Coward v. Baddeley, 4 H. & N., 278; 28 L. J. (Exch.), 290.

(8) Bull. N. P., 16.

(9) 1 Mod., 24; W. Jones, 444; Arch. Cr. Pl. & Ev., 21st Ed., 758.

(10) R. v. Buchanan, 12 Man. L. R., 190; 1 Can. Cr. Cas., 442.

(11) R. v. Coney, 8 Q. B. D., 534; 15 Cox C. C., 46.

(12) Gibbons v. Pepper, 2 Salk, 637; *See, also*, comments on excusable homicide, *ante*, pp. 228 and 229.

(13) Fost., 260; Com. Dig. Pleader, 3 M., 18.

It is likewise a good defence to prove that the alleged assault was merely the lawful and moderate correction of a child by its parent, or of a servant by his master, or of a scholar by his teacher. (14)

See *ante*, p. 229 et seq., as to self-defence, etc.

The defendant may justify an assault by proving that he committed it in defence of his possession, as, for instance, to restrain the prosecutor from taking his goods, or to remove the prosecutor out of the defendant's house, or to prevent him from entering it, provided the force used in any of these cases be no more than is necessary. (15)

In the case of a trespass, without actual force, the owner of the close, etc., or the occupier or possessor of a house, etc., must first request the trespasser to depart before he can justify laying his hand on him for the purpose of removing him; and even, after refusal, he can only justify such force as is necessary to effect his removal; but, if the trespasser use force, then the owner or possessor may oppose force to force. (16)

As to justification of peace officers using force in making arrests, serving process, etc., see section 31 et seq., *ante*.

**259. Indecent assaults on females.** — Every one is guilty of an indictable offence and liable to two years' imprisonment, and to be whipped, who —

(*a*) indecently assaults any female ; or

(*b*) does anything to any female by her consent which but for such consent would be an indecent assault, such consent being obtained by false and fraudulent representations as to the nature and quality of the act. 53 V., c. 37, s. 12.

If, on an indictment for an indecent assault, it appears that the woman consented to the assault, under circumstances shewing that the consent was obtained by fraud, such consent will constitute no defence; such a case being expressly provided for by sub-section (*b*) of the above section. (17)

In the case of R. v. Case, the facts were these. Case, a medical man had connection with a girl fourteen years of age under the pretence that he was thereby treating her medically for the complaint for which he was attending her, she making no resistance solely from the *bonâ fide* belief that such was the case.

It was held that this was certainly an indecent assault, and probably a rape.

It is well settled that in a criminal charge arising out of a rape, or an attempt at rape, or an indecent assault, evidence of the prosecutrix's general reputation for chastity is admissible as bearing upon the question of consent, but that evidence of specific acts of lewdness and unchastity with other men than the accused is not admissible. If she be asked as to them she cannot be compelled to answer, and, if she does answer and denies

(14) 1 Hawk., c. 60, s. 23; c. 62, s. 2; 2 Bos. & P., 224.

(15) See sections 48, 49 and 50, *ante*, and sections 53 and 54, *ante*. And see 2 Rol. Abr., 548, 549.

(16) Weaver v. Bush, 8 T. R., 78; 2 Salk., 641. See comments at pp. 52 and 53.

(17) For decisions to the same effect, see R. v. Case, 1 Den., 580; 19 L. J., M. C., 174; R. v. Bennett, 4 F. & F., 1105.

them, her answer will be conclusive. She cannot be contradicted. So that where on the trial of an indictment for an indecent assault, the prosecutrix denied, on cross examination, having had intercourse with a third person named to her, it was held that such third person could not be called to contradict her upon the answer. (18) If, however, on cross-examination, the prosecutrix denies having had previous intercourse *with the accused*, evidence may, in that case, be given to contradict her. (19)

See section 685, *post*, as to receiving the evidence of a child of tender years, without oath, in cases of indecent assaults under section 259, and in the case of any charge under sections 269 or 270 of carnally knowing or attempting to carnally know a girl under fourteen; and see section 25 of the *Canada Evidence Act, 1893*, *post*, which extends the power of receiving the evidence of a child of tender years, without oath, to all other legal proceedings.

Although section 259 prescribes, as the punishment for indecent assault, both imprisonment and whipping, the Court has the right, under section 932, *post*, to impose only the imprisonment without the whipping. (20)

**260. Indecent assaults on males.** — Every one is guilty of an indictable offence and liable to ten years' imprisonment and to be whipped who assaults any person with intent to commit sodomy, or who, being a male, indecently assaults any other male person. R. S. C., c. 157, s. 2. (As amended by 56 Vict., c. 32).

**261. Consent of child under fourteen no defence.** — It is no defence to a charge or indictment for any indecent assault on a young person under the age of fourteen years to prove that he or she consented to the act of indecency. 53 V., c. 37, s. 7.

This section applies to all offences, which include an indecent assault, committed either upon male or female children.

**262. Assaults occasioning bodily harm.** — Every who commits any assault which *occasions* actual bodily harm is guilty of an indictable offence and liable to three years' imprisonment. R. S. C., c. 162, s. 35.

A defendant was convicted under sections 20 and 47, respectively, of the English Statute, 24-25 Vic., c. 100, upon an indictment charging him, in one count, with "unlawfully and maliciously inflicting grievous bodily harm" upon his wife, and, in the other count, with "an assault" upon her "occasioning actual bodily harm." It appeared that, at a time when the defendant knew, but his wife did not know, that he was suffering from venereal disease, he had connection with her, that, as a result, the disease was communicated to her, and that, had she been aware of his condition, she would not have submitted to the intercourse. The case was tried in the Central Criminal Court; the trial Judge being the Recorder of London, who directed the Jury that, if the facts were proved to their satisfaction,

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(18) R. v. Holmes, L. R., 1 C. C. R., 334; Laliberté v. R., 1 S. C. R., 117. And see Scott v. Simpson, 8 Q. B. D., 491, and Gross v. Brodrecht, 24 Ont. A. R., 687.

(19) R. v. Riley, 18 Q. B. D., 481; 56 L. J., M. C., 52.

(20) R. v. Robidoux, 2 Can. Cr. Cas., 19.

they might find the defendant guilty on either count, notwithstanding that the prosecutrix was his wife. After the conviction, a case was stated and reserved for the consideration of all the Judges, before thirteen of whom it was fully argued on the question of whether the prisoner could be legally found guilty on either or both of the counts, — the result being that the conviction was quashed, nine of the Judges, — namely, Lord Coleridge, C. J., Pollock and Huddleston, B. B., Stephen, Manisty, Mathew, A. L. Smith, Wills and Grantham, J. J., — holding, (on the ground, apparently, of the prosecutrix being the defendant's wife), that the conduct of the defendant did not constitute an offence under either of the above sections of the English Statute, (Field, Hawkins, Day, and Charles, J.J., dissenting. (20*a*)

It is not clear whether the decision in this Clarence case overruled the cases of R. v. Bennett and R. v. Sinclair, — in the former of which an uncle was indicted for an indecent assault upon his niece, he being diseased and she being ignorant thereof, and in which it was held, by Willes, J., that an assault is within the rule that fraud vitiates consent, and that, therefore, the prisoner, knowing that he had a foul disease, having induced his niece, (who was ignorant of his condition), to sleep with him, and having infected her, any consent given by her was vitiated by his concealment of his condition, and that he was guilty of an indecent assault, — (20*b*) and, in the latter of which cases, the prisoner, being diseased, had connection with a girl who was ignorant of his being diseased, and, having communicated the disease to her, he also was convicted of an indecent assault. (20*c*) But the remarks of some of the Judges in the Clarence case seem to shew that they doubted the soundness of the principle upon which these two cases of R. v. Bennett and R. v. Sinclair, were decided.

**263. Aggravated assaults.** — Every one is guilty of an indictable offence and liable to two years' imprisonment who —

(*a*) assaults any person with intent to commit any indictable offence ; or

(*b*) assaults any public or peace officer engaged in the execution of his duty, or any person acting in aid of such officer ; or

(*c*) assaults any person with intent to resist or prevent the lawful apprehension or detainer of himself, or of any other person, for any offence ; or

(*d*) assaults any person in the lawful execution of any process against any lands or goods, or in making any lawful distress or seizure, or with intent to rescue any goods taken under such process, distress or seizure. R. S. C., c. 162, s. 34 ; or

(*e*) on any day whereon any poll for any election, parliamentary or municipal, is being proceeded with, within the distance of two miles from the place where such poll is taken or held, assaults or beats any person. (As amended by 57-58 V., c. 57).

In the case of an assault upon a public or peace officer, the fact that the accused did not know that the person assaulted was a peace officer, or that such officer was acting in the execution of his duty will be no defence. (21)

(20*a*) R. v. Clarence, 22 Q. B. D., 23; 16 Cox C. C., 511.
(20*b*) R. v. Bennett, 4 F. & F., 1105.
(20*c*) R. v. Sinclair, 13 Cox C. C., 28.
(21) R. v .Forbes, 10 Cox C. C., 362; Arch. Cr. Pl. & Ev., 21st Ed., 781.

As to *resisting* or *wilfully obstructing* a public officer, see section 144, *ante*.

**264. Kidnapping.**— Every one is guilty of an indictable offence and liable to seven years' imprisonment who, *without lawful authority* —

(*a*) kidnaps any other person with intent —

(i) to cause such other person to be *secretly* confined or imprisoned in Canada against his will ; or

(ii) to cause such other person to be unlawfully sent or transported out of Canada against his will ; or

(iii) to cause such other person to be sold or captured as a slave, or in any way held to service against his will ; or

(*b*) forcibly seizes and confines or imprisons any other person within Canada.

2. Upon the trial of any offence under this section the non-resistance of a person so unlawfully kidnapped or confined shall not be a defence unless it appears that it was not caused by threats, duress or force, or exhibition of force. (As amended by the *Criminal Code Amendment Act 1900*, 63-64 V., c. 46, which came into force on the 1st January 1901).

Under this section as amended there are two separate and distinct offences, namely, (*a*), the offence of kidnapping and the offence of unlawful and forcible seizure and imprisonment. Under the section as it stood before it was amended, the unlawful and forcible seizure and imprisonment of a person was punishable only where made with the like intent as in the case of kidnapping provided for in paragraph (*a*).

The terms *kidnapping*, and criminal *false imprisonment* do not differ greatly in signification; yet they are not so far identical as to justify the treating of the two offences as one. (22)

FALSE IMPRISONMENT is any unlawful restraint of one's liberty effected either by physical force actually applied or so threatened or exhibited as to overpower the will. There need be no manual touch; but force of some sort must be used, and there must be a detention against the will; and it is indispensable that these two circumstances should unite. (23) The offence was a misdemeanor at common law. (24)

KIDNAPPING is a false imprisonment aggravated by either secretly confining or intending to secretly confine the victim, or conveying or intending to convey the victim to some other place.

Blackstone defines kidnapping to be "the forcible abduction or stealing away of a man, woman or child from their own country and sending them into another. (25) But it has been held that transportation to a foreign country is not a necessary part of the offence. (26)

(22) 2 Bish. New Cr. L. Com., section 746.
(23) Ib.
(24) 4 Bl. Com., 218.
(25) 4 Bl. Com., 219.
(26) 1 East P. C., 429.

The difference between a criminal false imprisonment and kidnapping appears to be this that the latter is not only an unlawful and forcible detention of a person against his will, but a removal of him or an intention to remove him beyond the reach of his country's laws, by *secretly* confining him within his own country or by sending him away into foreign parts.

The expression "kidnapper" seems to have been derived from "*kid*,"—the slang name for a child,—and "*napper*," (Danish), signifying to snatch at; and originally meant, one who snatches at children, or "*kids*." (27)

At common law, kidnapping, or the stealing and carrying away or secreting of any person was an offence formerly punishable by fine, imprisonment, and the pillory. (28)

By the Roman law *plagium*, (manstealing, or kidnapping), was the abduction or stealing of a free person, or of the slave of another. By the *Lex Fabia* the penalty was a pecuniary one; but, after the crime of kidnapping became common, the punishment was increased to banishment, and, in some cases, was capital. (29)

Under the old Jewish law, manstealing was punishable with death. (30)

The question sometimes arises, in connection with the law of extradition, as to the right to kidnap, and the effect of kidnapping, in a foreign state, a person who has taken flight after committing a crime in his own country, and of forcibly bringing him back to the country from whose justice he has escaped.

A case of this kind came up in the Supreme Court of the United States upon an appeal from a judgment of the Supreme Court of Illinois confirming a conviction upon an indictment for larceny.

After the commission of the offence in Illinois the prisoner, Frederick M. Ker, fled to and was subsequently kidnapped in Peru and forcibly brought back against his will into Illinois and there tried and convicted of the offence with which he was charged, the Supreme Court of Illinois holding that it could give him no relief in respect of the kidnapping, that the treaties of extradition made by the United States do not guarantee a fugitive from one country an asylum in another but merely make provision that for certain crimes he shall be surrendered to justice in the modes prescribed by the treaties, and that the remedy for a trespass committed by a kidnapper unauthorized by and not professing to act under any authority from either government would be either by an action of damages at the instance of the injured party or by a proceeding against such kidnapper by the government whose law he had violated, which, in this case, would be the government of Peru, who could have the kidnapper extradited to Peru and tried there for a violation of its laws; and the decision of the Illinois Supreme Court was confirmed by the United States Supreme Court. (31)

**265. Common Assaults.** — Every one who commits a common assault is guilty of an indictable offence and liable, if convicted upon an indictment, to one year's imprisonment, or to a fine not

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(27) Brewer's Dict., 475.
(28) 1 East P. C., c. 9, s. 3, p. 429; R. v. Baily, Comb., 10; 4 Bl. Com., 419.
(29) Lord MacKenzie's Rom. L., 361, 362.
(30) Deut., chap. 24, v. 7.
(31) Ker. v. S. (Ill.), 9 Cr. L. Mag., 201.

exceeding one hundred dollars, and on summary conviction to a fine not exceeding twenty dollars and costs, or to two months' imprisonment with or without hard labour. R. S. C., c. 162, s. 36.

See comments under section 258, *ante*.

Under the provisions of Part LV, *post*, (sections 782-802), magistrates are empowered, under certain circumstances, and under certain conditions, to try, summarily, persons charged with certain indictable offences,—the consent of the accused being required in some cases, and, in some cases, not. Amongst the indictable offences thus subject, under Part LV, to summary trial, are included cases of aggravated assault, indecent assault, etc., as will be seen by section 783, *post*.

By sections 797, 798 and 799, *post*, it is provided, in reference to these summary trials of indictable offences, that, "whenever the magistrate finds the offence not proved, he shall dismiss the charge, and make out and deliver to the person charged a certificate under his hand stating the fact of such dismissal;" that "every conviction under this part shall have the same effect as a conviction upon indictment for the same offence;" and that "every person who obtains a certificate of dismissal or is convicted under the provisions of this part, shall be released from all further or other criminal proceedings *for the same cause*."

Provisions similar to these are contained in the Imperial Statute, 42-43 Vic., c. 49. *(The summary jurisdiction Act, 1879.)*

Sub-section 8 of section 842, *post*, enacts that no justice shall hear and determine any case of assault and battery in which any title to or interest in lands or real property arises.

Provision is now made by section 864, *post*, (as amended by *Criminal Code Amendment Act, 1900*), that, whenever any person is charged with common assault, the justice may summarily hear and determine the charge, or may, if he thinks fit, deal with it as an indictable offence.

By sections 865 and 866, *post*, (which are similar, in effect, to sections 44 and 45 of the English Statute, 24-25 Vic., c. 100), it is enacted that: "If the justice, upon the hearing of any case of assault or battery *upon the merits* where the complaint is preferred by or on behalf of the person aggrieved, under the next preceding section, deems the offence not to be proved, or finds the assault or battery to have been justified, or so trifling as not to merit any punishment, and accordingly dismisses the complaint, he shall *forthwith* make out a certificate under his hand stating the fact of such dismissal, and shall deliver such certificate to the person against whom the complaint was preferred;" and that "If the person against whom any such complaint has been preferred, by or on behalf of the person aggrieved, obtains such certificate, or, having been convicted, pays the whole amount adjudged to be paid, or suffers the imprisonment, or imprisonment with hard labour, awarded, he shall be released from all further or other proceedings, civil or criminal, *for the same cause*."

The certificate of dismissal can only be granted when there has been a full hearing *upon the merits*. If the certificate is granted on a withdrawal of the charge, before hearing, it will be no bar to subsequent proceedings for the same assault. (32)

The effect of the certificate of dismissal, when granted, on an acquittal, or, of payment of the penalty or suffering the punishment imposed, on a

(32) Reed v. Nutt, 24 Q. B. D., 669; 17 Cox C. C., 86.

conviction, as the case may be, is to release the defendant from all other proceedings *for the same cause*.

It has been held, in England, that the meaning and intent of the enactments above mentioned, in connection with summary trials, is that when a case so summarily dealt with has been dismissed by the magistrate or justice, *on its merits*, the defendant has the right, *ex debito justitiæ*, to receive from the magistrate or justice, the certificate of dismissal, and that the clause which refers to the making out of the certificate, and which contains the word *forthwith*, means that such certificate is to be made out *forthwith* on the defendant making application for it. (33)

A summary conviction for assault has, accordingly, been held to be a bar to a subsequent indictment for a felonious stabbing based on the same transaction; (34) and it has been held a bar to an indictment for unlawful wounding and an assault occasioning actual bodily harm, arising out of the same circumstances. (35)

A summary conviction for assault has, however, been held not to be a bar to a subsequent indictment for manslaughter, in a case where the man, who was assaulted, afterwards died in consequence of the assault. (36)

It appears that the production of the certificate of dismisal is of itself sufficient evidence of such dismissal, without proof of the signature of the magistrate or justice; (37) and if the defendant appeared before the magistrate or justice, the recital, in the certificate, of the fact of a complaint having been made and of a summons having been issued, is sufficient evidence of these facts without producing the complaint or summons. (38)

As already seen, the consent of the accused is required in order to give a magistrate jurisdiction to summarily dispose of some of the indictable offences mentioned in section 783. But with regard to some others of such offences, — e. g. charges against persons for being keepers or inmates or habitual frequenters of disorderly houses, — the magistrate's summary jurisdiction is, by section 784, *post*, made absolute and independent of the consent of the accused.

Section 784, sub-section 2, also makes the magistrate's summary jurisdiction absolute and independent of any consent, in regard to all the offences mentioned in section 783, in cases in which "any person who being a seafaring person and only transiently in Canada, and having no permanent domicile therein, is charged, either within the city of Quebec as limited for the purpose of police ordinance, or within the City of Montreal as so limited, or in any other seaport city or town in Canada where there is such magistrate, with the commission therein of *any of the offences hereinbefore mentioned*, (39) and also in the case of any other person charged with any such offence on the complaint of any such seafaring person whose testimony is essential to the proof of the offence."

Sub-section 3 of section 784, (as amended by the *Criminal Code Amend-*

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(33) Hancock v. Somes, 1 E. & E., 795; 28 L. J. (M. C.), 196; Costar v. Hetherington, 1 E. & E., 802; 28 L. J. (M. C.), 198.

(34) R. v. Stanton, 5 Cox C. C., 324; R. v. Walker, 2 M. & Rob., 446.

(35) R. v. Elrington, 1 B. & S., 688; 31 L. J. (M. C.), 14; R. v. Miles, 24 Q. B. D., 423; 59 L. J. (M. C.), 56.

(36) R. v. Morris, L. R., 1 C. C. R., 90; 36 L. J. (M. C.), 84.

(37) *See* The Canada Evidence Act, 1893, section 10, *post*.

(38) R. v. Westley, 11 Cox C. C., 139; Arch. Cr. Pl. & Ev., 21st Ed., 155.

(39) The offences, here referred to, include, — as already shown, *ante*, p. 271, — aggravated assaults, indecent assaults, etc. But *see* full list of these offences in section 783, itself, *post*.

*ment Act, 1900*), moreover, provides that, "the jurisdiction of the magistrate in the provinces of Prince Edward Island and British Columbia, and in the North West Territories, and the district of Keewatin, under this part, is absolute without the consent of the person charged, except in cases coming within the provisions of section 785, and except in cases under sections 789 and 790, where the person charged is not a person who, under section 784, sub-section 2, can be tried summarily without his consent."

## PART XXI.

## RAPE AND PROCURING ABORTION.

### RAPE.

**266. Definition.** — Rape is the act of a man having carnal knowledge of a woman, who is not his wife, without her consent, or with consent which has been extorted by threats or fear of bodily harm, or obtained by personating the woman's husband, or by false and fraudulent representations as to the nature and quality of the act.

2. No one under the age of fourteen years can commit this offence.

"Carnal knowledge is complete upon penetration to any, even the slightest degree, and even without the emission of seed."

This paragraph 3 was transferred by the *Amending Act* of 1893, (56 Vic., c. 32), to Part I, and made into section 4A. (See page 8, *ante*.)

**267. Punishment.** — Every one who commits rape is guilty of an indictable offence and liable to suffer death, or to imprisonment for life. R. S. C., c. 162, s. 37.

With reference to rape committed by personating a woman's husband, section 4 of the English *Criminal Law Amendment Act*, 1885, (48-49 Vic., c. 69), is as follows: —

"Whereas doubts have been entertained whether a man who induces a married woman to permit him to have connexion with her by personating her husband is or is not guilty of rape, it is hereby enacted and declared that every such offender shall be deemed to be guilty of rape."

It seems to have always been the law, as stated now in sub-section 2 of the above section 266, that no one under the age of fourteen years can commit a rape. The law presumes a boy under the age of fourteen years of age to be incapable of committing a rape; (1) and no evidence can be admitted against him to shew that he has, in fact, attained the full state of puberty and was capable of committing the crime. (2)

(1) 1 Hale, 630; R. v. Groombridge, 7 C. & P., 582; R. v. Brimilow, 9 C. & P., 366; 2 Moo. C. C., 122.
(2) R. v. Philips, 8 C. & P., 736; R. v. Jordan, 9 C. & P., 118.

A husband, too, is legally incapable of committing a rape upon his wife; (3) but a husband may be punished for aiding in the commission of a rape by another upon his wife; (4) and so may a boy under fourteen be punished, as a principal, for aiding another in the commission of the offence, (5), or for having aided and assisted another to commit the offence of carnally knowing a girl under fourteen, or to commit an assault with intent to commit a rape, or he may be convicted of having committed a common assault, (6), or an indecent assault. (7)

The act of carnal connection must, in order to be rape, have been done without the woman's consent, unless her consent thereto was obtained by threats or fear of bodily harm or by the false personation or fraud mentioned in the above section, 266.

It has been held, therefore, that if the connection took place when the woman was in a state of insensibility from liquor with which she was made drunk by the accused, (though the liquor was given only to excite her), it was rape. (8)

Ether or chloroform administered to a woman and overcoming her mental and physical nature, will have the same effect in law as administering intoxicating liquor. In an Ohio case, *Lawrence*, J., laid it down that where a woman has chloroform given her by a man, for the purpose of obtaining with her carnal intercourse to which she would not otherwise consent, then if she "had the capacity to hear, feel, and remember, and a capacity to speak and, forcibly resist, but the inclination to do so was lost, the will overcome by the action of chloroform, either operating upon the *will* faculty, or the *judgment* and *reflective* faculties (or sexual emotions), so that the mind was thereby incapable of fairly comprehending the nature and consequences of sexual intercourse, and the defendant, knowing these facts, had unlawful carnal knowledge of her, forcibly, that would be rape. And it would, in such a case, be wholly immaterial whether the entire mind was disordered and overthrown, or only such faculties thereof as are rendered incapable of having just conceptions, and drawing therefrom correct conclusions in relation to the alleged rape." (9)

It has also been held that, where a man got into bed to a woman while she was asleep, and, he knowing she was asleep, had connection with her while in that state, he was guilty of rape. (10)

Where a medical man, by pretending to be treating, medically, a young girl under fourteen, had connection with her, she being led to believe that it was part of the treatment, the prisoner was held to be guilty of an indecent assault. (11) It would now be a rape under section 266 of our Code, and it was so held to be, in a case, (decided in England after the case of R. v. Case), in which the prosecutrix, a girl of nineteen, had consulted the prisoner a quack doctor, as to her illness, and he, under pretence of performing a surgical operation, had connection with her, she submitting un-

(3) 1 Hale, 629.
(4) R. v. Audley, (Lord), 3 St. Tr., 393.
(5) 1 Hale, 620, 639; R. v. Eldershaw, 3 C. & P., 396; R. v. Allen, 1 Den., 364.
(6) R. v. Waite, 17 Cox C. C., 554; [1892] 2 Q. B., 600. See, also, R. v. Hartlen, 30 N. S. R., 317.
(7) R. v. Williams, 62 L. J. M. C., 69.
(8) R. v. Camplin, 1 Den., 89; 1 C. & K., 746.
(9) S. v. Green, Whart. & St. Med. Jur., 2nd Ed., s. 459; 2 Bish. New Cr. L. Com., s. 1126.
(10) R. v. Mayers, 12 Cox C. C., 311.
(11) R. v. Case, 1 Den., 580; 19 L. J. M. C., 40.

der the belief that he was merely performing the surgical operation, and that belief being wilfully and fraudulently induced by the prisoner. (12) But later on, it has been held, in England, that the effect of the *Criminal Law Amendment Act, 1885*, is to set aside the decision in R. v. Flattery, and that it is a good defence, there, to an indictment for rape that the carnal knowledge alleged was had with the woman's consent, even though such consent was obtained by fraud; but that under such circumstances the prisoner may be convicted of indecent assault. (13)

The following are some of the older definitions of rape:

EAST. — "Rape is the unlawful carnal knowledge of a woman *by force* and against her will." (14)

COKE, — In the second Institute, gives the following, from the Mirror: "Rape is when a man hath carnal knowledge of a woman *by force* and against her will." (15)

HALE. — "Rape is the carnal knowledge of any woman above the age of ten years *against her will*, and of a woman-child under the age of ten years with or against her will." (16)

HAWKINS. — "It seems that rape is an offence in having unlawful and carnal knowledge of a woman *by force* and against her will. (17)

BLACKSTONE. — Rape is "the carnal knowledge of a woman *forcibly* and against her will." (18)

RUSSELL. — "Rape has been defined to be the having unlawful and carnal knowledge of a woman *by force* and against her will." (19)

These definitions and some of the judicial constructions placed upon the words, "*forcibly*" and "*against her will*," have helped to produce the common notion that, to constitute a rape, there must have been desperate resistance on the part of the woman and the employment of overpowering force on the part of the man.

The present definition as contained in the above section, 266, namely "the act of carnally knowing a woman, *without her consent*," is much better calculated to meet the ends of justice than the old definitions. Bishop argues the matter out, as follows:—

"While, thus, [*during sleep*], there may be rape of a woman who does not resist, one in the normal condition, awake, mentally competent, and not in fear, will oppose with a vehemence and by measures varying with her special nature and the particular circumstances, this greatest of all outrages, *unless she mentally consent*. So that, though in words she objects, if she makes no outcry and no resistance, she, by her conduct, consents, and there is no rape. (20) In just principle, it is believed that the extent and form of the resistance should in each case be shown to the jury, who, weighing this evidence with the rest, will find as of fact whether or not the woman consented. But the question seems commonly to be treated by the courts as a question of law, and they often lay it down that the resistance must be to the extent of the woman's ability. (21) Some of the

(12) R. v. Flattery, 2 Q. B. D., 410; 46 L. J. M. C., 130.
(13) R. v. O'Shay, 19 Cox C. C., 76.
(14) 1 East, P. C., 434.
(15) 2 Inst., 180.
(16) 1 Hale, P. C., 628.
(17) 1 Hawk. P. C. Curw. ed., p. 122, s. 2.
(18) 4 Bl. Com., 210.
(19) 1 Russ. Cr., 3rd Ed., 675.
(20) Reynolds v. P., 41 How. Pr., 179; Brown v. C., 82 Va., 653.
(21) Anderson v. S., 104 Ind., 467; Oleson v. S., 11 Neb., 276; 38 Am. R., 366.

cases, both old and modern, are quite too favorable to the ravishers of female virtue. Thus, where a man locked his servant girl of fourteen in a barn and had connection with her, a verdict for rape was set aside because the judge at the trial refused to direct the jury that to convict they must be satisfied she 'resisted the defendant to the extent of her ability,' though he did tell them that 'the act must have been done by force and against her will and resistance.' Said the learned judge in the Court of Appeals: '*The resistance must be up to the point of being overpowered by actual force*, or of inability, from loss of strength, longer to resist, or, from the number of persons attacking, resistance must be dangerous or absolutely useless, *or* there must be *dread or fear of death*.' (22) Various other cases state that the woman's will must oppose the act, and that any inclination favoring it is fatal to the prosecution. The latter terms are not under the ordinary facts repugnant to good doctrine. And the stronger ones just quoted might not be very objectionable in a barbarous age; but, in our age, to compel a frail woman, or girl of fourteen, to abandon her reason, and measure all her strength with a robust man, knowing the effect will be to make her present deplorable condition the more wretched, yet not to preserve her virtue, — on pain of being otherwise deemed a prostitute instead of the victim of an outrage, — is asking too much of virtue and giving too much to vice. The *text of the law*, we have seen, and, it is believed, the better judicial doctrine, requires only that the case shall be one in which the woman did not consent. Her resistance must not be a mere pretence, but in good faith." (23)

As penetration to the slightest degree is sufficient to constitute carnal knowledge, a penetration of such depth as not to injure the hymen was held sufficient to constitute a rape. (24)

When actual penetration is not proved the defendant may, nevertheless, on an indictment for rape be found guilty, — by virtue of section 711, *post*, — of an attempt to commit a rape, or he may be convicted of an indecent assault, or of a common assault. (See section 713, *post*).

An indictment charged A with rape, and B as an abettor. The jury found A guilty of an attempt at rape and B of aiding A in the attempt; and the conviction was affirmed. (25)

It is no excuse that the woman consented at first, if the offence was afterwards actually committed by force or against her will. (26) Even that the woman was a common strumpet, or the mistress of the ravisher is no excuse. (27) although such circumstances as these should, certainly, operate strongly with the jury as to the probability or improbability of the fact that connection was had against the woman's consent.

Although the party who complains of being ravished is a competent witness upon every part of the case, the credibility of her evidence is a matter for the jury to appreciate according to the circumstances. If she be of good reputation and if she make known the offence and seek out the offender without delay, or if the accused take flight, all such circumstances as these will help the probability of her evidence. If on the other hand her reputation is bad, and her evidence be uncorroborated by the testimony of other witnesses; if the place where the alleged outrage took place was one where she might have made herself heard, and she made no outcry; these

(22) P. v. Dohring, 59 N. Y., 374, 382; 17 Am. R., 349.
(23) R. v. Rudland, 4 F. & F., 495. See 2 Bish. New Cr. L. Com., s. 1123.
(24) R. v. Russen, 1 East P. C., 438, 439; R. v. McRae, 8 C. & P., 641.
(25) R. v. Hapgood, L. R., 1 C. C. R., 221; R. v. Wyatt, 39 L. J. M. C., 83.
(26) 1 Hawk., c. 41, s. 7.
(27) 1 Hale, 729.

will have a tendency to throw doubt on her evidence; especially if she be flatly contradicted by the accused, who is now, under the *Canada Evidence Act, 1893*, section 4, a competent witness.

The defendant may adduce evidence to shew that the woman is of notoriously bad character, unchaste, and of indecent habits, or that she is a common prostitute; or to shew that she has previously had carnal connection with the defendant of her own free will; (28) but he cannot adduce evidence, of other particular acts with other persons, so as to impeach her chastity. (29)

If asked on cross-examination whether, outside of the prisoner, she has had carnal connection with other men, named to her in the questions, and if she deny having had any such intercourse with them, her answer will be conclusive and those men cannot be called to contradict her. (30)

Although section 181, *ante*, makes it an indictable offence merely to have carnal connexion with a girl between the ages of fourteen and sixteen years, even with her consent, an indictment for the graver offence of rape will lie against one who *ravishes* such a girl, or has carnal connection with her, without her consent. (31)

The words "man" and "woman" used in section 266 are to be taken in a general or generic sense, as indicating all males and all females of the human race, and not in a limited sense as opposed to *boys* and *girls;* and it has been held that an indictment for rape lies against one who has ravished a female under fourteen against her will, notwithstanding the provisions of section 269, *post*, which enacts that every man is guilty of an indictable offence and liable to imprisonment for life and to be whipped who carnally knows any girl under the age of fourteen years not being his wife. (32)

A woman may be indicted for rape, as a principal, when she has aided and abetted a man in the commission of the offence. A man and his wife were indicted jointly for a rape committed upon a girl under the age of thirteen. The girl, who was the domestic servant of the two prisoners, was sent out by them for a quantity of whiskey. All three partook of the whisky, the girl being forced by the female prisoner to drink. The male prisoner then went upstairs to bed. Shortly afterwards the female prisoner forcibly took the girl up to the man's bedroom and the man had forcible connection with the girl. Held that both prisoners were guilty of rape. (33)

A prosecution for rape is a prosecution in fact for any of the offences of which the accused on an indictment for rape may be found guilty. So that, although it is, by section 5 of the *English Criminal Law Amendment Act, 1885*, provided that a prosecution for the offence of having or attempting to have carnal knowledge of a girl above thirteen and under sixteen shall not be commenced more than three months after the commission of the offence, it has been held that a prisoner, who was, within three months, accused of rape and committed for trial on that charge, may be indicted for and tried and convicted of carnally knowing the pros-

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(28) R. v. Riley, 18 Q. B. D., 481; 16 Cox C. C., 191.

(29) R. v. Hodgson, R. & R., 211; R. v. Clark, 2 Stark, 243; R. v. Barker, 3 C. & P., 589; R. v. Martin, 6 C. & P., 562.

(30) R. v. Holmes, L. R., 1 C. C. R., 334; 41 L. J. M. C., 12; R. v. Cockcroft, 11 Cox C. C., 410; R. v. Hodgson, R. & R., 211. See other authorities on this subject cited at p. 267, *ante*.

(31) R. v. Ratcliffe, 10 Q. B. D., 74; 52 L. J. M. C., 40.

(32) R. v. Riopel, 2 Can. Cr. Cas., 225; Que. Jud. Rep., 8 Q. B., 181.

(33) R. v. Ram & Ram, 17 Cox C. C., 609.

ecutrix a girl above thirteen and under sixteen, although when the indictment went before the Grand Jury more than three months had elapsed since the commission of the offence. (34)

Where a defendant was charged in the first count of an indictment with carnally knowing a girl between thirteen and sixteen, and, in the second count, with an indecent assault upon the girl, it was held that the defendant could be convicted of a common assault. (35)

In ordinary cases of rape, when a prosecutrix describes the outrage in her sworn testimony as a witness, evidence of her complaints made soon after the occurrence of the outrage is properly admissible to shew her credit and the accuracy of her recollection. (36)

A prosecutrix gave evidence that the prisoner came to a room in an inn where she was barmaid, when she was alone, committed a rape upon her, and then left the house, and that, an hour and a half afterwards, a customer came in, and that to this customer she made a complaint mentioning the prisoner's name in connection with it; and Baron Bramwell allowed her to give evidence of the particulars of what she told the customer and also allowed the customer to give evidence in detail of the prosecutrix's complaint to such customer. (37)

Upon the trial of an indictment for rape or other kindred offences against women or girls, the fact that a complaint was made by the prosecutrix shortly after the alleged outrage and the particulars of such complaint may so far as they relate to the charge be given in evidence, on the part of the prosecution, not as being evidence of the truth of the charge against the defendant, but as being evidence of the consistency of the prosecutrix's conduct with the story told by her in the witness box and as negativing consent on her part; and therefore the whole of her complaint ought, in the interest of the defendant, to be given in evidence. (38)

The prosecutrix's complaint should, in order to be admissible in evidence, be a complaint made as soon as possible after the occurrence. The first person met by the prosecutrix after the occurrence would seem to be the proper person to whom such complaint should be made. (39)

Where, on a charge of rape, it was sought to give in evidence statements made by the prosecutrix to a police officer on the day following the alleged outrage, the police officer having called upon her with reference to the matter, it was held that the evidence was inadmissible, it being considered that the statements of the woman to the police officer were not made as the unstudied outcome of the woman's feelings nor as speedily after the occurrence as could be reasonably expected, it appearing that she had made no complaint of the actual rape, but merely of an assault, to two women who had happened to come to the scene of the occurrence just after it had happened, and she having moreover made no complaint to her own husband before the police officer called upon her. (40)

In an English case of recent date, a similar lapse of time, — namely, one

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(34) R. v. West, 18 Cox C. C., 675; 67 L. J. Q. B., 62.

(35) R. v. Bostock, 17 Cox C. C., 700.

(36) See Remarks of Rolfe, B., in R. v. Megson & others, 9 C. & P., 420. See, also, R. v. Guttridge, 9 C. & P., 471, and R. v. Eyre, 2 F. & F., 579, to the same effect.

(37) R. v. Wood, 14 Cox C. C., 46.

(38) R. v. Lillyman, 18 Cox C. C., 346; 65 L. J. M. C., 195; [1896] 2 Q. B., 167; [1897] 1 Q. B., 374. See R. v. Rowland, 62 J. P., 459.

(39) R. v. Eyre, 2 F. & F., 579; R. v. Little, 15 Cox C. C., 319; R. v. McMahon, 18 O. R., 502.

(40) R. v. Graham, 19 C. L. T., 275; 31 O. R., 77; 3 Can. Cr. Cas., 22.

day, — was held to be a sufficient reason for excluding the details of a complaint, the Court remarking that the lapse of time between the commission of the offence and the making of the complaint was very important in these cases. (41)

But it has since been held in a case of rape tried at Montreal that, while the injured person should make her complaint as soon as possible after the commission of the offence, yet no specified time is fixed therefor, by law, and that the fact that the prosecutrix made a complaint to her mother seven days after the alleged offence and the details of such complaint were admissible as evidence for the prosecution to confirm the prosecutrix's testimony and disprove consent on her part, and that, among the particulars of the complaint, the name of the person accused by her of the offence could be stated; the Court considering that there is no settled rule as to how recent the complaint must be made, and that in the present case it was sufficiently recent in view of the fact that the prosecutrix, a girl of eighteen, had given, — as a very natural reason, — her bashfulness, for not complaining sooner, and that under the circumstances it was for the jury to weigh the time which elapsed before the complaint was made, when considering the probability of its truth. (42)

In an English Case of still more recent date, it has been held that, where the girl upon whom the offence has been committed is of tender years, the complaint made by her may be admissible, although not made at the earliest opportunity. (43)

Hale tells us that, in his time, rape was a felony by statute and that it "was anciently punished by loss of life. In process of time, that punishment seemed too hard; but the truth is, a severe punishment succeeded in place thereof, namely, castration and the loss of the eyes, as appears by Bracton (who wrote in the time of Henry III), lib. 3, c. 28. But, then, though the offender was convict at the King's suit, the woman that was ravished, if single, might, if she pleased, redeem him from the execution, if she elected him for her husband, and the offender consented thereto." (44)

Under the Roman law rape, — *raptus mulierum*, — was punished with death and confiscation of goods. It is said to be the general opinion of civilians that under the Roman law the offence might be committed, not only by forcible connection with a woman against her will, but by carrying off her person from her friends with a view to debauch her. (45)

As Lord Hale has said, rape is a most detestable crime and should be severely punished; but it is a crime of such a nature that an accusation can be easily made and is hard to prove, but it is still harder to be defended by a person accused of it, though he be never so innocent. (46)

**268. Attempt to commit rape.** — Every one is guilty of an indictable offence and liable to seven years' imprisonment who attempts to commit rape.

**269. Defiling a girl under fourteen.** — Every one is guilty of an indictable offence and liable to imprisonment for life, and to be whipped, who carnally knows any girl under the age of four-

(41) R. v. Rush, 60 J. P., 777.
(42) R. v. Riendeau, Que. Jud. Rep., 9 Q. B., 147; 3 Can. Cr. Cas., 293.
(43) R. v. Kiddle, 19 Cox C. C., 77.
(44) 1 Hale P. C., 626, 627.
(45) MacKenzie Rom. L., 3rd Ed., 362
(46) 1 Hale, 634.

teen years, not being his wife, whether he believes her to be of or above that age or not. 53 V., c. 37, s. 12.

**270.** Every one who attempts to have unlawful carnal knowledge of any girl under the age of fourteen years is guilty of an indictable offence and liable to two years' imprisonment, and to be whipped. 53 V., c. 37, s. 12.

The evidence in a case under section 269 is the same as in a case of rape, except that the consent or non-consent of the girl is immaterial. (47)

These two sections, 269 and 270, protect, against defilement and attempted defilement, (with or without their consent), all girls under fourteen, whether of previously chaste character or not: while section 181, *ante*, protects against defilement (with or without their consent), all girls between the ages of fourteen and sixteen, where unchastity is not established by the accused as provided by section 183A, *ante*.

If the defendant be indicted under section 269, he may, under section 711, *post*, be convicted of an attempt to commit the offence, if the evidence warrants it.

Upon a trial for either of the offences mentioned in sections 269 and 270, the jury may, under section 713, *post*, if the evidence points to that conclusion, return a verdict of guilty of an indecent assault or common assault, (48) even if the girl assented. (See section 261, *ante*).

See section 685, *post*, and the *Canada Evidence Act, 1893*, section 25, *post*, as to the evidence, without oath, of children of tender years.

Section 4 of the *Imperial Criminal Law Amendment Act, 1885*, makes it a criminal offence to carnally know a girl under the age of thirteen years, and section 5 of the same Act relates to the punishment of any person who carnally knows or attempts to carnally know any girl between the ages of thirteen and sixteen. And where a girl between the ages of thirteen and sixteen was convicted upon an indictment charging her with having unlawfully aided and abetted the commission upon herself by a man of the latter offence and with having solicited and incited its commission, it was held that the conviction was bad, as the Act was passed for the purpose of protecting young girls against being defiled with or without their consent and contained no provisions as to aiding and abetting or soliciting and inciting by girls; and the conviction was set aside. (49)

Where a boy under fourteen was indicted, under section 4 of the *English Criminal Law Amendment Act*, for carnally knowing a girl under the age of thirteen, it was held that, although he could not, (being under the age of fourteen), be convicted of that offence, he might nevertheless be found guilty of an indecent assault punishable under section 9 of that Act. (50)

It has been held, in England, that a prisoner may be indicted for the misdemeanor of having carnal knowledge or attempting to have carnal knowledge of a girl between the ages of thirteen and sixteen, notwithstanding that his committal for trial was on a charge of rape and notwithstanding that the misdemeanor for which he was indicted, tried and convicted was

(47) R. v. Brice, 7 Man. L. R., 627. And see R. v. Chisholm, 7 Man. L. R., 613.

(48) See R. v. Connolly, 26 U. C. Q. B., 317, and R. v. Roadley, 14 Cox C. C., 468.

(49) R. v. Tyrrell, 17 Cox C. C., 716; [1894] 1 Q. B., 710; 63 L. J. M. C., 58.

(50) R. v. Williams, [1893] 1 Q. B., 320; 62 L. J. M. C., 69.

committed more than three months, (the time limited by the statute for the prosecution of the offence), before the bill of indictment was laid and found by the Grand Jury, it being further held that a prosecution for rape is a prosecution for any of the offences of which the accused on an indictment for rape may be found guilty. (51)

Notwithstanding the provisions of section 269, which protects a girl under fourteen against defilement even with her own consent, an indictment will still lie for the offence of rape upon a girl under fourteen. (52)

On the hearing of a charge under section 5 of the *English Criminal Law Amendment Act*, it came out in the course of the evidence that the girl (who was fifteen years of age), lived with her parents, and had informed her mother that she was *enceinte* by the prisoner; that thereupon the mother told her daughter to "bring him there," namely, to her parent's house, which she did, and the immoral intercourse was there repeated, the mother admitting that she had, by arrangement with her daughter, found the prisoner in the act, in order that she might obtain evidence on which to prosecute him. The Justices having adjudicated upon the case and committed the prisoner for trial, an application was then made to them for a summons against the mother, charging her, under section 6 of the Act, with being the occupier of premises and with having induced or suffered her daughter, a girl between thirteen and sixteen, to be in such premises for the purpose of being unlawfully and carnally known; and the Justices having refused the application, it was held, upon an application for a mandamus to compel the Justices to grant the summons, that the mother's conduct was not an offence under section 6 of the Act, and a mandamus was refused. (53)

**271. Killing unborn child.** — Every one is guilty of an indictable offence and liable to imprisonment for life who causes the death of any child which has not become a human being, in such a manner that he would have been guilty of murder if such child had been born.

2. No one is guilty of any offence who, by means which he, in good faith, considers necessary for the preservation of the life of the mother of the child, causes the death of any such child before or during its birth.

This section will meet the case of any wilful and unlawful killing of a child which, in consequence of the injuries inflicted upon it, becomes extinct either while it is still in the womb or while it is proceeding but has not yet completely proceeded from its mother's body.

By section 219, *ante*, a child only becomes a human being when it has completely proceeded in a living state from the body of its mother; and it is not homicide to kill a child which becomes extinct before it has so become a human being.

Sub-section 2 of the above section, 271, is meant for the protection of medical men who, acting in good faith, in the course of their professional practice, find it necessary either to induce premature labor so as to save both mother and child, or, in extreme cases, to kill, during or before labor, the unborn child, in order to save the life of the mother. For instance, there

(51) R. v. West, [1898] 1 Q. B., 174; 67 L. J., Q. B., 62.
(52) R. v. Dicken, 14 Cox C. C., 8; R. v. Rateliffe, 15 Cox C. C., 127.
(53) R. v. Merthyr Tydvill, (Justices), 38 Sol. J., 340; Stone's Jus. Man., 30th Ed., 968.

are cases, in which, on account of certain deformities, such as what is termed, in medical parlance, an extreme narrowing of the *pelvic brim*, it may be impossible or very dangerous, even with the aid of forceps, to effect delivery at the end of the full term of gestation, and in which a skilful and careful medical practitioner may, by inducing premature birth, at seven months, bring forth the child, sometimes alive, with perfect safety to the mother. Medical statistics appear to show that a very small proportion of women die under the operations necessary to induce these premature births, and that many of the children, thus prematurely born, live. One M. Figuera is mentioned as having collected 280 cases, in which only six proved fatal to the mothers; and Dr. Hoffman is said to have collected 524 cases, in thirty four of which the operations had been repeated three, four or more times; and in 373 of these cases, 250 children were born alive and 123 dead. (54)

## ABORTION.

**272. Using means to procure abortion.** — Every one is guilty of an indictable offence and liable to imprisonment for life who, with intent to procure the miscarriage of any woman, whether she is or is not with child, unlawfully *administers to* her or *causes to be taken by* her any drug or other noxious thing, or unlawfully uses any instrument or other means whatsoever with the like intent. R. S. C., c. 162, s. 47.

**273. Woman using means to procure her own abortion.** — Every woman is guilty of an indictable offence and liable to seven years' imprisonment who, whether with child or not, unlawfully administers to herself or permits to be administered to her any drug or other noxious thing, or unlawfully uses on herself or permits to be used on her any instrument or other means whatsoever with intent to procure miscarriage. R. S. C., c. 162, s. 47.

**274. Supplying means to procure abortion.**—Every one is guilty of an indictable offence and liable to two years' imprisonment who unlawfully supplies or procures any drug or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she is or is not with child. R. S. C., c. 162, s. 48.

Where the prisoner gave a woman a drug for the purpose of procuring an abortion, and she took it for that purpose, in the prisoner's absence, this was held to be a causing of it to be taken. (55)

The drug or other thing administered must be, either in its nature, or by reason of the quantity, noxious; and it would not be sufficient if, not being actually noxious, in itself, it was merely imagined by the defendant

(54) Woodm. & T., For. Med., 745.

(55) R. v. Wilson, Dears. & B., 127; 7 Cox C. C., 190; 26 L. J. (M. C.), 18; R. v. Farrow, Dears. & B., 164.

that it would have the effect intended. (56) But, if the drug administered actually produces mis-carriage, — and there be no other evidence of its nature, — this, in itself, is sufficient evidence of its being noxious. (57)

Where the drug is not noxious in itself and quite innoxious and even useful when administered in small quantities, yet if the quantity administered by the defendant is noxious, that makes the drug so administered a noxious thing. (58)

On the other hand, if the drug is such that when administered in large quantities it is noxious yet if in the quantity administered by the defendant, it is innoxious, he will not be guilty of administering a noxious thing. (59)

In a case where the instrument alleged to have been used to procure an abortion was a quill, which, by its nature, might have been used for an innocent purpose, evidence was allowed to be adduced, in order to prove the intent, showing that the prisoner had, at other times, caused miscarriages by similar means. (60)

To constitute the offence of supplying a noxious thing, knowing that it was intended to be used to procure abortion, the thing supplied must be of a noxious character, in itself, or be noxious by virtue of the quantity in which it was supplied. (61)

It has been held that, if the drug supplied by the defendant be noxious, and be supplied with the intention of its being used to procure abortion, the offence is complete, although the woman may not have intended to use the drug, and although no one but the defendant may have intended that it should be used to procure a miscarriage; (62) and even although the woman was not, and never had been pregnant. (63)

The terms *miscarriage* and *abortion* are used, by medical men, to signify the expulsion of the ovum or child *before* it is *viable;* and the term *premature labor* is used by them to signify the expulsion of the child *after* it is *viable.*

*Ovum* is generally used to signify an early stage of infant life, before what is popularly called quickening. It is also called, *embryo. Fœtus* is a word used to signify the fruit of the womb from the period of quickening until his birth; but, in the later stages, during the seventh, eighth, and ninth months, it is more usual to speak of it as the *child.*

An *embryo* of three months is usually from two to two and a half inches in length, and about an ounce and a half in weight.

A *fœtus* of four months is from five to six inches, in length, and about three ounces in weight.

A *fœtus* of five months is from six to seven inches in length, and from five to seven ounces in weight.

At six months a *fœtus* is from nine to ten inches in length, and about a pound in weight; at seven months it is from thirteen to fifteen inches long, and weighs from three to four pounds; at eight months it reaches from fourteen to sixteen inches in length, and weighs from two to five

(56) R. v. Isaacs, L. & C., 220; 9 Cox C. C., 228.
(57) R. v. Hollis, 12 Cox C. C., 463.
(58) R. v. Cramp, 5 Q. B. D., 307; 49 L. J. (M. C.), 44.
(59) R. v. Hennah, 13 Cox C. C., 547.
(60) R. v. Dale, 16 Cox C. C., 703.
(61) R. v. Cramp, and R. v. Hennah, *supra.*
(62) R. v. Hillman, L. & C., 343; 33 L. J. (M. C.), 60.
(63) R. v. Titley, 14 Cox C. C., 502.

pounds; and at nine months, or at the end of the full term of gestation, the child is from seventeen to twenty one inches long, and varies from five to nine pounds in weight.

For a child to be *viable*, in other words, to be capable of living after his birth, it must have attained a certain degree of development and growth. Seven months' children and those born at eight months are sufficiently common; but there are records of some remarkable cases, (not necessary to be particularized here), of infants born at much earlier stages of gestation.

The practical conclusions, arrived at by medical scientists, as to a child's viability, are as follows:

1. Children born at seven months, eight months, and intermediate periods up to term, not only may live, but constantly do so;
2. Life is also possible, though less probable, when the birth takes place at six to seven months. A few survive;
3. Children have been born alive as early as four to five months. At the latter age, or a few days more, one or two have survived;
4. Although, from the first moment of impregnation, the ovum is *alive*, yet, previous to the fifth month there is no possibility (so far as we know) of their being reared, and before six or seven months, it is very improbable.

The Scotch law allows six lunar months, or 168 days, for a child to be both viable and legitimate. The Parliament of Paris, in the case of Cardinal Richelieu, decided "that the *fœtus* at five months possessed that capability of living to the ordinary period of human existence which the law of France required for establishing its title to inheritance." The Code Napoleon mentions 180 days, or six calendar months. (64)

As, from a medical point of view, the average period, at which a *fœtus* becomes viable, is six months, the term *abortion* is, medically, usually limited to procuring the expulsion of the contents of the womb, *before the sixth month of gestation*. But the law makes no such distinction of time.

If, in the attempt to procure abortion, or after and in consequence of the abortion being effected, the woman dies, the crime is usually considered as murder, although the accused may not have meant to destroy life. He would now come within the definition of murder contained in section 227*d*, *ante*.

Thus, where a man had procured an abortion on a woman, and the woman died as the result of his act, it was held, in a recent English case that the man committed murder, unless when he committed the act he could not as a reasonable man have contemplated that it could result in death; in which case the crime would be reduced to manslaughter. (65)

Where, upon an indictment for procuring an abortion, two prisoners were convicted of an attempt to commit abortion, it was contended on their behalf upon an application for leave to appeal, under section 746, *post*, that although evidence was adduced at the trial to support a conviction for procuring abortion, there was no evidence adduced in support of the conviction for an attempt, and that therefore the prisoners should be discharged or given a new trial. Held that, as there was evidence to shew the commission of the greater offence, the jury might believe a portion of it and properly convict of the lesser offence; and the application was refused. (66)

(64) Wood. and T. For. Med., 749.
(65) R. v. Whitmarsh, 62 J. P., 711.
(66) R. v. Hamilton & Bustard, 17 C. L. T., 370.

In a trial for murder by committing an abortion resulting in the girl's death, it appeared that the *post mortem* examination was insufficient and that so far as the medical evidence was concerned, it was possible that death might have been occasioned by some undiscovered disease which a *post mortem* examination of other organs than those examined might have disclosed, and none of the medical men would swear positively to the cause of death; but there was other evidence tending to shew that death was caused by a criminal operation and connecting the prisoners therewith. Held that there is no rule that the cause of death must be proved by *post mortem* examination, and that the latter evidence was properly submitted to the jury. (67)

**Means of procuring abortion.**—Women have been known to employ some of the most extraordinary means to procure abortion: such as violently rolling down hill, throwing themselves downstairs, or out of window, submitting themselves to be laced with extreme tightness, or even to be trampled on and kicked on the abdomen. Tardieu mentions the following case:—

In the Assize Court of the Loire-Inférieure, it was proved that a peasant, who had seduced his servant, and wished to make her abort, mounted on a strong horse, and put the girl on the same horse, then galloped wildly hither and thither, throwing her down on the ground whilst in full gallop, and this repeatedly. Having tried this twice without success he conceived the horrible idea of applying to her stomach bread just taken from a very hot oven. This means failed like the former, and the poor victim gave birth to a living and well-formed child at term. (68)

Amongst the drugs generally used to procure abortion might be included almost every known purgative, and almost every drug or herb which has medicinal properties.

The following commonly used substances,—squills, sarsaparilla, guaiacum, aloes, balm, horehound, camomile, wormwood, saffron, borax, mugwort, and juniper, are considered by many authorities to be perfectly harmless in this respect; although some have considered that aloes, wormwood, borax, and mugwort possess properties which may be indirectly effective in procuring abortion.

It seems that such poisons as arsenic, mercury, sulphate of copper, and cantharides have no special action on the *uterus*, and that to produce any effect for purposes of abortion they would have to be given in doses almost necessarily fatal.

There is some medical evidence that *iodide of potassium, yew, pennyroyal* and *oil of rue* will cause abortion, and the evidence is still stronger in regard to the efficacy of *savine* and *ergot of rye*.

Amongst the mechanical instruments and contrivances which have been used in procuring abortion may be mentioned pointed sticks and wooden skewers, syringes, catheters, guarded stilettos, forceps, long knitting needles, and steel claws, the latter being worn on the fingers, for the purpose, as it seems, of penetrating the membranes or tearing the embryo. (69)

**Proof.**—It was held in an American abortion case that, any declarations or acts of the defendant tending to show his intention and purpose to produce the abortion are admissible, whether such acts and declarations were prior or subsequent to the particular act charged in the indictment:

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(67) R. v. Garrow & Creech, 1 Can. Cr. Cas., 246; 5 B. C. L. R., 61; Can. Ann. Dig., (1897), 97.

(68) Tardieu Étude Méd. Lég. sur l'Avortement, p. 27.

(69) Wood. & T. For. Med., 753, *et seq.*

that the defendant made a subsequent attempt to accomplish the same purpose by different means is admissible to show with what purpose and intent he made the attempt charged in the indictment as well as to corroborate the evidence of the first attempt; and that a letter written by the defendant, containing ambiguous language, may be received in evidence against him, and its language explained by parol, when it relates to the question at issue.

The defendant in this case had been convicted in the Circuit Court of Baltimore county, upon an indictment charging him, with furnishing Rachael Taylor, a pregnant woman, with certain drugs and medicines and with advising and soliciting her to take them for the purpose of producing an abortion.

After the State had proved, by the woman Taylor, that the defendant had furnished her with some pills and drops and advised her to take them, saying that they would destroy the child of which she was pregnant, the witness was asked if the defendant had proposed to her any other means of producing the abortion; and she answered, that he had taken her to a doctor in Baltimore and told her to go through an operation to destroy the unborn child, but that she refused to submit to such operation. To this question and answer the defendant objected, and, on the court allowing them, the defendant excepted.

The State then put in evidence a letter, from the prisoner to the woman Taylor, in which he said, "I made you a fair proposition, which if you had not spurned we would have been the same as ever," etc., and asked her what was the proposition referred to, upon which she answered that it was a proposition by the defendant that she should be operated upon. The defendant also objected to this question and answer, and, on same being allowed, he excepted.

Upon these two exceptions the case came before the Maryland Court of appeals; and, in rendering judgment in that Court, Stone, J., said, as to the first exception:

"The *gravamen* of the offence charged against the accused was his purpose and intention to produce an abortion upon the body of Rachael A. Taylor, and he is charged with endeavoring to effect that purpose by furnishing her with drugs, and advising her to take them. Any declarations or acts of the defendant tending to show his intention and purpose to produce such abortion are admissible, whether made prior or subsequent to the particular act charged in the indictment. That he made a subsequent attempt to accomplish the same purpose by different means, is admissible to shew with what purpose and intent he made the attempt charged in the indictment, as well as to corroborate the evidence of the first attempt. In the case of King v. Ellis, (70), the prisoner, a shopman, was indicted for robbing his employer's money-drawer of a particular sum of money on a particular day. At the trial, evidence was admitted that the prisoner had robbed the drawer at other times. Upon review, the court, Bayley, J., delivering the opinion, said: 'Generally speaking, it is not competent to a prosecutor to prove a man guilty of one felony by proving him guilty of another unconnected felony; but where several felonies are connected together and form part of one entire transaction, then the one is evidence of the character of the other.' Holroyd said in the same case: 'Upon an indictment for robbing the prosecutor of a coat, the robbery having been committed by the prisoner threatening to charge the prosecutor with an unnatural crime, I received evidence of a second ineffectual attempt to obtain a one pound note from the prosecutor by similar threats, but reserved the point for the judges, and they were of opinion that the evidence was admissible to show that the prisoner was guilty of the former transaction.' The proof of a second attempt to accomplish the same pur-

(70) R. v. Ellis, 6 B. & C., 145.

pose is, therefore, we think, clearly admissible to prove the purpose in the former attempt, and the ruling of the Court on the first exception must be affirmed."

In reference to the second exception the learned judge said: —

"Declarations of the accused, as to the crime with which he is charged, if voluntary, are always admissible against him. This letter is nothing but a declaration made by the prisoner. It refers to a proposition, but does not say what it was; and it was entirely competent to shew by parol, what the proposition was, if it applied to the case. The ruling on this second exception, also, must therefore be affirmed." (71)

In an Iowa case, where the testimony of the woman upon whom the abortion was attempted was to the effect that she was with child by the accused, and that, upon telling him of her condition, he gave her two bottles of "Dr. Lyon's Spanish Drops," which he said "would be sure to bring her all right," and which, when she took it, made her "dizzy" and sick, and where the accused, when testifying in his own behalf, admitted having had illicit intercourse with the woman, who was a servant in his family, and the giving of the medicine, but claimed that he did not know that she was pregnant, that he gave it to her only to restore regular menstruation, — it was held that the evidence was sufficient to support a conviction. (72)

In the State of Wisconsin, (whose laws make it manslaughter, in case of the death of either child or mother), to administer to a pregnant woman any drug or other substance, or to employ any instrument or other means, with intent thereby to destroy the child, unless the operation is necessary to preserve the life of the mother, or has been advised by two physicians to be necessary for that purpose, it was held, that the fact that one of the defendants, who was a physician, thought that the operation was necessary to save the life of the mother, was no defence where the evidence showed that it was in fact unnecessary; that, as the evidence showed that defendant operated with a knife on the womb of a healthy woman nineteen years old, so that she was delivered of a partly grown child, and was then attacked with peritonitis, of which she died, an inference that the operation was not necessary to save her life was warranted; that the fact that the woman had threatened to commit suicide unless she could be relieved of the child with which she was pregnant, did not show such a necessity to perform the operation in order to save her life as was contemplated by the statute; that an instruction, that defendants must show beyond a reasonable doubt that they had the advice of two physicians that the operation was necessary to save the life of the mother, is harmless error, where defendants have introduced no evidence whatever that they had such advice, this being a fact peculiary within their knowledge, whose non-existence it is practically impossible for the State to show; and that, the defendants being husband and wife, evidence that the wife, in the absence of the husband, offered to produce the abortion for the deceased, and stated that she had helped other women out of similar trouble, is admissible to show that she acted without the coercion of her husband.

The facts as established in evidence were, briefly stated, as follows: that Minnie Beardsley, being pregnant, applied to Dr. Hatchard to procure an abortion upon her; that he administered medicine to her, and operated upon her womb three times with a long sharp instrument for that purpose; that she was a healthy woman, nineteen years of age; that Mrs. Hatchard had previously offered to perform the operation, and voluntarily assisted her husband in doing so each time; that a few days after the last operation

(71) Lamb v. State, S. C., 9 East. Rep., 283; 9 Cr. L. Mag., 338.
(72) State v. Montgomery, 33 N. W. Rep., 143; 9 Cr. L. Mag., 712.

Minnie was delivered of a partly grown female child; that she was immediately attacked with inflammation of the bowels or peritonitis, and died thereof the day after her delivery, and that her disease was caused by such operations upon her person. (73)

A woman who, believing herself to be with child, but not being with child, conspires with other persons to administer drugs to herself or to use instruments on herself, with intent to procure abortion may be convicted of conspiracy to procure abortion. (74)

## PART XXII.

## OFFENCES AGAINST CONJUGAL AND PARENTAL RIGHTS — BIGAMY — ABDUCTION.

### BIGAMY.

**275. Definition.** — Bigamy is —

(*a*) the act of a person who, being married, goes through a form of marriage with any other person *in any part of the world* ; or

(*b*) the act of a person who goes through a form of marriage *in any part of the world* with any person whom he or she knows to be married ; or

(*c*) the act of a person who goes through a form of marriage with more than one person simultaneously or on the same day. R. S. C., c. 27, s. 10.

2. A "form of marriage" is any form either recognized as a valid form by the law of the place where it is gone through, or, though not so recognized, is such that a marriage celebrated there in that form is recognized as binding by the law of the place where the offender is tried. Every form shall for the purpose of this section be valid, notwithstanding any act or default of the person charged with bigamy, if it is otherwise a valid form. The fact that the parties would, if unmarried, have been incompetent to contract marriage shall be no defence upon a prosecution for bigamy.

3. No one commits bigamy by going through a form of marriage —

(*a*) *if he or she* in good faith and on reasonable grounds *believes his wife or her husband to be dead* ; or

(*b*) if his wife or her husband has been continually absent for seven years then last past and he or she is not proved to have known that his wife or her husband was alive at any time during those seven years ; or

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(73) Hatchard v. State (Wis.), 48 N. W. Rep., 380 ; 13 Cr. L. Mag., 566, 620.

(74) R. v. Whitehurch, 16 Cox C. C., 743.

(*c*) if he or she has been divorced from the bond of first marriage ; or

(*d*) if the former marriage has been declared void by a court of competent jurisdiction. R. S. C., c. 161, s. 4.

4. No person shall be liable to be convicted of bigamy in respect of having gone through a form of marriage in a place not in Canada, unless such person, *being a British subject resident in Canada*, leaves Canada with intent to go through such form of marriage.

**276. Punishment.** — Every one who commits bigamy is guilty of an indictable offence and liable to seven years' imprisonment.

2. Every who commits this offence after a previous conviction for a like offence shall be liable to fourteen years' imprisonment. R.S.C., c. 161, s. 4.

**Proof of the first marriage.** — Proof must be made of the two marriages, and that, at the time of the second marriage, the first husband or first wife, as the case may be, was living. It is immaterial whether the first marriage was celebrated here or abroad. (1) If celebrated abroad it may be proved by any person present at it; and circumstances should be proved from which the jury may presume that it was a valid marriage according to the laws of the country in which it was celebrated; and, now, under section 4 of the *Canada Evidence Act, 1893, post*, the first wife or the first husband is a competent though not a compellable witness.

Proof that the first marriage was celebrated by a person appearing and officiating as a priest, and that it was understood by the parties to be the marriage ceremony, according to the rites and customs of the foreign country, would be sufficient presumptive evidence of it, so as to throw upon the defendant the *onus* of impugning its validity. (2)

It was however, *held* by Lush, J., that, in an indictment for bigamy, every thing must be proved most strictly, and that, therefore, evidence of the first marriage in Scotland, by a Roman Catholic priest who had many times previously performed similar ceremonies there, would not suffice, without proof of the law of Scotland, as to such marriage. (3) And in another case it was held that a valid marriage in Scotland could not be proved except by the evidence of a person having a knowledge of the law of Scotland as to marriages. (4)

If the first marriage was celebrated in this country, it may be proved by the production of the register of the marriage from the proper custody, that is from the Church itself or from the custody of the priest, clergyman or other officiating minister; or by a duly certified copy thereof or extract therefrom, together with some proof, either direct or presumptive, of the identity of the parties. (5)

Proof by the production of a certified copy of or extract from a marriage register is provided for by sections 13 and 14 of the *Canada Evidence Act, 1893, post;* but a copy or extract cannot be received in evidence,—

(1) 1 Hale, 692.
(2) See R. v. Inhabitants of Brampton, 10 East, 282.
(3) R. v. Savage, 13 Cox C. C., 178.
(4) R. v. Povey, Dears, 32; 22 L. J. (M. C.), 19.
(5) R. v. Hawes, 1 Den., 270; R. v. Tilson, 1 F. & F., 54.

according to section 19 of the *Canada Evidence Act*, — unless the party intending to produce the same has before the trial, given at least ten days' notice to the party against whom it is intended to be produced.

Proof that the marriage took place in a dissenting chapel, in the presence of the registrar, that the entry in the registrar's book was signed by a person who proved the fact of the marriage, as a witness to the marriage, and that the parties afterwards cohabited for some years, was held sufficient *prima facie* proof that the chapel was duly registered as a place in which marriages might be lawfully solemnized: (6) and where the marriage was solemnized in a dissenting chapel by a dissenting minister in the presence of the registrar of the district and two witnesses, and the certificate was produced, it was held to be unnecessary to prove that the chapel was registered. (7) In another case, it was proved that the marriage was solemnized in a building a few yards from the parish church, while the church was under repair and it was further proved that divine service had several times been performed in this building. It was, therefore, held that the building must be presumed to have been licensed, and that therefore the marriage might be properly solemnized there. (8)

Under the old English Marriage License Laws, it was at one time held, that, if the marriage were by license, and if either of the parties were a minor at the time, it was necessary to prove that the marriage was solemnized with the consent of the parents or guardian of the minor; although subsequent countenance from the parents or guardian, or other similar circumstances, afforded ground for presuming the necessary consent. (9) Later legislation, however, had the effect of rendering it unnecessary, in bigamy cases, to prove the consent of the parents or the guardian to the first marriage of a minor. (10)

It was originally the intention of the English Marriage Act that the banns should be published in the true names of the parties, and, if the banns were published in names totally different from those which the parties used or by which they were known, it used to have the effect of invalidating the marriage, whether the misdescription was by accident or from design and whether it was fraudulent or not; but, now, under the English Marriage Laws, in order to invalidate a marriage for want of due publication of banns the misdescription in the banns must be with the knowledge of both parties. (11)

By the Imperial Statute 6 and 7 W. IV, c. 85, section 42, it was enacted "that if any persons shall knowingly and wilfully intermarry under the provisions of this Act, without due notice to the superintendent-registrar, the marriage of such persons shall be null and void;" and it was held that, to render a marriage invalid under that act, it must be with a knowledge by both parties, that no due notice had been given; and therefore where one of the parties, — in disregard of a clause of the Act, which requires the name and surname of each of the parties intending marriage to be stated in the notice, — gave a notice stating therein a false christian name, but it did not appear that that was done with the knowledge of the other party, the marriage was held valid. (12)

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(6) R. v. Manwaring, Dears & B., 132; 26 L. J. (M. C.), 10.
(7) R. v. Cradock, 3 F. & F., 837.
(8) R. v. Cresswell, 45 L. J. (M. C.), 77.
(9) R. v. Butler, R. & R., 61; R. v. Morton, R. & R., 19 *n.*; R. v. James, R. & R., 17.
(10) R. v. Birmingham, 8 B. & C., 29.
(11) R. v. Inhabitants of Wroxton, 4 B. and Ad., 640. See R. v. Kay, 16 Cox C. C., 292.
(12) R. v. Rea, 41 L. J. (M. C.), 92; L. R., 1 C. C. R., 365.

Where the parties were married in Ireland with the ceremonies necessary to make a marriage of Roman Catholics valid, the man and the woman both declaring themselves to be Roman Catholics, it was held that the man could not, on an indictment for bigamy, set up his alleged protestantism to defeat such marriage. (13)

Although, in bigamy cases, a first valid marriage must be proved it appears that it is not essential, in order to establish it, that proof should be made of the license, or of the publication of the banns, etc.; but that the fact of the marriage having been validly solemnized may be proved by some person who was actually present, and saw the ceremony performed. (14) Or, the prisoner's own admission of a prior marriage may be relied on as good evidence to shew that it was lawfully solemnized. (15)

A written contract between the parties is essential, however, to the validity of a marriage between Jews, which contract is afterwards solemnly ratified in the synagogue: and it has been held in England that in order to prove such a marriage, it is not sufficient to prove the religious ceremony by the parol testimony of some person who was present, but that the contract must also be produced and proved. (16)

Proof of a first marriage which is merely *voidable* but which has not been voided, is sufficient, in a prosecution for bigamy. (17) Thus, a marriage contracted in Ireland by a minor, without consent,—such a marriage being, by the Irish Marriage Act, voidable only within a year,—will support a conviction for bigamy, if such first marriage has not been vacated. (18)

But it is otherwise if the first marriage be not merely voidable but actually *void*. As, for instance, if a woman marry A, and in A's lifetime, marry B, and then, after A's death, and whilst B is alive, she also marry C, she cannot be indicted for bigamy, in marrying C, because her marriage with B was a mere nullity. (19)

So, if a man marry A, and, in the lifetime of A, he marry B, and, afterwards, in the lifetime of both A and B, he marry C, he cannot be prosecuted for bigamy, on an indictment charging him with that offence in marrying C during the lifetime of his wife B; because the marriage with B was void. (20) The indictment, to be good, would have to charge him with committing bigamy in marrying C, during the lifetime of A.

If a boy under fourteen, or a girl under twelve contract matrimony, it is void, unless both parties to such marriage consent to and confirm it after the one who was under the age of consent arrives at the age of consent. (21)

On an indictment for bigamy a witness was called to prove the first marriage, and swore that it was solemnized by a justice of the peace in the State of New York who had power to marry; but the witness was not a lawyer nor an inhabitant of the United States and did not say how the

(13) R. v. Orgill, 9 C. & P., 80.
(14) R. v. Allison, R. & R., 109; R. v. Manwaring, Dears. & B., 132; 26 L. J. (M. C.), 10.
(15) R. v. Newton, 2 M. & Rob., 503; R. v. Simmonsto, 1 C. & K., 164. And see R. v. McQuiggan, 2 L. C. R., 346, and R. v. Creamer, 10 L. C. R., 404.
(16) Horn. v. Noel, 1 Camp., 61; R. v. Athausen, 17 Cox C. C., 630.
(17) 3 Inst., 88; R. v. Kay, 16 Cox C. C., 292.
(18) R. v. Jacobs, 2 Moo. C. C., 140.
(19) 1 Hale, 693.
(20) R. v. Willshire, 6 Q. B. D., 366.
(21) Co. Lit., 79; R. v. Gordon, R. & R., 48.

authority of the justice of the peace was derived. *Held*, that the proof was insufficient. (22)

**Proof of the second marriage.** — Although the first marriage must be proved to have been a valid one, this is not necessary with regard to the second or bigamous marriage. The above section, 275, makes it bigamy for any person, being married, *to go through a form of marriage* with any other person; and sub-section 2 declares that "every form of marriage shall, for the purpose of this section, be valid, notwithstanding any act or default of the person charged with bigamy, if it be otherwise a valid form." So, that, after proving the defendant's first marriage, it will be sufficient to make proof of his having gone through a second marriage ceremony with another woman, and it will be no defence to an indictment for bigamy to shew that the second marriage was not legal but was void, by reason, for instance, of the parties to it being relations within the prohibited degrees of consanguinity or affinity. (23)

Where, therefore, in the second marriage, the defendant assumed a fictitious name, the offence was, nevertheless, held complete. (24)

Upon an indictment for bigamy in marrying Anna T., the defendant's first wife being alive, it appeared that the second wife's name was not Anna but Susanna, but the defendant himself had written her name as *Anna* in the note for publication of banns, and he had signed the register in which she was so called; and it was held that, although the woman's name might not be Anna, the defendant could not defend himself on the ground that he did not marry Anna T. but Susanna. (25)

Where the second wife was married by the name of Eliza Thick, which name she had purposely assumed, when the banns were published, so that she should not be known to be the person intended, (her name being Eliza Brown), *Gurney* B. held this to be no answer to the charge of bigamy. (26)

A man, who, being married, married another woman, and gave a false name, in his notice to the registrar, without it appearing that the woman knew of it, — was found guilty of bigamy. (27)

The English Court of Crown Cases Reserved has, in a case reserved for the consideration of all the judges, laid down the following general rule, namely: that where a person already bound by an existing marriage, goes through a form of marriage known to and recognized by the law as capable of producing a valid marriage, for the purpose of a pretended and fictitious marriage, the case is none the less within the statute relating to bigamy, by reason of any special circumstances, which, independently of the bigamous character of the marriage, may constitute a legal disability in the particular parties or make the form of marriage resorted to specially inapplicable to their individual case. So that, where A, a married man, whose wife was living, went through the marriage ceremony with another woman related to him within the prohibited degrees of affinity, so that the second marriage, even if not bigamous, would have been void, he was held guilty of bigamy. (28)

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(22) R. v. Smith, 14 U. C., Q. B., 565.
(23) R. v. Brawn, 1 C. & K., 144.
(24) R. v. Allison, R. & R., 109.
(25) R. v. Edwards, R. & R., 283.
(26) R. v. Penson, 5 C. & P., 412.
(27) R. v. Rea, L. R., 1 C. C. R., 365; 41 L. J. (M. C.), 92; Arch. Cr. Pl. & Ev., 21st Ed., 1022.
(28) R. v. Allen, L. R., 1 C. C. R., 367, 376; 41 L. J. (M. C.), 97, 101; 12 Cox C. C., 193.

The case of R. v. Fanning, (29) — in which the Irish Court of Criminal Appeal held that, to constitute the offence of bigamy, the second marriage must have been one which, but for the existence of the previous marriage, would have been a valid marriage, — was fully considered by the English Court of Criminal Appeal, in the case of R. v. Allen, *supra*, and disapproved.

It will be noticed that sub-section 2 of section 275 of our Code now expressly provides that, "the fact that the parties would, if unmarried have been incompetent to contract marriage shall be no defence upon a prosecution for bigamy."

**Proof of first wife or husband being alive.** — The prosecution must prove that the first husband or first wife, as the case may be, was living when the second marriage was solemnized. This may be done by some person acquainted with the first husband or first wife and who saw him or her at the time of the second marriage or afterwards. The fact that the first wife was living at a period *antecedent* to the time of the second marriage may or may not afford a reasonable inference that she was living at the time of the second marriage. For instance, if it were proved that she was living and in good health on the day preceding the second marriage, the inference would be very strong that she was still living on the day of the second marriage; and the jury would probably find that she was so. If, on the other hand, it were proved that the first wife was in a dying condition on the day preceding the second marriage, and nothing further were proved, the jury would probably decline to draw the inference that she was still living on the day of the second marriage.

The question, therefore, is one entirely for the jury; and the law makes no presumption either way. (30) Therefore, where, on a trial of a woman for bigamy, it was proved that the second marriage took place in 1847, but that the first husband had been last seen alive in 1843, and the judge directed the jury that there being no circumstances leading to any reasonable inference that he had died, he *must* be presumed to have been alive at the time of the second marriage, this direction was held to be erroneous, and the conviction was quashed. (31)

**Principal defences.** — The principal defences available to the defendant in a prosecution for bigamy are: 1. Belief, on reasonable grounds, that the first husband or the first wife, as the case may be, is dead; 2. Continual absence of the first wife or husband for seven years; 3. Divorce from the bond of the first marriage, and 4. That the first marriage has been declared void by a court of competent jurisdiction.

On the subject of bigamy, there is a difference, in at least one important point, between our Code and the English Draft Code and between our Code and the Imperial Statute.

Our section 275 expressly declares that, "No one commits bigamy by going through a form of marriage, (*a*), if he or she, in good faith and on reasonable grounds, *believes* his wife or her husband to be dead, or (*b*), if his wife or her husband has been *continually absent for seven years* then last past, and he or she is not proved to have known that his wife or her husband was alive at any time during those seven years. By a proviso contained in section 216 of the English Draft Code, it is provided that "No one shall be deemed to commit bigamy by going through such" form of marriage as aforesaid if he or she has been *continually absent* from his or her wife or husband *for seven years* then last past and is not proved to

(29) R. v. Fanning, 17 Ir. C. L. R., 289; 10 Cox C. C., 411.
(30) R. v. Lumley, L. R., 1 C. C. R., 196; 38 L. J. (M. C.), 86; 11 Cox C. C., 274.
(31) Id.

have known that his wife or her husband was alive at any time during these seven years; but, unless there be such absence as aforesaid, a BELIEF on any grounds whatever that a wife or husband is dead shall be no defence to a charge of bigamy, if such wife or husband was in fact alive when the form of marriage was gone through." And section 57 of the Imperial Act, (24-25 Vic., c. 100), contains the following provision. "Provided that nothing in this section contained shall extend * * * * to any person marrying a second time, whose husband or wife shall have been *continually absent* from such person for the space of seven years then last past, and shall not have been *known by such person to be living within that time.*"

The remarks of the Royal Commissioners, (at page 25 of their Report), on the subject of bigamy are as follows: —

The existing statute as to bigamy is so worded as to have given rise to a difference of judicial opinion as to whether it does or does not, from motives of policy, make it a crime to marry again during the life of the husband or wife, though in the *bona fide* and reasonable belief that the first husband or wife was dead, unless seven years had elapsed since he or she was last heard of. We have thought it important that the law should be certain, and have accordingly framed the clause so as to leave no doubt what the law would be. In doing so we have adopted the construction which has been more generally put on the existing statute.

"No doubt, the conviction of a man marrying again within the seven years, under the honest belief that his wife was dead, may be regarded as a hard case; but the hardship may, at present, be mitigated by the infliction of a nominal punishment, and will be capable of still further mitigation if the Draft Code becomes law. On the other hand, care must be taken not to give encouragement to bigamous marriages by relaxing the rule that a man marrying within the prescribed seven years does so at his peril.

"Among the suggestions furnished to us was one that clause 216 might subject a Hindoo coming to England to a prosecution for having a plurality of wives in his own country. So far as this point is concerned, the clause is taken from the Act of 1861, which re-enacted in terms the Act of 1828. We have merely altered the wording so as to make it harmonize with the other sections of the Draft Code by changing 'elsewhere than in England or Ireland,' into 'any part of the world.' During the half century which has elapsed, since the first of these statutes was passed, no attempt has ever been made to apply them to such a case as the one suggested, for the reason we presume, that 'marriage,' in these statutes, means the union for life, of one man with one woman, to the exclusion of all others, as is well expressed by Lord Penzance in Hyde v. Hyde. (32) Whatever may be the ceremony by which a polygamist adopts a woman, as one of his wives, the relation which it creates is essentially different from that which our criminal legislation contemplated by the word 'marriage.'"

It will be seen that the main difference between our law, as it now stands, and the law of England is that the Imperial Statute does not contain the clause contained in the above section, 275, declaring that, no one commits bigamy by going through a form of marriage, "if he or she, in good faith and on reasonable grounds, *believes* his wife or her husband to be dead."

There is also some difference between the wording of the two enactments, in regard to the seven years' absence. The English Statute has the words, "and shall not have been known by such person to be living within that time," while the wording of the clause in our law is "and he or she *is not*

(32) Hyde v. Hyde, 35 L. J. (Prob.), 57.

*proved* to have known that his wife or her husband was alive at any time during those seven years."

This, however, is merely a verbal difference. The effect of the two seems to be the same; for in England, as well as in Canada under the law as expressed in the 161 R. S. C., s. 4, and previous Canadian statutes, worded like the Imperial Statute, it has been held that, when, on a trial for bigamy, absence for seven years is proved, it is, then, for the prosecution to shew that the prisoner knew his wife to be alive at some time during the seven years, and that, on the prosecution failing to do so, the prisoner is entitled to an acquittal. (33)

In another case, where it was proved that the accused's first husband had been absent from her for more than seven years, the jury found that they had no evidence that, at the time of her second marriage, she knew him to be alive, although she had the means of acquiring knowledge of that fact had she chosen to make use of such means; and it was held that, upon this finding, the conviction could not be supported. (34)

Where the defendant's first wife had left him sixteen years, and it was proved by the second wife that she had known him for nine years living as a single man, and had never heard of the first wife who it appeared had been living seventeen miles from where the defendant, (a poor laboring man), resided, he was held entitled to an acquittal. (35)

With regard to the seven years absence clause, there were for a time a number of conflicting decisions rendered in England, it being held in a few cases, by some of the judges, (including Baron Martin and Baron Cleasby), that, although seven years had not passed since the first marriage, yet, if the prisoner reasonably believed that his first wife was dead, he was entitled to an acquittal; (36) while others held that, under the terms of the 24-25 Vic., c. 100, s. 57, already quoted, unless seven years had elapsed between the first and second marriages, it was no defence for the prisoner to show that he had reasonable grounds for believing that his first wife was dead. This was the holding in a number of cases, (37) and, in their Report on the English Draft Code, the Royal Commissioners, in their remarks upon bigamy, (see extract set out at p. 294, *ante*), not only take this view of the law, but emphasize the necessity of framing the clause on this subject in such a manner as to make the law certain in this respect, in order, as they say that, — although it may be a hardship to convict a man of bigamy for marrying again under the honest belief that his wife was dead, — encouragement may not be given to bigamous marriages by relaxing the rule that a man marrying within the prescribed limit of seven years does so at his peril.

But the whole subject has since, (in 1889), been thoroughly considered and finally settled by the English Court of Criminal Appeal in Tolson's case, in which, on account of the conflicting views of individual judges, the point had been reserved by Stephen, J.; and it was decided by that Court, composed of Lord Coleridge, C. J., and Hawkins, Stephen, Cave,

(33) R. v. Curgerwen, L. R., 1 C. C. R., 1; 35 L. J. (M. C.), 58; 10 Cox C. C., 153; R. v. Heaton, 3 F. & F., 819; Arch. Cr. Pl. & Ev., 21st Ed., 1024; R. v. Pierce, 13 O. R., 226; R. v. McQuiggan, 2 L. C. R., 340; R. v. Fontaine, 15 L. C. J., 141; R. v. Dwyer, 27 L. C. J., 201; R. v. Debay, 3 G. & O., 540; R. v. Smith, 14 U. C. Q. B., 565; Bur. Dig., 254.

(34) R. v. Briggs, Dears. & B., 98; 26 L. J. (M. C.), 7. See R. v. Dane, 1 F. & F., 323; R. v. Cross, 1 F. & F., 510.

(35) R. v. Thomas Jones, C. & Mar., 614.

(36) R. v. Turner, 9 Cox C. C., 145; R. v. Horton, 11 Cox C. C., 670; R. v. Moore, 13 Cox C. C., 544.

(37) R. v. Gibbons, 12 Cox C. C., 237; R. v. Bennett, 14 Cox C. C., 45.

Day, Smith, Wills, Grantham, and Charles, JJ., (Denman, Field, and Manisty, JJ., and Pollock and Huddlestone, BB., dissenting), that a *bona fide* belief on reasonable grounds in the death of the husband at the time of the second marriage afforded a good defence to the indictment, although the second marriage took place within seven years of the time when the defendant last knew of her husband being alive. (38)

Our own law, as expressed in clause (*a*) of sub-section 3 of section 275, coincides with the holding of the English Court of Criminal Appeal in the Tolson case.

With regard to the other two grounds of defence to a prosecution for bigamy, namely, that before the second marriage the party indicted was divorced from the bond of the first marriage, or that the first marriage had been declared void by a Court of competent jurisdiction, it was formerly considered that no sentence or act of a foreign country or state could dissolve, *a vinculo matrimonii*, an English marriage for grounds on which it was not liable to be so dissolved in England. This rule seems to have been adopted in the case of *R. v. Lolley*, in which a Scotch divorce *a vinculo matrimonii*, for the husband's adultery, the marriage having been solemnized in England was held to be invalid in England, the husband's adultery alone, unaccompanied with cruelty or desertion not being, under English law, a sufficient ground for a divorce *a vinculo matrimonii;* but there was in this case an additional question of domicile involved: for not only was the marriage solemnized in England, but the parties were, at the time of the granting of the divorce, domiciled there; and this alone, would have been a good ground for holding the divorce, granted by a Scotch Court, invalid, in England, independently of and without reference to the rule above alluded to (39) In fact, that rule has by the English Court of Appeal, been since denied to be law, in a later case, in which the marriage was also solemnized in England, the parties being a Scotchman and an English woman. In this case, also, the decree of divorce *a vinculo*, was granted by a Scotch Court and the ground of divorce was one for which a divorce is not obtainable in England, but there was this difference, that the husband's domicile was in Scotland; and the Scotch divorce, in this case, was held to be valid in England, on the ground that although the marriage had been solemnized in England, the question of divorce was not an incident of the marriage contract to be governed by the *lex loci contractus*, but an incident of status to be disposed of by the law of the domicil of the parties,—that is to say, the domicil of the husband; and in its judgment the English Court of Appeal specially pointed out that the Scotch divorce *a vinculo* which, in R. v. Lolley, was held to be invalid in England was that of persons whose marriage had been solemnized in England, and whose domicil at the time of the divorce was also *English*. (40)

A decree of divorce obtained in a foreign court may be impeached by extrinsic evidence shewing that such court had no jurisdiction or that such decree was obtained by fraud. (41)

A domiciled Englishman was married in London to a woman domiciled in the United States. After three months' cohabitation she left him, on perfectly friendly terms, to go on a visit to the United States. She refused to return to him, and sent an agent to England to try to persuade him to consent to a collusive divorce, which he refused to do. A year later, the wife commenced proceedings in Philadelphia for a divorce on the ground of her husband's cruelty, it being alleged, among other things, that, by

(38) R. v. Tolson, 23 Q. B. D., 168; 58 L. J.(M. C.),97; 16 Cox C. C., 629.
(39) R. v. Lolley, R. & R., 238.
(40) Harvey v. Farnie, L. R., 5 P. D., 153; L. R., 6 P. D., 35; Arch. Cr. Pl. & Ev., 21st Ed., 1024.
(41) R. v. Wright, 1 P. & B., 363.

virtue of a certain Act of the Pennsylvanian Legislature, she had recovered her American domicil by residing twelve months within that State. The husband took no notice of the American proceedings, and the Philadelphia Court pronounced a decree for divorce as prayed; upon which the wife married in America and cohabited with her second husband. The first husband then commenced proceedings in England for dissolution of his marriage on the ground of his wife's bigamy and adultery; and it was held that the proceedings in the American suit had been rightly disregarded, that no decree dissolving the marriage pronounced in the Courts of a country in which the first husband had neither been resident nor domiciled could be binding on him in England, and that the first husband was entitled to the relief prayed by him. (42)

**Bigamy committed out of Canada.** — Although, in the first part of section 275, bigamy is defined to be the act of a person who, being married, marries another person, *in any part of the world*, the latter part of this clause is modified by sub-section 4, which declares that: —

"No person shall be liable to be convicted of bigamy in respect of having gone through a form of marriage in a place *not in Canada*, unless such person, being a British subject resident in Canada, leaves Canada with intent to go through such form of marriage."

This proviso is based upon the principle that, Canada being a colony, our parliament has power only to legislate for offences committed within Canada, and the clause is meant to restrict to our own jurisdiction the early words of the section speaking of marriages *in any part of the world*, by making it an offence for a British subject resident in Canada to leave Canada *with intent* to commit bigamy in some other part of the world, and to carry out such intent; that being the full extent of the power of the Canadian Parliament, as a colonial legislature, according to a decision in that respect rendered in regard to the jurisdiction of an Australian parliament, by which decision it was held that, although the words used in the Australian Statute extended to marriages solemnized beyond the territorial jurisdiction of the Australian parliament, that parliament had no authority in that behalf, and that its legislation must be confined to its territorial jurisdiction and be interpreted accordingly. The Australian case was decided on an appeal to the English Privy Council, which reversed a judgment of the Supreme Court of New South Wales, the latter Court having rejected an appeal from a conviction by the Court of Quarter Sessions at Sydney. The appellant, a British subject, had been married to his first wife in Sydney. Some years afterwards, he obtained from a District Court of the United States a decree of divorce from his first wife, and, later on, he married another woman in the State of Missouri, his first wife being still alive; but it was found that the decree of divorce was one obtained without any notice having been given to the first wife of the divorce proceedings. The Privy Council held, that, the maxim *extra territorium jus dicenti impune non paretur*, was applicable to such a case, and that the alleged offence, being one which, upon the face of the record, was charged to have been committed in the United States of America, and which, if committed at all, was committed in another country beyond the jurisdiction of the colony of New South Wales, the conviction must be set aside. (43)

In an American case, a somewhat similar decision was rendered, under the following circumstances. The Code of the State of North Carolina provides that "if any person, being married, shall marry any other person during the life of the former husband or wife, *whether the second marriage*

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(42) Green v. Green, and Sedgwick, 62 L. J., P. D. & A., 112; [1893] P., 89.

(43) McLeod v. Atty. Gen. N. S. Wales, 14 L. N., 402; [1891] A. C., 455, Jefferys v. Boosey, 4 H. of L. Cas., 815-926, cited and approved of

*shall have taken place in the State of North Carolina or elsewhere*, every such offender shall be guilty of a felony, and every such offence shall be punished in the county where the offender shall be apprehended *as if actually committed there;*" and the Supreme Court of North Carolina considered such a provision repugnant to the constitution, and held that an indictment would not lie against the defendant for having contracted a bigamous marriage in South Carolina and afterwards come into the State of North Carolina to cohabit with the person so married. But the Court added: —

"We do not, however, wish to be understood as questioning the power of the State to punish one of its citizens who goes out of the State with intent to evade its laws by celebrating a bigamous marriage beyond its jurisdiction, and returning to live within its borders." (44)

In sub-section 2, clause (*a*) of section 4 of the R. S. C., chapter 161, there was a clause somewhat similar, in effect, to the above sub-section 4 of section 275 of the Criminal Code; and, both before and since the coming into force of the Code, there have been several conflicting decisions as to the constitutionality of this provision. For instance, in a case in which the second marriage was contracted outside of Canada, but the parties, — who were British subjects and residents of Canada, — had, with intent to be married, gone out of Canada and got married accordingly, it was held that the above provision was *intra vires*, and that the parties were guilty of bigamy; (45) while, in a later case, in which the question of the validity of a conviction for bigamy committed under similar circumstances was considered, it was held that the provision was *ultra vires*, — Armour, C. J., saying, that, in view of the decision in the case of McLeod v. Attorney General of New South Wales, the Dominion Parliament, being a subordinate legislature, has no power to enact that it should be a crime for a British subject already married to marry again abroad, the second marriage being the offence and the Dominion Parliament having no power to legislate about such an offence committed abroad. (46)

Since the decision in the last mentioned case, a special case, — under the provisions of the *Supreme and Exchequer Courts Act*, as amended by 54-55 Vic., c. 25, — has been referred by the Governor General in Council, to the Supreme Court of Canada on the question of whether the Dominion Parliament had authority to enact sections 275 and 276 of the Criminal Code, and what portions of them are *ultra vires*, if they or either of them are *ultra vires* in part only; and, after full consideration of this special case, the opinion arrived at by the Supreme Court, (Sir Henry Strong, C. J., dissenting), was that the sections are *intra vires* of the Parliament of Canada, a distinction being drawn as to the case of McLeod v. Attorney General of New South Wales, principally on the ground that the Australian Act contained no such provision as that contained in sub-section 4 of our section 275. (47)

**277. Feigned marriages.** — Every one is guilty of an indictable offence and liable to seven years' imprisonment who procures a feigned or pretended marriage between himself and any woman, or who knowingly aids and assists in procuring such feigned or pretended marriage. R. S. C., c. 161, s. 2.

Under section 684, *post*, no person can be convicted of an offence against

(44) S. v. Cutshall, (S. C.), 15 S. E. Rep., 261.
(45) R. v. Brierly, 14 O. R., 525.
(46) R. v. Plowman, 25 O. R., 656; 14 C. L. T., 504.
(47) *In re* Bigamy sections of the Criminal Code, 1 Cr. Cas., 172; 17 C. L. T., 319; 27 S. C. R., 461.

section 277 upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused.

**278. Polygamy.** — Every one is guilty of an indictable offence and liable to imprisonment for five years, and to a fine of five hundred dollars, who —

(*a*) practises, or, by the rites, ceremonies, forms, rules or customs of any denomination, sect or society, religious or secular, or by any form of contract, or by mere mutual consent, or by any other method whatsoever, and whether in a manner recognized by law as a binding form of marriage or not, agrees or consents to practise or enter into

(i) any form of polygamy ;

(ii) any kind of conjugal union with more than one person at the same time; or

(iii) what among the persons commonly called Mormons is known as spiritual or plural marriage; or

(*b*) who lives, cohabits, or agrees or consents to live or cohabit in any kind of conjugal union with a person who is married to another, or with a person who lives or cohabits with another or others in any kind of conjugal union; or

(*c*) celebrates, is a party to, or assists in any such rite or ceremony which purports to make binding or to sanction any of the sexual relationships mentioned in paragraph (*a*) of this section ; or

(*d*) procures, enforces, enables, is a party to, or assists in the compliance with, or carrying out of, any such form, rule or custom which so purports; or

(*e*) procures, enforces, enables, is a party to, or assists in the execution of, any such form of contract which so purports, or the giving of any such consent which so purports. 53 V., c. 37, s. 11. (As amended by the *Criminal Code Amendment Act 1900*).

This is, for the most part, a re-enactment of 53 Vic., c. 37, section 11; shortly after the passing of which it was held, that mere cohabitation was not sufficient to sustain a conviction under it. The point came up before the Court of Appeals of the Province of Quebec at Montreal in March 1891, in a case in which one Labrie, a married man, was tried for living and cohabiting, in conjugal union, with Rosa Ada Martin, the wife of Joseph B. Martin. Proof was made of the fact of cohabitation and of each of the parties being married to other persons. It was claimed, however, by the defendant's counsel, Mr. St. Pierre, that there was no offence upon which a conviction could be legally sustained; that the clause "who lives, cohabits, or agrees or consents to live or cohabit, in any kind of *conjugal union* with a person who is married to another, or with a person who lives or cohabits with another or others in any kind of *conjugal union*" was aimed at the repression of Mormonism, and was taken from the Edmund's Act in the United States; that it was not intended to prevent mere immorality but only applied to Mormons and the like, who, before cohabiting together, go through a marriage of some sort, — a "*conjugal union*," — supposed to be binding upon them. For the Crown it was contended that the law applied to any one who, being married, cohabited or agreed

or consented to cohabit with another married person. The defendant being found guilty, Mr. Justice Baby reserved the point raised by the defence. The late Chief Justice Dorion, in delivering the judgment of the court, quashing the conviction, said, that it was apparent from the Act that there must be some form of contract between the parties which they might suppose to be binding on them, but which the law was intended to prohibit, and that in this case, therefore, there was no offence shewn within the meaning of the law. (48)

An Indian, who, according to the marriage contract of his tribe, takes two women at the same time as his wives and cohabits with them, is guilty of polygamy under the above section, 278. (49)

**Proof of polygamy.**—Section 706, *post*, provides that, "in the case of any indictment under section 278 (*b*), (*c*), and (*d*), no averment or proof of the method in which the sexual relationship charged was entered into, agreed to, or consented to, shall be necessary in any such indictment, or upon the trial of the person thereby charged: nor shall it be necessary upon such trial to prove carnal connection had or intended to be had between the persons implicated."

Where, in a prosecution for polygamy, the proof of the polygamous marriage consisted of the confessions of the accused, and circumstances tending to corroborate the confessions, the evidence, on conviction, was held sufficient to support the verdict. (50)

**279. Solemnization of marriage without lawful authority.** — Every one is guilty of an indictable offence and liable to a fine, or to two years' imprisonment, or to both who —

(*a*) without lawful authority, the proof of which shall lie on him, solemnizes or pretends to solemnize any marriage; or

(*b*) procures any person to solemnize any marriage knowing that such person is not lawfully authorized to solemnize such marriage, or knowingly aids or abets such person in performing such ceremony. R. S. C., c. 161, s. 1.

No prosecution for any offence under this section can be commenced after the expiration of two years from its commission. (See section 551 *b*, *post*.)

**280. Solemnization of marriage contrary to law.** — Every one is guilty of an indictable offence and liable to a fine, or to one year's imprisonment, who, being lawfully authorized, knowingly and wilfully solemnizes any marriage in violation of the laws of the province in which the marriage is solemnized. R. S. C., c. 161, s. 3.

**281. Abduction of any woman of any age.**—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, with intent to marry or carnally know *any woman*, whether

(48) R. v. Labrie, M. L. R., 7 Q. B., 211.
(49) R. v. Bear's Shin Bone, 3 Can. Cr. Cas., 329.
(50) U. S. v. Bassett, (Utah Supr. Ct.), 13 Pac. Rep., 237.

married or not, or with intent to cause any woman to be married to or carnally known by any other person, takes away or detains any woman *of any age* against her will. R. S. C., c. 162, s. 43.

This section applies to every woman, — whether over or under age, whether married or single, and whatever her position in life may be, — so as to protect her from any interference, (either by her *abduction* or by her *detention* against her will, with intent to marry or carnally know her or to cause her to be married or carnally known), by rendering any one, who thus interferes with her, liable to fourteen years' imprisonment.

If the woman be taken away, in the first instance, with her own consent, but afterwards refuse to continue with the offender, and if, he still *detain* her, against her will, he is punishable, under section 281, for such detention (51)

If, after having been, in the first instance, *forcibly* taken away, the woman be afterwards married or defiled, by or at the instance of her abductor, with her own consent, the offence will still be committed within the terms of the above enactment; for the offender is not to escape from liability to punishment, by having prevailed over the weakness of a woman whom he originally got into his power by such base means. (52) Even if she be taken away and married with her own consent, yet, it seems, that, if this be effected by means of fraud, it would still be within the law; for, she cannot, whilst under the influence of fraud, be considered a free agent. (53)

It was held, even before the coming into force of the *Canada Evidence Act, 1893*, that the woman, though married by her abductor, was a competent witness against him, on the ground that though she was his wife *de facto*, she was not so, *de jure* (54); but there can be no doubt upon this point now, under section 4 of the *Canada Evidence Act, post*, by which every accused's wife or husband is rendered competent as a witness.

**282. Abduction of an heiress.** — Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, with intent to marry or carnally know any woman, or with intent to cause any woman to be married or carnally known by any person —

(*a*) *from motives of lucre* takes away or detains *against her will* any such woman *of any age* who has any interest, whether legal or equitable, present or future, absolute, conditional or contingent, in any real or personal estate, or who is a presumptive heiress or coheiress or presumptive next of kin to any one having such interest ; or

(*b*) *fraudulently allures, takes away* or *detains* any such woman, being *under* the age of *twenty-one years*, out of the possession and against the will of her father or mother, or of any other person

(51) See, also, 1 Hawk., c. 41, s. 7.
(52) Fulwood's Case, Cro. Car., 488; Swendon's Case, 5 St. Tr., 450; 1 Hale, 660.
(53) R. v. Perry, 1 Hawk., c. 41, s. 13; R. v. Wakefield, 2 Lew., 279; Arch. Cr. Pl. & Ev., 21st Ed., 802.
(54) 1 Hale, 661; Brown's Case, Ventr., 243; 3 Keb., 193.

having the lawful care or charge of her, with intent to marry or carnally know her.

2. Every one convicted of any offence defined in this section is incapable of taking any estate or interest, legal or equitable, in any real or personal property of such woman, or in which she has any interest, or which comes to her as such heiress, co-heiress or next of kin; and if any such marriage takes place such property shall upon such conviction, be settled in such manner as any court of competent jurisdiction, upon any information at the instance of the Attorney General, appoints. R. S. C., c. 162, s. 42.

Clause (*a*) of this section has reference to the *taking away* or *detaining* of any heiress of any age against her will, such taking or such detention being *from motives of lucre*, and with intent to marry or carnally know her or cause her to be married or carnally known. As this clause relates to and punishes, with fourteen years' imprisonment, the abduction or detention, *from motives of lucre*, of a woman of any age,—having an interest in some property,—with intent, etc., and as section 281 relates to and punishes, in the same way, the abduction or detention of a woman of any age,—whether rich or poor, heiress or no heiress,—with intent, etc., *and without regard*, as a matter of course, *to any motives of lucre*, it would seem that, if the prosecution should be unable, in the case of an heiress, to make proof, either, of the defendant's mercenary motives, or of the facts which constitute the woman an heiress, so as to bring the case within the terms of clause (*a*) of section 282, the defendant could be convicted under section 281, without the necessity of making any such proof.

As the punishment, for the forcible abduction or detention of a woman, *with intent*, etc., is, under the terms of the two sections, 281 and 282 (*a*), the same, whether she be an heiress or a pauper, and, as, under section 281, the heiress,—as a *woman*, simply,—may prosecute and punish her abductor, independently of and without proving her riches or his motives of lucre, the special value of section 282, in regard, at least, to the case contemplated by clause (*a*), seems to lie in the extra provision contained in the second sub-section of the section, whereby the offender is rendered incapable of taking, even by marrying his victim, any estate or interest of any kind in her property.

Clause (*b*) of section 282, protects any woman, rich or poor, under the age of twenty one, against being either *fraudulently allured from or taken away or detained*,—with or without her own consent,—out of the possession and *against the will of her parents or guardian*, with intent to marry or carnally know her or cause her to be married or carnally known.

In order to constitute the offence, it is not necessary, under either of the above sections, 281 or 282, that there should be an actual marriage or defilement. The intent to marry or defile is sufficient.

The *taking away* or *detaining*, against the woman's will, or, in the case of a girl under twenty one, the *fraudulent allurement* or the *taking* or *detaining* against the will of the parents or guardian, coupled in either case with the intent to marry or carnally know the woman, or have her married or carnally known, constitute the offence; and, upon an indictment under clause (*b*) of section 282, it is not necessary to show that the accused knew that the woman was an heiress, or had an interest in any property. (55)

(55) R. v. Kaylor, 1 Dor. Q. B., 364; Burb. Dig., 257.

The intent may be proved by the acts and declarations of the defendant, or it may be inferred from the circumstances of the case. (56)

Upon an indictment under any of the clauses of the above sections, 281 and 282, a verdict may, in pursuance of section 711, *post*, be rendered finding the accused guilty of an attempt, if the evidence warrants it, or, in pursuance of section 713, *post*, he may be convicted of a common assault.

**283. Unlawfully taking a girl under sixteen from her parents or guardians.** — Every one is guilty of an indictable offence and liable to five years' imprisonment who unlawfully takes or causes to be taken any *unmarried girl*, being *under* the age of *sixteen years*, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her.

2. It is immaterial whether the girl is taken with her own consent or at her own suggestion or not.

3. It is immaterial whether or not the offender believed the girl to be of or above the age of sixteen. R. S. C., c. 162, s. 44.

The first clause of this section is to the same effect as the Imperial Statute on the subject, (24-25 Vic., c. 100, s. 55).

It has been held that, if the girl, — without any persuasion, inducement or blandishment on the part of the defendant, — leaves her father, so that she has got fairly away from and entirely left home, and then *subsequently*, goes to the defendant, although, morally, it may be his duty to send her back to her father's possession, his not doing so is no infringement of this enactment: for it does not say that he shall *restore her*, but only that he shall not *take her away*. (57)

But, if the girl, while living at home with her father, leaves the house for a mere temporary purpose, intending to return home again, she is, in that case, still in her father's possession, within the meaning of the law, and if, while she is so out of her father's house, temporarily, the defendant induces her to run away with him, he is guilty of the above offence. (58)

Where the defendant met a girl in the street, and, after taking her with him to a neighboring town and there seducing her, returned with her and left her where he had met her, she going home to her father's house, where she lived, it was held that, the defendant, who had made no enquiry and did not know who the girl was nor whether she had a father living or not, could not be convicted of an offence, against section 55 of 24-25 Vic., c. 100, although he had no reason to believe and did not believe her to be a girl of the town. (59)

But such a case would come within the provisions of section 181, *ante*, so as to render the man guilty of having illicit connection with a girl under the age of sixteen.

It is an offence, under this law, to take away a natural or illegitimate daughter under sixteen from the possession of her putative father. (60)

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(56) R. v. Barrett, 9 C. & P., 387.
(57) R. v. Olifier, 10 Cox C. C., 402.
(58) R. v. Mycock, 12 Cox C. C., 28.
(59) R. v. Hibbert, L. R., 1 C. C. R., 184; 38 L. J. (M. C.), 61; 11 Cox C. C., 246. See, also, R. v. Green, 3 F. & F., 274.
(60) 1 Hawk., c. 11, s. 14; R. v. Cornfield, 2 Str., 1162; R. v. Sweeting, 1 East. P. C., 457.

It has been held to be an abduction, under this law, to induce the parents, by false and fraudulent representations, to allow the defendant to take the girl away. (61)

Where a girl was encouraged by her mother in a loose course of life, by permitting her to go out alone at night and dance at public-houses, from one of which places she went away with the defendant, it was held that the girl could not be said to be taken away against the mother's will within the meaning of this law. (62)

It should be proved that the girl was under sixteen and unmarried.

It has been held to be no defence, (63) and it is, by the third clause of the above section, expressly declared that it is immaterial, that, the offender believed the girl to be of or above the age of sixteen.

It has been held, and it is so declared by the second clause of the above section that the consent of the girl is immaterial. The gist of the offence is the taking of the girl out of the possession of her parents or of any one having legal care or charge of her, against their will, independently of the taker's motive or intent. So, that the taking need not be by force, active or constructive, and it is no legal excuse or any answer to the charge that there is an absence of any corrupt motive, or that the defendant made use of no other means than the common blandishments of a lover, to induce the girl to elope with and marry him. (64) And so, where the defendant went in the night to the girl's father's house and placed a ladder against her window, and held it for her to descend, which she did, and eloped with him, this was held to be a "taking out of the possession of her father," although the girl herself had proposed the plan to the defendant. (65)

Where, in another case the girl was persuaded by the defendant to go away with him from her father's house, without her father's consent, and she accordingly left home by a pre-arrangement between them and went and met the prisoner at an appointed place, without any intention of going back to her father, this was held to be a taking of the girl out of her father's possession, since up to the time of her meeting with the defendant as appointed, she had not yet absolutely renounced her father's protection, and was still in his constructive possession. (66)

The defendant, by arrangement with the girl, met her and stayed with her away from her father's house for several nights, sleeping with her; the jury found that the father did not consent to this, and that the defendant knew he did not; and they also found that he took the girl away with him in order to gratify his passions and with the intention of then letting her go home, and not with any intention of keeping her from her home permanently; and the conviction, under these circumstances, was held right. (67)

The defendant, by promises, induced a girl to leave her father's house and live with him; and it was held, that he could be convicted, under this

(61) R. v. Hopkins, C. & Mar., 254.
(62) R. v. Primelt, 1 F. & F., 50.
(63) R. v. Robins, 1 C. & K., 456; R. v. Booth, 12 Cox C. C., 231; R. v. Prince, L. R., 2 C. C. R., 154; 44 L. J. (M. C.), 122; 13 Cox C. C., 138.
(64) R. v. Kipps, 4 Cox C. C., 167; R. v. Booth, 12 Cox C. C., 231; R. v. Tursleton, 1 Lev., 257; 1 Sid., 387; 2 Keb., 32.
(65) R. v. Robins, 1 C. & K., 456.
(66) R. v. Mankletow, Dears., 159; 22 L. J. (M. C.), 115.
(67) R. v. Timmins, Bell, 276; 30 L. J. (M. C.), 45.

law, although not actually present or assisting the girl when she left her father's roof. (68)

A girl who is employed as a barmaid at a distance from her father's house is under the lawful charge of her employer and not in the possession of her father, and, therefore, an indictment will not lie for taking her out of her father's possession. (69)

A, a girl under sixteen, who, with her father's consent, was under the care of B, her uncle, was allowed, by B, to dine at the house of C, the husband of B's sister. C took A for a drive and stayed over night with her, at an hotel, where he debauched her. The next day he left her at B's. *Held*, that B had the lawful care of A, and that she was unlawfully taken out of his possession by C. (70)

A, having come to Victoria, British Columbia, from a town in the United States, wrote to a girl under sixteen, living with her parents in said town, urging her to come and join him, and, on receiving her reply consenting to come, he sent her money to pay her expenses; and she came to Victoria where A met her and took her to a boarding house where they passed the night together. Upon an indictment against A for abduction under section 283, it was held (Davie, C. J., and Crease, J., dissenting), that, inasmuch as, when the girl met A at Victoria, she had abandoned her father's possession and control, A was not guilty of committing, in Canada, the offence of taking her out of her father's control, and, further, that as the reception by the girl of the prisoner's letters was the motive cause of her leaving her father's control, the offence took place out of the jurisdiction of Canadian Courts. (71)

**284. Stealing children under fourteen.** — Every one is guilty of an indictable offence and liable to seven years' imprisonment who with *intent to deprive* any parent or guardian of any child, *under* the age of *fourteen* years, of the possession of such child, *or with intent to steal any article* about or on the person of such child, unlawfully —

(*a*) *takes* or *entices* away *or detains* any such child ; or

(*b*) *receives* or *harbours* any such child *knowing* it to have been dealt with as aforesaid.

2. Nothing in this section shall extend to any one who gets possession of any child, claiming in good faith a right to the possession of the child. R. S. C., c. 162, s. 45.

3. In this section the word "guardian" has the same meaning as it has in sections 183 and 186, as interpreted by section 186a. (Added by the *Criminal Code Amendment Act 1900*).

The English Statute (24-25 Vic., c. 100, s. 56), has the words, "by force or fraud," and provides that a person shall be guilty of the offence who, by force or fraud leads or takes away, or decoys or entices away any child, etc., so that in order to support a conviction in England for feloniously

(68) R. v. Robb, 4 F. & F., 59; Arch. Cr. Pl. & Ev., 21st Ed., 805.
(69) R. v. Henkers, 16 Cox C. C., 257; Arch. Cr. Pl. & Ev., 21st Ed., 806.
(70) R. v. Mondelet, 21 L. C. J., 154; Bur. Dig., 258.
(71) R. v. Blythe, 4 B. C. L. Rep., 276; 1 Can. Cr. Cas., 363; Can. Ann. Dig. [1896], 102.

and unlawfully, by fraud, taking away a child under fourteen, with intent thereby to deprive its father of its possession, it is necessary to make proof of the use of some fraud, although it is not necessary to prove that the fraud by means of which the possession of the child was obtained was practised upon the child itself. Where, therefore, a prisoner was convicted upon an indictment charging such an offence,—it having been proved that possession of the child, which was eleven weeks old, had been obtained by means of a fraud practiced upon the child's mother, it was held, that the prisoner was rightly convicted. (72)

In an English case, a woman, was held rightly convicted, upon evidence that the child, having been placed by its mother in the prisoner's service, was afterwards missing, and could not be discovered, and that the woman had given different accounts of what had become of the child, but implying that she had given her up to some third party, although there was no evidence that she still had possession of the child, nor indeed any evidence of where it was. (73)

In an American case it was held that, where a wife separates from and leaves her husband, taking her two-year-old child, and is assisted, in leaving her husband, by another person, and the child, after such separation, continues to be in the custody and under the control of the wife,—the person so assisting her to leave her husband is not guilty of unlawfully taking and carrying away the infant child, which the mother continues to retain in her care and possession. (74)

In another American case, it was held, by the Pennsylvania Supreme Court, that under a law of that state, inflicting a penalty for taking or decoying a child under ten years of age, with intent to deprive its parents or guardian of its possession or with intent to steal any article of value about its person, an indictment, omitting these essential ingredients of the offence, was fatally defective; and that an agreement between a father and other persons to get peaceable possession of his child is not a criminal conspiracy where unlawful means are agreed on or used to accomplish their purpose. The defendants in that case, Ira Myers and his mother were charged with having, with others, conspired to kidnap, decoy and carry away a child under the control and authority of Jessie Myers, and for having, in pursuance of such conspiracy, taken the child from her possession. The defects which the Court found in the indictment were, among others, that, it did not allege that the child was under ten years of age, nor that the accused intended to deprive its parents or other persons in lawful charge of the child of the possession, nor to steal any article about its person; but in turning, from the defects in the indictment, to the proof offered in support of the charge, the Court found the accused Ira Myers to be the father of the child, and that the other persons assisted him in obtaining, without violence or a breach of the peace, the possession of it; but it was contended for the prosecution that the agreement to assist in taking possession of the child constituted a conspiracy. The Court, however, held that, as the father could lawfully take peaceable possession of his own child, it was no offence to agree to aid him in doing so, there being no unlawful means agreed upon or used to accomplish their purpose. (75)

(72) R. v. Bellis, 17 Cox C. C., 660; 62 L. J. M. C., 155.
(73) R. v. Johnson, 15 Cox C. C., 481.
(74) S. v. Angel, (Kan. Supr. Ct.), 11 Cr. L. Mag., 788.
(75) C. v. Myers, S. C., 23 Atl. Rep., 164; 14 Cr. L. Mag., 252.

PART XXIII.

## DEFAMATORY LIBEL.

**285. Definition.** — (As amended by the *Criminal Code Amendment Act 1900*). A defamatory libel is matter published, without legal justification or excuse, *likely* to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or designed to insult the person of or concerning whom it is published.

2. Such matter may be expressed either in words legibly marked upon any substance whatever, or by any object signifying such matter otherwise than by words, and may be expressed either directly or by insinuation or irony.

**286.** Publishing a libel is exhibiting it in public, or causing it to be read or seen, showing or delivering it or causing it to be shown or delivered, with a view to its being read or seen by the person defamed or by any other person.

Section 285, contains the same definition of libel as that contained in section 227 of the English Draft Code, the only difference being that the latter has the word "*calculated*" in place of the word "*likely*" appearing above in italics; and, with the exception of a few variations, mostly verbal, the whole of the sections, (except section 291), of this part, down to and including section 302, *post*, are identical with the corresponding sections of the English Draft Code.

With regard to their definition of libel, the Royal Commissioners say, in a marginal note, that it is "the existing law, the criminality of libel depending upon its tendency to produce a breach of the peace;" and, in another note, they say, in reference to privileged communications, that "sections 229 to 237, inclusive, (corresponding with our sections 287, 288, 289, 290, 292, 293, 294, 295 and 296), are believed to declare the existing common law as to what constitutes a priviledged communication;" but that "there has been a diversity of judicial opinion upon this subject."

It will be seen, by the second clause of section 285, that the libellous matter may be either by words legibly marked, that is, written or printed, etc., on any substance, such as, for instance, paper, parchment, linen, wood, copper, glass, stone, etc.; or by any object signifying any such matter in some other way than by words, as, for instance, by a statue, (1) a wax model, (2) or an effigy, (3) etc., or by a picture, a drawing, a sketch, a painting, (4) an engraving, a photograph, etc., or by fixing up a gallows against a man's door. (5)

A chalk mark on a wall may be a libel; and, as the wall cannot be conveniently brought into Court, secondary evidence may be given of the mark. (6)

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(1) 1 Hawk. P. C., 542.
(2) Monson v. Tussauds Lim., [1894] 1 Q. B., 671; 63 L. J. Q. B., 454.
(3) Eyre v. Garlick, 42 J. P., 68.
(4) Austin v. Culpepper, 2 Show., 313; Du Bost v. Beresford, 2 Camp., 511.
(5) Hawk. P. C., 542.
(6) Tarpley v. Blaby, 7 C. & P., 395.

## PRIVILEGED PUBLICATIONS AND COMMUNICATIONS.

**287. Publication on invitation or provocation.** — No one commits an offence by publishing defamatory matter on the invitation or challenge of the person defamed thereby, nor if it is necessary to publish such defamatory matter in order to refute some other defamatory statement published by that person concerning the alleged offender, if such defamatory matter is believed to be true, and is relevant to the invitation, challenge or the required refutation, and the publishing does not in manner or extent exceed what is reasonably sufficient for the occasion.

This section provides that a defamatory publication shall be no offence, — 1, when it is published by invitation or challenge from the person defamed, or, 2, when it is a necessary refutation of a previously published defamatory statement; provided, in either case, it be relevant and be believed to be true.

**Invited or challenged publications.** — It would hardly be proper to punish communications procured by the complainant's own contrivance and request. If the only publication that can be proved is one made by the defendant in response to an application from the complainant or one of his agents or some one acting on his behalf, demanding an explanation, it seems only right that the answer, if fair and relevant, should be privileged. But this rule does not apply when there has been a previous unprivileged publication, by the defendant, of the same libel which causes or leads to enquiry by the party defamed; for, in that case, it is the defendant himself who has brought on the enquiry.

If there are rumors afloat prejudicial to a man's character and he endeavours to trace them to their source, all statements made *bona fide* to him or any agent of his, in the course of such an investigation, are rightly protected. (7) But it makes a great difference if the rumors originated with the defendant, so that what he has, himself, previously circulated produces the enquiry; and if, on being applied to, he acknowledges having originated the rumors and persists in and repeats the libellous or defamatory matter, or asserts his belief in it, the repetition will not be privileged, although thus elicited by the person defamed. (8)

### ILLUSTRATIONS.

A, a servant knowing the character which B, his master would give him, procured C, to write a letter to B, in order to obtain from the latter an answer upon which to ground proceedings for libel. *Held*, that such proceedings could not be maintained. (9)

A witness, (an agent of the plaintiff), hearing that the defendant had a copy of a libellous print, went to defendant's house, and asked to see it; the defendant thereupon produced it, and pointed out the figure of the

(7) Odg. Lib. & Sl., 3rd Ed., 255.

(8) Smith v. Mathews, 1 Moo. & Rob., 151; Griffiths v. Lewis, 7 Q. B., 61; 14 L. J. (Q. B.), 199; Richards v. Richards, 2 Moo. & Rob., 557; Force v. Warren, 15 C. B. (N. S.), 806.

(9) King v. Waring & Ux., 5 Esp., 15.

plaintiff and the other persons caricatured. Lord Ellenborough nonsuited the plaintiff, as there was no other publication proved. (10)

A, discharged B, his servant, and when applied to, by another gentleman, gave him a bad character. B's brother-in-law, C, thereupon repeatedly called on A, to inquire why he had dismissed B; and at last A wrote to C, stating his reasons specifically. B sued out a writ the same day the letter was written. *Held*, by Lord Mansfield, C. J., and Butler, J., that no action lay on such letter, as A was evidently entrapped into writing it. (11)

A friend of plaintiff's asked defendant to act as arbitrator between plaintiff and A, in a dispute about a horse. Defendant declined. The friend wrote again strongly urging defendant to use his influence with A, not to bring the case into court. Defendant again declined, and stated his reasons; and, on this letter, plaintiff brought an action. Subsequently another friend of the plaintiff's, with his knowledge and consent, wrote to defendant that she was confident he was misinformed about the plaintiff. Defendant replied that he believed A, and his servant, and not the plaintiff. On this plaintiff brought a second action of libel. *Held*, that both letters were privileged. (12)

The plaintiff was a builder, and contracted to build certain school-rooms at Bermondsey. The defendant started a false report, that in the building the plaintiff had used inferior timber; the report reached the plaintiff, who thereupon suspended the work, and demanded an inquiry; and the committee of the school employed defendant to survey the work and report. He reported falsely that inferior timber was used. Lord Lyndhurst directed the jury, that if they believed that the reports which produced the inquiry originated with the defendant, the defendant's report to the committee was not privileged. Verdict for the plaintiff. (13)

**Provoked publication.** — If a person is attacked in a newspaper, he may write back to rebut the charges made against him and may retort upon his assailant, when such retort is a necessary part of his defence, or fairly arises out of the charges made against him. (14) The privilege, however, extends only to such retorts as are a fair answer to the assailant's attacks.

ILLUSTRATIONS.

The plaintiff, a barrister, attacked the Bishop of Sodor and Man before the House of Keys in an argument against a private bill, imputing to the bishop improper motives in his exercise of church patronage. The bishop wrote a charge to his clergy refuting these insinuations, and sent it to the newspapers for publication. *Held*, that under the circumstances, the bishop was justified in sending the charge to the newspapers, for an attack made in public required a public answer. (15)

The defendant was a candidate for the county of Waterford. Shortly before the election, the Kilkenny Tenant Farmer's Association published in *Freeman's Journal* an address to the constituency, describing the defendant as "a true type of a bad Irish landlord — the scourge of the country," and charging him with tyranny and oppression towards his tenants, and especially towards the plaintiff, one of his former tenants. The defendant

(10) Smith v. Wood, 3 Camp., 323.
(11) Weatherston v. Hawkins, 1 T. R., 110.
(12) Whitely v. Adams, 15 C. B. N. S., 392; 32 L. J. C. P., 89.
(13) Smith v. Mathews, 2 Moo. & Rob., 151.
(14) O'Donoghue v. Hussey, Ir. R., 5 C. L., 124.
(15) Laughton v. Bishop of Sodor and Man, L. R., 4 P. C., 495; 42 L. J. P. C., 11.

thereupon published, also in *Freeman's Journal*, an address to the constituency, answering these charges, and, in so doing, necessarily libelled the plaintiff. *Held*, that such an address, being an answer to an attack, was *primâ facie* privileged. (16)

The plaintiff, a policy-holder in an insurance company, published a pamphlet accusing the directors of fraud. The directors published a pamphlet in reply, declaring the charges contained in the plaintiff's pamphlet to be false and calumnious, and also asserting that in a suit instituted by the plaintiff, the latter had sworn, in support of these charges, the opposite of his own handwriting. Cockburn, C. J., held the director's pamphlet *primâ facie* privileged, and directed the jury as follows: "If you are of opinion that it was published *bonâ fide* in defence of the company, and to prevent these charges from operating to their prejudice, and to vindicate the character of the directors, and not with a view to injure or lower the character of the plaintiff, and think that the publication did not go beyond the occasion, you ought to find for the defendants on the general issue." Verdict for defendants. (17)

A, the manager of a private lunatic asylum, unsuccessfully attempted to seize and carry off B, a lady, whom he *bonâ fide* believed to be insane. He did so at the request of her husband, proper certificates having been obtained and all the requirements of the Lunacy Act complied with. B, who was perfectly sane, constantly afterwards attacked A in the newspapers, challenging him to justify his conduct. A, at last, wrote a letter in answer to these attacks and sent it to the *British Medical Journal*. Huddleston, B, held this letter privileged. (18)

At a vestry meeting called to elect fresh overseers, A accused B, one of the outgoing overseers, of neglecting the interests of the vestry, and not collecting the rates; B retorted that A had been bribed by a railway company. *Held*, that the retort was a mere *tu quoque*, in no way connected with the charge made against B by A, and was therefore not privileged; for it was not made in self-defence, but in counter-attack. (19)

**288. Publishing in Courts of Justice.** — No one commits an offence by publishing any defamatory matter, in any proceeding held before or under the authority of any court exercising judicial authority, or in any inquiry made under the authority of any statute or by order of Her Majesty, or of any of the departments of Government, Dominion or Provincial.

See section 290, *post*, as to the publication of *fair reports* of public proceedings in any court of justice.

**289. Publishing parliamentary papers.** — No one commits an offence by publishing to either the Senate, or House of Commons, or to any Legislative Council, Legislative Assembly or House of Assembly, defamatory matter contained in a petition to the Senate, or House of Commons, or to any such Council or Assembly, or by publishing by order or under the authority of the Senate or

(16) Dwyer v. Esmonde, 2 L. R. (Ir.), 243.
(17) Kenig v. Ritchie, 3 F. & F., 413; R. v. Veley, 4 F. & F., 1117.
(18) Weldon v. Winslow, *Times* for March 14th — 19th, 1884; Coward v. Wellington, 7 C. & P., 531.
(19) Senior v. Medland, 4 Jur. N. S., 1039.

House of Commons, or of any such Council or Assembly, any paper containing defamatory matter or by publishing, in good faith and without ill-will to the person defamed, any extract from or abstract of any such paper.

With regard to the publication of parliamentary documents, see section 705, *post*.

In connection with the same subject, sections 6 and 7 of the R. S. C., chap. 163, remain unrepealed. (See Schedule Two, *post*.)

**290. Fair Reports of Proceedings of Parliament and Courts.** — No one commits an offence by publishing in good faith, for the information of the public, a fair report of the proceedings of the Senate or House of Commons, or any committee thereof, or of any such Council or Assembly, or any committee thereof, or of the public proceedings *preliminary* or *final* heard before any court exercising judicial authority, nor by publishing, in good faith, any fair comment upon any such proceedings.

The rule embodied in this section applies to all courts of justice, superior or inferior, of record or not of record. (20) It is immaterial whether the proceeding be *ex parte* or not; and recent decisions in England, — where the law on the subject is not so wide as ours as expressed in the above section, — shew that it is also immaterial whether the matter be one over which the court has jurisdiction or not, and whether it disposes of the case finally or sends it for trial to a higher tribunal. (21)

Formerly, the law was not construed so as to privilege reports of proceedings (especially when *ex parte*) before police magistrates or justices of the peace; and many judges, by their *dicta*, denied any privilege to fair and accurate reports of *ex parte* proceedings, even in the superior courts; (22) but a different view was afterwards taken by such judges as Cockburn, C. J., (23) and Lawrence, J., (24) who saw a good reason for such a privilege in the fact that "the general advantage to the country of having the proceedings of all courts of justice made public more than counterbalances the inconvenience to private persons, whose conduct may be the subject of such proceedings."

In the course of his remarks in the case of Wason v. Walter, Cockburn, C. J., said, "The true criterion of the privilege is not whether the report was or was not of a proceeding *ex parte*, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public, and innocent of all intention to do injury to the reputation of the party affected."

It was not until 1878 that the law became settled, in England, by the decision in Usill's case, in which it was held that the privilege extended to all *bonâ fide* and correct reports of all proceedings in a magistrate's court, whether *ex parte* or otherwise.

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(20) Odg. Lib. & Sl., 3rd Ed., 278.
(21) Usill v. Hales, 47 L. J., C. P., 323.
(22) Maule, J., in Hoare v. Silverlock, 19 L. J. C. P., 215, and Abbott, C. J., in Duncan v. Thwaites, 3 B. & C., 556.
(23) In Wason v. Walter, L. R., 4 Q. B., 87.
(24) In R. v. Wright, 8 T. R., 298.

Usill's case arose out of an item, which appeared in three London newspapers, in the following words: —

"Three gentlemen, civil engineers, were among the applicants to the magistrate yesterday, and they applied for criminal process against Mr. Usill, a civil engineer of Great Queen Street, Westminster. The spokesman stated that they had been engaged in the survey of an Irish railway by Mr. Usill, and had not been paid what they had earned in their various capacities, although from time to time they had received small sums on account; and, as the person complained of had been paid, they considered that he had been guilty of a criminal offence in withholding their money. Mr. Woolrych said it was a matter of contract between the parties; and although, on the face of the application they had been badly treated, he must refer them to the County Court."

Mr. Usill sued the proprietor of each of three newspapers, and the three actions were tried together before Lord Coleridge. The learned Judge told the jury that the only question for their consideration was whether or not the publication complained of was a fair and impartial report of what took place before the magistrate; and that, if they found that it was so, the publication was privileged. The jury found that it was a fair report of what occurred, and accordingly returned a verdict for the defendant in each case. *Held*, that the report was privileged, although the proceedings were *ex parte*, and although the magistrate decided that he had no jurisdiction over the matter. (25)

The same principle was followed in a still more recent English case, in which a fair and accurate report of an *ex parte* application made to justices in open court for the issue of a summons for perjury was held privileged, although, in that case, the justices granted the summons, and the matter was not finally disposed of on that day but came on for hearing a week later, and was then dismissed. The Court of Appeal held that it was enough if there was a final decision "at one stage or other of the proceedings," and that the reporters might report the proceedings at each stage. (26) In other words, a newspaper reporter may report everything that occurs publicly in open court without fear of any action, provided only that his reports are fair and accurate. (27)

So, that although, in the English Statutory Law relating to the subject, there is no provision, — such as that contained in our law, — expressly including both *preliminary* and final proceedings, the rule privileging fair and accurate reports of proceedings before a public court of justice, is held, in England, to extend to preliminary as well as to final proceedings.

There are two cases, however, in which reports of judicial proceedings, although fair and accurate, are not privileged. The first is where the Court has itself prohibited the publication, as it has the power to do pending litigation, (28) although nowadays such a prohibition is very rare; (29) and the second is where the subject matter of the trial is an obscene or blasphemous libel or where for any other reason the proceedings are unfit for publication. It is not justifiable to publish even a fair and accurate report of such proceedings; and such a report is indictable as a criminal libel. (30)

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(25) Usill v. Hales, Usill v. Brearley, and Usill v. Clarke, 3 C. P. D., 319; 47 L. J. C. P., 332.

(26) Kimber v. The Press Association, [1893] 1 Q. B., 65.

(27) Odg. Lib. & Sl., 3rd Ed., 281.

(28) Per Turner, L. J., in Brook v. Evans, 29 L. J., Ch., 616. And see R. v. Clement, 2 B. & A., 218.

(29) See Levy v. Lawson, 27 L. J., Q. B., 283.

(30) R. v. Mary Carlile, 3 B. & A., 167; Steele v. Brannan, L. R., 7 C. P., 261; Re "Evening News," 3 Times L. R., 255.

**291. Fair reports of public meetings.** — No one commits an offence by publishing in good faith, in a newspaper, a fair report of the proceedings of any public meeting if the meeting is lawfully convened for a lawful purpose and open to the public, and if such report is fair and accurate, and if the publication of the matter complained of is for the public benefit, and if the defendant does not refuse to insert in a conspicuous place in the newspaper in which the report appeared a reasonable letter or document of explanation or contradiction by or on behalf of the prosecutor.

The provision contained in this section is not contained in the English Draft Code.

**Reports of public meetings.** — It will be seen by this section, 291, that, in order for the report of the proceedings of a public meeting to be privileged, not only must the meeting be one open to the public, but the matter reported and published, as an account of what has taken place at such public meeting, must be matter which is of public concern, and the publication of which is for the public benefit.

This is only right; for it would be a very serious matter to privilege the reproduction in public print of everything of a private nature, or anything not of public interest spoken, at a meeting, of and injurious to the reputation of individuals. A meeting may be thinly attended, or the audience may know the speaker who utters the slanderous words at such meeting to be unworthy of credit, and may not believe what he says. But it would be a terrible thing for the person defamed if such words could be printed and published to all the world, merely because they were uttered at a meeting. Charges recklessly made in the excitement of the moment might thus be diffused throughout the country, and would remain recorded in a permanent form against a perfectly innocent person. We cannot tell into whose hands a copy of that newspaper may come. Moreover, additional importance and weight is given to such a calumny by its publication in the columns of a respectable paper. Many people will believe it merely because it is in print. If the report is to be spread over the world by means of the press, the malignant falsehoods of the vilest of mankind, which would not receive the least credit where the author is known, would make an impression which it would require much time and trouble to erase, and which it might be difficult, if not impossible, ever completely to remove. (31)

Section 291 is to the same effect as was section 2, (now repealed), of the Imperial Statute 44 and 45 Vic., c. 60, (the *Newspaper Libel and Registration Act, 1881*). The present English Law on the subject is contained in the *Law of Libel Amendment Act, 1888*, section 4, which is as follows: —

"A fair and accurate report published in any newspaper of the proceedings of a public meeting, or, (except where neither the public or any newspaper reporter is admitted), of any meeting of a vestry, town council, school board, board of guardians, board or local authority formed or constituted under the provision of any act of parliament, or of any committee appointed by any of the above mentioned bodies, or of any meeting of any commissioners authorized to act by letters-patent, Act of Parliament, warrant under the Royal Sign Manual, or other lawful warrant or authority, select committees of either House of Parliament, justices of the peace in quarter sessions assembled for administrative or deliberative purposes, and

(31) See Remarks of Lord Campbell in Davison v. Duncan, 26 L. J., Q. B., 106, and of Best, C. J., in De Crespigny v. Wellesley, 5 Bing., 402-406.

the publication at the request of any government office or department, officer of state, commissioner of police, or chief constable, of any notice or report issued by them for the information of the public, shall be privileged unless it shall be proved that such report or publication was published or made maliciously: Provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter: Provided, also, that the protection intended to be afforded by this section shall not be available as a defence in any proceedings if it shall be proved that the defendant has been requested to insert in the newspaper in which the report or other publication complained of appeared, a reasonable letter or statement, by way of contradiction or explanation of such report or other publication, and has refused or neglected to insert the same: Provided, further, that nothing in this section contained shall be deemed or construed to limit or abridge any privilege now by law existing, or to protect the publication of any matter not of public concern and the publication of which is not for the public benefit.

"For the purposes of this section *public meeting* shall mean any meeting *bonâ fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted."

**292. Fair discussion.** — No one commits an offence by publishing any defamatory matter which he, on reasonable grounds, believes to be true, and which is relevant to any subject of public interest, the public discussion of which is for the public benefit.

**Matters of public interest.** — Among matters of public interest Odgers (32) mentions the following: —

1. *Affairs of State:* (including the policy, foreign or domestic, of the government, the conduct of public servants, all suggestions of reforms in existing laws, all bills before parliament, the adjustment and collection of taxes, etc.);

2. *The administration of justice;* (including the conduct of suitors and witnesses, the verdicts of juries, etc., but on these, during the progress of a trial there should be nothing beyond simple reports, and no comments until after the trial is ended);

3. *Public institutions and local authorities;* (including town councils, school boards, boards of health, vestries, hospitals, colleges, asylums, etc.);

4. *Ecclesiastical affairs:* (including a bishop's government of his diocese, a rector's management of his parish, etc.);

5. *Books, pictures and architecture;*

6. *Theatres, concerts and other public entertainments;*

7. Other appeals to the public, (as where a man by his conduct brings himself or his inventions or the goods in which he deals within the rule relating to public interest or where a man puts himself prominently forward and acquires for a time a *quasi*-public position).

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Condemnation of the foreign policy of the Government, however sweeping, is no libel.

The evidence before a Royal Commission is matter *publici juris*, and everyone has a perfect right to criticise it. (33)

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(32) Odg. Lib. & Sl., 3rd Ed., 46-57.

(33) Per Wickens, V. C., in Mulkern v. Ward, L. R., 13 Eq., 622; 41 L. J., Ch., 464.

So is evidence taken before a Parliamentary Committee on a local gas bill. (34)

A report of the Board of Admiralty upon the plans of a naval architect, submitted to the Lords of the Admiralty for their consideration, is a matter of national interest. (35)

All appointments by the Government to any office are matters of public concern. (36)

A newspaper is entitled to comment on the fact (if it be one) that corrupt practices extensively prevailed at a recent Parliamentary election so long as it does not make charges against individuals. (37)

A meeting assembled to hear a political address by a candidate at a Parliamentary election, and the conduct thereat of all persons who take any part in such meeting, are fair subjects for *bonâ fide* discussion by a writer in a public newspaper. (38)

The details of a long-protracted squabble between a professional singer and a great composer do not become matters of public interest, merely because the former ultimately applies to a police magistrate for a summons against the latter. (39)

"The management of the poor and the administration of the poor-law in each local district are matters of public interest." (40)

The official conduct of a way-warden may be freely criticised in the local press. (41)

The manner in which a coroner's officer treats a deceased's poor relatives when serving them with a summons for an inquest, and the behaviour of such officer in court are matters of public concern. (42)

The conduct of a trustee of a private corporation, as such trustee, is not a matter of public interest. (43)

The press may comment on the fact of the incumbent of a parish having, contrary to the wishes of the church-warden, allowed books to be sold in church during the service, and cooked a chop in the vestry after service. (44)

The court were equally divided on the question whether sermons preached in open church, but not printed and published, were matter for public comment. (45)

*Quære*, would it not depend upon whether or not the sermon itself dealt with matters of public interest?

The articles which appear in a newspaper and its general tone and style

(34) Hedley v. Barlow, 4 F. & F., 224.
(35) Henwood v. Harrison, L. R., 7 C. P., 606; 41 L. J. C. P., 206.
(36) Seymour v. Butterworth, 3 F. & F., 372.
(37) Wilson v. Reed and others, 2 F. & F., 149.
(38) Davis v. Duncan, L. R., 9 C. P., 396; 43 L. J. C. P., 185.
(39) Weldon v. Johnson, *Times* for May 27th, 1884.
(40) Per Cockburn, C. J., in Purcell v. Sowler, 2 C. P. D., 218; 46 L. J. C. P., 308.
(41) Harle v. Catherall, 14 L. T., 801.
(42) Per Bowen, J., in Sheppard v. Lloyd, *Daily Chronicle* for March 11th, 1882.
(43) Wilson v. Fitch, 41 Cal., 363.
(44) Kelly v. Tinling, L. R., 1 Q. B., 699; 35 L. J. Q. B., 231.
(45) Gutherole v. Miall, 15 M. & W., 319.

may be the subject of adverse criticism, as well as any other literary production; but no attack should be made on the private character of a writer on its staff. (46)

A comic picture of the author of a book, *as author*, bowing beneath the weight of his volume, is no libel; though a personal caricature of him as he appeared in private life would be. (47)

Criticism, however trenchant, on any new poem or novel, or on any picture exhibited in a public gallery, is no libel. (48)

But to maliciously pry into the private life of any poet, novelist, artist, or statesman, is indefensible.

A gentleman unconnected with the stage got up what he called "a Dramatic Ball." The company was disorderly and far from select. No actor or actress of any reputation was present at the ball, or took any share in the arrangements. The *Era*, the special organ of the theatrical profession, published an indignant article, commenting severely on the conduct of the prosecutor in starting such a ball for his own profit, and particularly in calling such an assembly "a Dramatic Ball." Criminal proceedings resulted in a verdict of "Not guilty." (49)

A newspaper, commenting on a flower-show, denounced one exhibitor by name as "a beggarly soul," "famous in all sorts of dirty work," and spoke of "the tricks by which he and a few like him used to secure prizes" as being now "broken in upon by some judges more honest than usual." Such remarks are clearly *not* fair criticism on the flower-show. (50)

Whoever seeks notoriety, or invites public attention, is said to challenge public criticism; and he cannot resort to the law courts if that criticism be less favorable than he anticipated. (51)

So that, if a complainant in a prosecution for defamatory libel, has himself called public attention to the subject matter of the alleged libel by obtaining the publication of newspaper articles commending his conduct, he thereby invites public criticism thereof and cannot object that the answer to his own articles is not a publication in the public interest. (52)

**293. Fair comment.**— No one commits an offence by publishing fair comments upon the public conduct of a person who takes part in public affairs.

2. No one commits an offence by publishing fair comments on any published book or other literary production, or any composition or work of art or performance publicly exhibited, or any other communication made to the public on any subject, if such comments are confined to criticism on such book or literary production, composition, work of art, performance or communication.

We have seen already, (53) that,—side by side with the gradual devel-

(46) Heriot v. Stuart, 1 Esp., 437; Stuart v. Lovell, 2 Stark., 93; Campbell v. Spottiswoode, 3 F. & F., 421; 32 L. J. Q. B., 185.
(47) Sir John Carr v. Hood, 1 Camp., 355*n*.
(48) Strauss v. Francis, 4 F. & F., 939, 1107; 16 L. T., 674.
(49) R. v. Ledger, *Times* for Jan. 14th, 1880. And see Dibdin v. Swan and Bostock, 1 Esp., 28.
(50) Green v. Chapman, 4 Bing. N. C., 92.
(51) Odg. Lib. & Sl., 3rd Ed., 56.
(52) R. v. Brazeau, 3 Can. Cr. Cas., 89.
(53) See comments under section 124, *ante*.

opment and advance of broader popular views and sentiments, — corresponding changes and improvements, in the general law of libel, have been effected, partly by express legislation on that subject, (54) and partly by the tacit establishment and judicial recognition of the modern rule or right of fair comment; so that the old idea of libel, — written blame, *true* or *false* of any man *public* or *private*, — which held firm possession of the judicial mind, a hundred years ago, has long since, been relegated to a place among the things of the past, and has given way to the more modern, common sense doctrine which allows, to every man, the right to give free and honest expression to his views on matters of public interest and general concern.

In the words of Cockburn, C. J., — "Our law of libel has, in many respects, only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognized. Comments on government, on ministers and officers of state, on members of both Houses of Parliament, on judges and other public functionaries, are now made every day, which half a century ago would have been the subject of actions or *ex officio* informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that, though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties?" (55)

The real ground upon which the right of fair and honest comment and criticism rests is not, in a strictly legal sense, that of the matter being privileged by reason of the occasion, but that honest criticism is no libel; in other words, when anything defamatory is used in the course of any criticism, it is no longer criticism, so far as the defamatory part of it is concerned.

Odgers points out that true criticism differs from defamation in the following particulars: —

"1. Criticism deals only with such things as invite public attention, or call for public comment. It does not follow a public man into his private life, or pry into his domestic concerns;

2. Criticism never attacks the individual, but only his *work*. Such work may be either the policy of a government, the action of a member of parliament, a public entertainment, a book published, or a picture exhibited. In every case the attack is on a man's *acts*, or on some *thing* and not upon the man himself. A true critic never indulges in personalities, but confines himself entirely to the merits of the subject matter before him;

3. The critic never takes advantage of the occasion to gratify private malice, or to attain any other object beyond the fair discussion of matters of public interest, and the judicious guidance of the public taste. He will carefully examine the production before him, and then honestly and fearlessly state his true opinion of it." (56)

"Every one has a right to publish such fair and candid criticism, even

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(54) Fox's Libel Act, 1792, (32 Geo. 3, c. 60); Lord Campbell's Act, (6-7 Vic., c. 96); 37 Vic., c. 38; R. S. C., c. 163; *The Newspaper Libel and Registration Act, 1881*, (Imp.); *The Law of Libel Amendment Act, 1888*, (Imp.).

(55) Chief Justice Cockburn's Rem. in Wason v. Walter, L. R. 4 Q. B., 93, 94.

(56) Odgers' Lib. & Sl., 3rd Ed., 34, 35.

"although the author may suffer loss from it. Such a loss the law does not consider as an injury, because it is a loss which the party ought to sustain. It is, in short, the loss of fame and profits to which he was never entitled. * * * Reflection upon personal character is another thing. Show me an attack upon the moral character of the plaintiff, or any attack upon his character unconnected with his authorship, and I should be as ready as any judge who ever sat here to protect him. But, I cannot hear of malice on account of turning his works into ridicule." (57)

"Liberty of criticism must be allowed, or we should neither have purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science. That publication, therefore, I shall never consider as a libel, which has for its object, not to injure the reputation of any individual, but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality." (58)

"A critic must confine himself to criticism, and not make it the veil for personal censure, nor allow himself to run into reckless and unfair attacks merely from the love of exercising his power of denunciation." (59)

Comment on well-known facts, or facts, which are admitted to exist is a very different thing from asserting as a fact, something which is unsubstantiated, and then commenting upon the thing so asserted and unsubstantiated.

The very statement of the rule as to fair and *bonâ fide* comment on a matter of public interest assumes that the matters commented upon have been, some how or other, ascertained to be actual facts. It does not mean that a man may invent something, and then proceed to comment upon it, in what would be a fair and *bonâ fide* manner, if the thing were actually a fact well known or admitted.

It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to make the bare assertion that he has been guilty of particular acts of misconduct.

Although the right to comment upon the public acts of public men is not the peculiar privilege of the press, but the right of citizens generally, and although, in strict law, newspaper writers stand in no better position than any other person, still they are usually allowed greater latitude by juries; for, in a great measure, the duty of watching narrowly the conduct of government officials and the working of all public institutions, and of commenting freely on all matters of general concern to the nation, and of fearlessly exposing abuses, is a duty which has come to be looked upon, by the public at large, as one within the peculiar province of the press.

Odgers also points out that "*Comment* and *criticism* on matters of public interest stand on a very different footing from *reports* of judicial or Parliamentary proceedings. Such reports are privileged, so long as they are fair and accurate *reports*, and nothing more. But so soon as there is any attempt at *comment*, the privilege is lost. In short, report and comment are two distinct and separate things. A report is the mechanical reproduction, more or less condensed or abridged, of what actually took place: comment is the judgment passed, on the circumstances reported, by one who has applied his mind to them. *Fair reports* are *privileged* publications; while *fair comments*, if on matters of public interest, are, as such, *no libels at all*." (60)

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(57) Rem. of Lord Ellenborough, in the celebrated case of Sir John Carr. v. Hood, 1 Camp., 355 *n*.

(58) Lord Ellenborough, in Tabart v. Tipper, 1 Camp., 351.

(59) Per Huddleston, B., in Whistler v. Ruskin, *Times* for Nov. 27th, 1878.

(60) Odgers, Lib. & Sl., 3rd Ed., 34.

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A newspaper is entitled to comment upon the hearing of a criminal charge and the evidence produced thereat, and discuss the conduct of the magistrates in dismissing the charge without hearing all the evidence; but not to disclose "*evidence which might have been adduced*" and argue therefrom that the accused was guilty of the felony. (61)

A and B owned the *Natal Witness*, in which they attacked the official conduct of C the British Resident Commissioner in Zululand, asserting that he had violently assaulted a Zulu chief, that he had set on his native police to assault and abuse others, etc. They declared that though doubt had been thrown on these stories they would prove to be true on investigation. They then proceeded, on the assumption that the charges were true, to comment on C's conduct in offensive and injurious language. At the trial, it was proved that the charges were without foundation; and A and B made no attempt to support them by evidence. Verdict for £500. Motion for a new trial refused by Supreme Court of Natal. *Held*, on appeal to Privy Council that the distinction must be closely drawn between comment or criticism, and allegations of fact; and that the publication was in no way privileged. (62)

A newspaper reported that the mother of a lady, dead and buried, had applied to the coroner, on affidavits that the body might be exhumed, and proceeded to give a sensational narrative of shocking acts of cruelty to the deceased committed by her husband, imputing that he had caused her death. This narrative commenced — "From inquiries made by our reporter it appears," etc. In reality the reporter had made no inquiries; he had merely read the affidavits, and accepted the *ex parte* statements contained in them as truth; they were in fact wholly false. He was convicted and fined £50. (63)

A Dublin newspaper asserted that plaintiff, the manager of the Queen's Printing Office in Ireland, had corruptly supplied *Freeman's Journal* with official information and surreptitious copies of official documents. A plea of fair comment, stating that *Freeman's Journal* did somehow get official information earlier than other papers, and that defendant *bonâ fide* believed that such information could only have been obtained from the Queen's Printing Office, was held bad on demurrer. (64)

It is not a fair comment on any legal proceedings to insinuate that a particular witness committed perjury in the course of them. (65)

A, in "A History of New Zealand," stated that B, a cavalry lieutenant, had charged at some women and children who were harmlessly hunting pigs, "and cut them down gleefully and with ease;" that he had dismissed a subordinate officer who protested against this cruelty, and that he was known among the Maoris as "Kohuru" (the murderer). A, admitted that these facts did not appear in official reports, or in any other history of New Zealand; but he called a witness who had made a statement to the Governor of New Zealand on hearsay evidence, containing the same charge, a copy of which statement the Governor had forwarded to A. *Held*, no defence. Verdict £5,000, damages. (66)

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(61) Hibbins v. Lee, 4 F. & F., 243; 11 L. T., 541. Helsham v. Blackwood, 20 L. J. C. P., 187; 15 Jur., 861.

(62) Davis & Sons v. Shepstone, 11 App. Cas., 187; 55 L. J. P. C., 51.

(63) R. v. Andrew Gray, 26 J. P., 663.

(64) Lefroy v. Burnside, (No. 2), 4 L. R. Ir., 557.

(65) Roberts v. Brown, 10 Bing., 519; 4 Moo. & S., 407.

(66) Bryce v. Rusden, 2 Times L. R., 435. See, also, Brenon v. Ridgway, 3 Times L. R., 592.

**294. Seeking remedy for grievance.** — No one commits an offence by publishing defamatory matter for the purpose, in good faith, of seeking remedy or redress for any private or public wrong or grievance from a person who has, or is reasonably believed by the person publishing to have, the right or be under obligation to remedy or redress such wrong or grievance, if the defamatory matter is believed by him to be true, and is relevant to the remedy or redress sought, and such publishing does not in manner or extent exceed what is reasonably sufficient for the occasion.

In making an application for the purpose of obtaining redress for some injury received, care should be taken to make the application to some one having jurisdiction to entertain it, or having power to redress the grievance, or who is *reasonably believed*, by the applicant, to be under some obligation to afford a remedy; for if the applicant recklessly make statements to some one who is, as he ought to have known, altogether unconcerned with the matter, the privilege may be lost. (67)

A letter to the Secretary of War, with the intent to prevail on him to exert his authority to compel the plaintiff (an officer of the army) to pay a debt due from him to defendant, was held privileged, although the Secretary of War had no *direct* power or authority to order the plaintiff to pay his debt. "It was an application," says Best, J., "for the redress of a grievance, made to one of the King's ministers, who, as the defendant honestly thought, had authority to afford him redress." (68)

The inhabitants of a district prepared a memorial charging plaintiff, a teacher in a district school, with drunkenness and immorality, and sent it to the local superintendant of schools. It ought strictly to have been sent first, to the trustees of that particular school, who would, then, if they thought fit, in due course forward it to the local superintendent to take action upon it. *Held*, that the publication was still *primâ facie* privileged, although, by a mistake easily made, sent to the wrong quarter in the first instance. (69)

An elector of Frome petitioned the Home Secretary, stating that plaintiff, a magistrate of the borough, had made speeches inciting to a breach of the peace, and praying for an inquiry, and for plaintiff's removal from the commission of the peace. Such petition was held to be privileged, although it should more properly have been addressed to the Lord Chancellor. (70)

**295. Answers to inquiries.** — No one commits an offence by publishing, in answer to inquiries made of him, defamatory matter relating to some subject as to which the person by whom, or on whose behalf, the inquiry is made has, or on reasonable grounds is believed by the person publishing to have, an interest in knowing the truth, if such matter is published for the purpose, in good faith, of giving information in respect thereof to that person, and if such defamatory matter is believed to be true, and is *relevant*

(67) 1 Hawk. P. C., 544.
(68) Fairman v. Ives, 5 B. & Ald., 642; 1 D. & R., 252.
(69) McIntyre v. McBean, 13 U. C. (Q. B.), Rep., 534.
(70) Harrison v. Bush, 25 L. J. Q. B., 23, 59; Searll v. Dixon, 4 F. & F. 250.

to the inquiries made, and also if such publishing does not in manner or extent exceed what is reasonably sufficient for the occasion.

The answer to an enquiry should not consist of irrelevant information gratuitously volunteered. For instance, if A. asks B. the name and address of C. B is not justified in launching out into some disparagement of C's credit or conduct.

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If A. is about to have dealings with B. but first comes to C. and confidentially asks him his opinion of B, C's answer is privileged. (71)

If a friend tells me he wants a good lawyer to act for him and asks my opinion of Smith, I am justified in telling him all I know for or against Smith. But if a stranger asks me in the train, "Is not that gentleman a lawyer?" I should not be justified in replying, "Yes, but he ought to have to have been stripped of his gown long ago."

A met B. and addressing him said: "I hear that you say the bank of Bromage and Snead at Monmouth has stopped. Is it true?" B answered. "Yes. I was told so. It was so reported at Cricklewell; nobody would take their bills, and I came to town in consequence of it myself." *Held*, that if B understood A to be asking for information by which to regulate his conduct, and spoke the words by way of honest advice, they were *primâ facie* privileged. (72)

A was asked to sign a memorial, to retain B as trustee of a charity from which office he was about to be removed. A refused to sign, and on being pressed for his reasons, stated them. *Held*, privileged. (73)

A had been a Major-General commanding irregular troops during the Crimean war. Complaint having been made of the insubordination of the troops, the corps commanded by A was placed under the superior command of General Vivian. A then resigned, and General Vivian directed General Shirley to inquire and report on the state of the corps, and referred him for information on the matter to B. General Vivian's private secretary and civil commissioner. All communications made by B to General Shirley touching the corps and A's management of it are privileged, if the jury find that B honestly believed that he was acting within the scope of his duty in making them. (74)

Where a father employed the defendant to make inquiries about the position and antecedents of his daughter's husband, a report by the defendant to the father of the result of his inquiries is privileged. (75)

Nash selected A to be his attorney in an action. B, apparently a total stranger, wrote to Nash to deprecate his so employing A. This was held to be clearly *not* a confidential communication. (76)

A husband asked a medical man to see his wife and ascertain her mental condition. He reported to the husband that she was insane. *Held*, a privileged communication. (77)

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(71) Story v. Challands, 8 C. & P., 234.
(72) Bromage v. Prosser, 4 B. & Cr., 247; 1 C. & P., 475.
(73) Cowles v. Potts, 34 L. J. Q. B., 247.
(74) Beatson v. Skene, 5 H. & N., 838; 29 L. J. Ex., 430; Hopwood v. Thorn, 19 L. J. C. P., 94.
(75) Atwill v. Mackintosh, 6 Lathrop (120 Mass.), 177.
(76) Godson v. Home, 1 B. & B., 7; 3 Moore, 223.
(77) Weldon v. Winslow, Times for March 14th to 19th, 1884.

I am not justified in standing at the door of a tradesman's shop and voluntarily defaming his character to his intending customers. But if an intending customer comes to me and inquires as to the respectability or credit of that tradesman, it is my duty to tell him all I know.

Horsford was about to deal with the plaintiff, when he met the defendant, who said at once, without his opinion being asked at all. "If you have anything to do with Storey, you will live to repent it; he is a most unprincipled man," etc. Lord Denman directed a verdict for the plaintiff, because the defendant began by making the statement, without waiting to be asked. (78)

**296. Giving information.** — No one commits an offence by publishing to another person defamatory matter for the purpose of giving information to that person with respect to some subject as to which he has, or is, on reasonable grounds, believed to have, such an interest in knowing the truth as to make the conduct of the person giving the information reasonable under the circumstances: Provided, that such defamatory matter is relevant to such subject, and that it is either true, or is made without ill-will to the person defamed, and in the belief, on reasonable grounds, that it is true.

In a marginal note, upon the subject of this section, the Royal Commissioners cite, as an authority to be referred to, in connection with this class of privileged communications, the case of Coxhead v. Richards. (79)

In that case the Judges of the English Court of Common Pleas stood equally divided, as to whether a man may inform the owner of a ship that his captain has been guilty of gross misconduct at sea. A, the defendant in the case, had received, from an old and intimate friend, B, the first mate of a merchant ship a letter stating that he, B, was placed in a very awkward position owing to the drunken habits, etc., of C, the captain of the ship, of which B was the first mate, and saying, — "How shall I act? It is my duty to write to Mr. Ward [the owner of the ship], but my doing so would ruin the captain and his wife and family." A, — after much deliberation and consultation with other nautical friends, — thought it his duty to shew the letter to Ward, and did so; where upon Ward dismissed C from his position as captain. A knew nothing of the facts mentioned in B's letter, except from the letter itself. Tindal, C. J., told the jury that the publication of the letter by A, in shewing it to Ward was *primâ facie* privileged; and they negatived malice. As the full Court was afterwards equally divided on the question of whether the shewing of the letter was privileged the verdict rendered by the jury in favor of the defendant stood.

There are many authorities shewing that if a writing, although injurious to another's character, be published, without intent to injure his character, but *bonâ fide* for the purpose of investigating a fact in which the person making it is interested, or, in which the person to whom it is made is interested, or in the performance of a legal, naval, military, moral or social duty, it is not punishable as a libel. (80)

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(78) Storey v. Challands, 8 C. & P., 234.

(79) Coxhead v. Richards, 15 L. J., C. P., 278.

(80) Harrison v. Bush, 25 L. J., Q. B., 25; Whiteley v. Adams, 33 L. J., C. P., 89; Dawkins v. Lord Paulet, L. R., 5 Q. B., 94, 102; Robshaw v. Smith, 38 L. T., 423.

ILLUSTRATIONS.

My regular solicitor may, unasked, give me information concerning third persons of which he thinks it to my interest that I should be informed, even although not at the moment conducting legal proceedings for me. (81)

A solicitor who is conducting a case for a minor may inform his guardian of the minor's misconduct. (82)

A timekeeper employed on public works, on behalf of a public department, wrote a letter to the secretary of the department, imputing fraud to the contractor. Blackburn, J., directed the jury that if they thought the letter was written in good faith and in the discharge of the defendant's duty to his employers, it was privileged, although written to the wrong person. (83)

A relation may confidentially advise a lady not to marry a particular suitor, and assign reasons, provided he really believes in the truth of the statements he makes. (84)

A and B were joint owners of *The Robinson*, and engaged C as master; in April, 1843, A purchased B's share; in August, 1843, A wrote a business letter to B, claiming a return of £150, and incidentally libelled C. *Held* a priviledged communication, as A and B were still in confidential relationship. (85)

The defendant, a linendraper, dismissed his apprentice without sufficient legal excuse: he wrote a letter to her parents, informing them that the girl would be sent home, and giving his reasons for her dismissal. Cockburn, C. J., held this letter privileged, as there was clearly a confidential relationship between the girl's master and her parents. (86)

A, B, and C, are brother officers in the same regiment. A meets B and says, "I have learned that C has been guilty of an atrocious offence: I wish to consult you whether I should divulge it — whether I should speak of it to the commanding officer." Such remark and the discussion that ensues would be privileged, if *bonâ fide*. (87)

**297. Selling Periodicals containing defamatory Libel.** — Every proprietor of any newspaper is presumed to be criminally responsible for defamatory matter inserted and published therein, but such presumption may be rebutted by proof that the particular defamatory matter was inserted in such newspaper without such proprietor's cognizance, and without negligence on his part.

2. General authority given to the person actually inserting such defamatory matter to manage or conduct, as editor or otherwise, such newspaper, and to insert therein what he in his discretion thinks fit, shall not be negligence within this section unless it be

(81) Davis v. Reeves, 5 Ir. C. L. R., 79.
(82) Wright v. Woodgate, 2 C. M. & R., 573.
(83) Searll v. Dixon, 4 F. & F., 250.
(84) Todd v. Hawkins, 2 M. & Rob., 20; 8 C. & P., 88.
(85) Wilson v. Robinson, 7 Q. B., 68; 14 L. J. Q. B., 196.
(86) James v. Jolly, Bristol Summer Assizes, 1879. Odg. Lib. & Sl., 3rd Ed., 258.
(87) Bell v. Parke, 10 Ir. C. L. R., 284.

proved that the proprietor, when originally giving such general authority, meant that it should extend to inserting and publishing defamatory matter, or continued such general authority knowing that it had been exercised by inserting defamatory matter in any number or part of such newspaper.

3. No one is guilty of an offence by selling any number or part of such newspaper, unless he knew either that such number or part contained defamatory matter, or that defamatory matter was habitually contained in such newspaper.

For the meaning of the word "newspaper" see section 3 (*p*), *ante*.

The latter portion of the first paragraph of this section, 297, is to the same effect as section 5, (now repealed), of R. S. C., c. 163.

It is also similar to a clause contained in section 7 of Lord Campbell's Act, 6 and 7 Vic., c. 96 (Imp.), under which it has been held that the proprietors of a newspaper, who have appointed a competent editor to conduct it, are not criminally responsible for the publication of a libel inserted in the newspaper by the editor, if it be proved that the publication was made without their actual authority, consent or knowledge, and that such publication did not arise from want of due care or caution on their part. (88)

Holbrook's case came up before the Court twice, each time upon a motion for a new trial, and on each occasion, (although some of the judges dissented), it was held that, upon a proper construction of the statute, general authority to an editor to conduct the business of a newspaper, in the absence of anything to give it a different character, must be taken to mean an authority to conduct it according to law, and, therefore, not to authorize the publication of a libel; (89) and that holding has evidently been kept in view in framing clause 2 of the above section, 297.

It must be proved upon an indictment against the proprietor of a newspaper that the defendant was the proprietor or publisher of the paper at the time of the publication therein of the alleged libel. (90)

Section 640, *post*, provides that every proprietor, publisher, editor or other person charged with the publication in a newspaper of any defamatory libel, shall be dealt with, indicted, tried and punished in the province in which he resides, or in which such newspaper is printed.

The Imperial Statute 51-52 Vic., c. 64, (*The Law of Libel Amendment, Act, 1888*), provides, by section 8, that, no *criminal prosecution* shall be commenced against any proprietor, publisher, editor or any persons, responsible for the publication of a newspaper, for any libel published therein, *without the order of a judge* at Chambers being *first had and obtained*; and that the application for such order shall be made on notice to the person accused, who shall have opportunity of being heard against such application.

**298. Selling books containing defamatory matter.** — No one commits an offence by selling any book, magazine, pamphlet or other thing whether forming part of any periodical or not, al-

(88) R. v. Holbrook, 3 Q. B. D., 60; 47 L. J. (Q. B.), 35; 4 Q. B. D., 42; 48 L. J. (Q. B.), 113.
(89) Arch. Cr. Pl. & Ev., 21st Ed., 869, 891.
(90) R. v. Sellars, 6 L. N., 197.

though the same contains defamatory matter, if, at the time of such sale, he did not know that such defamatory matter was contained in such book, magazine, pamphlet or other thing.

2. The sale by a servant of any book, magazine, pamphlet or other thing, whether periodical or not, shall not make his employer criminally responsible in respect of defamatory matter, contained therein unless it be proved that such employer authorized such sale knowing that such book, magazine, pamphlet or other thing contained defamatory matter, or, in case of a number or part of a periodical, that defamatory matter was habitually contained in such periodical.

**299. When truth is a defence.** — It shall be a defence to an *indictment* or *information* for a *defamatory* libel that the publishing of the defamatory matter in the manner in which it was published was for the public benefit at the time when it was published, and that the matter itself was true. R. S. C., c. 163, s. 4.

See comments under section 302, *post*.

**300. Extortion by defamatory libel.** — Every one is guilty of an indictable offence and liable to two years' imprisonment, or to a fine not exceeding six hundred dollars, or to both, who publishes or threatens to publish, or offers to abstain from publishing, or offers to prevent the publishing of a defamatory libel with intent to extort any money, or to induce any person to confer upon or procure for any person any appointment or office of profit or trust, or in consequence of any person having been refused any such money, appointment or office. R. S. C., c. 163, s. 1.

**301.** Every one is guilty of an indictable offence and liable to two years' imprisonment or to a fine not exceeding four hundred dollars, or to both, who *publishes* any defamatory libel *knowing the same to be false*. R. S. C., c. 163, s. 2.

**302.** Every one is guilty of an indictable offence and liable to one year's imprisonment, or to a fine not exceeding two hundred dollars, or to both, who publishes any defamatory libel. R. S. C., c. 163, s. 3.

Section 286, *ante*, declares that publishing a libel is exhibiting it in public, or causing it to be read or seen, shewing or delivering it or causing it to be shewn or delivered with a view to its being read or seen by the person defamed or by any other person. So that it is a publication of a defamatory libel, not only to shew it or cause it to be shewn to others, but also to write and send it to the person defamed without publishing it to any one else.

A defendant was tried and convicted upon an indictment charging him with having unlawfully and maliciously written and published to a young woman of virtuous and modest character a defamatory letter of and concerning her and her character for virtue and modesty. It appears that

having seen a newspaper advertisement inserted by the young woman for a situation, the defendant wrote, and sent to her at the address which she had given, the letter in question containing a proposal in plain terms that she should surrender her chastity to him for a sum of money. *Held*, that the conviction was right, because, under all the circumstances, the letter was a defamatory one which might reasonably tend to provoke a breach of the peace. (91)

As to *Seditious Libels*, see sections 123 and 124; as to *Libels on Foreign Sovereigns* and *Spreading False News of public interest*, see sections 125 and 126; and as to *Blasphemous Libels*, see section 170, *ante*.

See, also, pp. 116-121, *ante*, for a brief history of the law of libel in general and of seditious libels in particular.

Section 299, *ante*, and section 634, *post*, giving a defendant accused of publishing a defamatory libel the right to plead the truth of the alleged libel, do not apply either to seditious libels or to blasphemous libels, the truth of which cannot be pleaded as a defence. (92)

Section 593, *post*, provides that in preliminary investigations of indictable offences, before police magistrates, the defendant may, after the examination of the witnesses for the prosecution, call and examine witnesses for the defence; but it does not seem that this gives a defendant in a libel case the right to prove at the preliminary examination the truth of the matter charged as a libel; for, although, in England, the right to call witnesses for the defence at a police court preliminary investigation existed long before the passing of the *Newspaper Libel and Registration Act, 1881*, it was there held, before that Act became law, that, although, where the charge was that of maliciously *publishing* a defamatory libel *knowing it to be false*, the magistrate had jurisdiction to receive evidence of the truth of the libel, so as to negative the allegation that the defendant knew it to be false, he had no such jurisdiction when the charge was simply that of maliciously publishing a defamatory libel. (93)

The English *Newspaper Libel and Registration Act, 1881*, however, made a very important change, there, on the subject, by enacting (in section 4) that "A court of summary jurisdiction, upon the hearing of a charge against a proprietor, publisher or editor or any person responsible for the publication of a newspaper, for a libel published therein, *may receive evidence as to the publication being for the public benefit, and as to the matters charged, in the libel being true*, and as to the report being fair and accurate, and published without malice, and as to any matter which, under this or any other act or otherwise, might be given in evidence, by way of defence, by the person charged, on his trial on indictment; and the court, if of opinion after hearing such evidence that there is a strong presumption that the jury on the trial would acquit the person charged, may dismiss the case;" and under section 5, of the same Act, the court, if it thinks that the libel, though proved, is of a trivial character, may, instead of sending the case before a jury, dispose of it summarily, provided the accused consents thereto, and may, in that case, adjudge him to pay a fine not exceeding £50.

In a case of criminal libel, in order to obtain a change of venue, it is not sufficient to allege that the prosecutor is interested in politics in the place where the alleged offence was committed and that in consequence the

(91) R. v. Adams, L. R., 22 Q. B. D., 66; 16 Cox C. C., 544.
(92) R. v. Hicklin, L. R., 3 Q. B., 374; R. v. Bradlaugh, 15 Cox C. C., 217; R. v. Ramsay, 15 Cox C. C., 231.
(93) R. v. Carden, 5 Q. B. D., 1; 49 L. J., M. C., 1; 14 Cox C. C., 339.

defendant cannot obtain a fair trial, there, and the fact that two abortive trials have taken place is not *per se* a reason for a change of venue. (94) And it is no ground to change the venue in a libel case that many of the defendant's witnesses reside at a distance and the defendant has no funds to bring them to that venue. (95)

Under section 615, *post*, an indictment for libel will not be insufficient for not setting out the words of it; but, if the words of the alleged libel are not set out, the Court may order the prosecutor to furnish the defendant with particulars.

Section 5 of the English *Libel Act*, (6-7 Vic., c. 96), enacts that "If any person shall maliciously publish any defamatory libel, every such person being convicted thereof, shall be liable to fine or imprisonment or both as the Court may award, such imprisonment not to exceed one year." And, where an indictment under this section charged the defendant with unlawfully writing and publishing a defamatory libel but omitted to allege that the libel was published *maliciously*, it was held, by the English Court for Crown Cases Reserved, that as section 5 of the English *Libel Act* was not one which created the offence nor one purporting to define the offence but one merely enjoining what punishment was to follow upon a conviction for an offence existing at common law, it was an indictment for a common law offence, and that although it omitted to allege that the publication was done maliciously, it was nevertheless good, inasmuch as, upon proof of the publication of the libel, the common law infers that such publication was malicious, until the inference is rebutted by the defendant, and that, therefore, the allegation that the publication of the libel was malicious was not a necessary averment. (96)

It will be noticed that section 285, *ante*, of our Code expressly defines a defamatory libel as "matter published, without legal justification or excuse, likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or designed to insult the person of or concerning whom it is published." And, where in a recent case at Montreal, the indictment alleged that the defendant unlawfully wrote and published a certain false and defamatory libel of and concerning the prosecutor to the latter's great prejudice and injury, it was held that the indictment merely set up a civil wrong, that, as the indictment merely charged the publication of a defamatory libel without stating that the same was likely to injure the reputation of the libelled person by exposing him to hatred contempt or ridicule or that it was designed to insult him, it was bad, by reason of the omission of an essential ingredient of the offence, and that it could not be amended but must be set aside and quashed, as the defect was a matter of substance. (97)

A plea of justification must be in writing and must allege not only that the matter published is true, but, that the publication of it was for the public benefit, and it must set forth the particular facts by reason of which it was for the public good.

These formalities are required by section 834, *post*.

By the fourth clause of section 834, it is provided that, along with the plea of justification, the defendant may plead not guilty, and, by clause three of the same section, it is provided that if the accusation charges the defendant with publishing the libel *knowing it to be false*, he may under

(94) R. v. Nichol, 20 C. L. T., 319.
(95) R. v. Casey, 13 Cox C. C., 614.
(96) R. v. Munslow, 18 Cox C. C., 112; [1895] 1 Q. B., 758; 64 L. J., M. C., 138.
(97) R. v. Cameron, 2 Can. Cr. Cas., 173; Que. Jud. Rep., 7 Q. B., 162.

the plea of not guilty, alone, adduce evidence of the truth of the matter published so as to negative the allegation that he knew it to be false.

Although a plea of justification must allege that the matter published is true and that it was for the public benefit that the alleged libel was published and must then set forth the particular facts by reason of which the publication was for the public good, it must not contain the evidence by which it is proposed to prove such particular facts nor any statements merely of comment or argument; and, where a plea of justification embodied a number of letters proposed to be used as evidence and contained paragraphs of mere comment and argument it was held that the plea was irregular and illegal and that the illegal averments must be struck out or the plea itself rejected and the defendant in the latter case allowed to plead anew. (98)

As the falsity of defamatory matter is presumed, the prosecution need not produce evidence of its falsity. The *onus* is upon the defendant to prove that it is true, that it is matter of public interest, and that the publication of it was for the public benefit; and the *whole* of the libel must be proved true. The justification must be as broad as the charge. If a material part be not proved to be true, the Crown will be entitled to a verdict. (99)

If the *gist* of the libel consists of one specific charge which is proved to be true, and of public interest, it is not necessary, in that case, that the defendant should justify every expression used by him in commenting on the prosecutor's conduct in connection with such specific charge. If the substantial imputation be proved true, a slight error in some detail will not prevent the defendant succeeding, provided such error in no way alters the complexion of the affair and would not have, on the reader, any different effect from that which the literal truth would produce. (100) If epithets or terms of general abuse be used, which do not add to the sting of the charge, they need not be justified. (101) But if these additional terms of abuse insinuate some further charge, in addition to the main imputation, or imply some circumstances substantially aggravating the main imputation, they must be justified as well as the rest. (102) In such a case, it will be a question for the jury whether the substance of the libellous statement has been proved true to their satisfaction. (103) As was said by Lord Denman, "It would be extravagant to say that in cases of libel *every* comment upon the facts requires a justification. A comment may introduce independent facts, a justification of which is necessary, or it may be the mere shadow of the previous imputation." (104)

In order to justify a libel it will not be sufficient to say that the defendant merely repeated what was said by another person. For instance, if the libel complained of, be "A B said that C had been guilty of fraud," etc., it would be no justification, for publishing these words, to plead that A B did in fact make that statement; for each repetition is a fresh defamation and the defendant by repeating A B's words, has made them his own, and is legally as liable as if he had invented the story himself. The only plea of justification which will be an answer, in such a case, must not

(98) R. v. Grenier, 1 Can. Cr. Cas., 55; Que. Off. Rep., 6 Q. B., 31.
(99) R. v. Newman, 22 L. J. Q. B., 156.
(100) Alexander v. N. E. Ry. Co., 34 L. J. Q. B., 152; Blake v. Stevens, 4 F. & F., 239.
(101) Edwards v. Bell, 1 Bing., 403; Morrisson v. Harmer, 3 Bing. N. C., 767.
(102) Helsham v. Blackwood, 20 L. J. C. P., 192.
(103) Warman v. Hine, 1 Jur., 820; Weaver v. Lloyd, 4 D. & R., 230.
(104) Cooper v. Lawson, 3 Ad. & E., 753.

merely allege that A B did in fact say so, but it must go on to aver, with all necessary particularity, that every statement which A B is reported by the defendant to have made is true in substance and in fact. (105) This rule, requiring justification of every substantial part of the alleged libel, was considered to press too severely on newspaper proprietors and editors, and, on that account it was relaxed, in their favor, as we have already seen, (106) by special legislation, under which newspaper reports of public meetings are privileged when they are fair and accurate reports of matters of public interest, the publication of which is for the public benefit.

## ILLUSTRATIONS.

Libel complained of: — that A, a proctor, was three times suspended from practice for extortion. Proof that he had *once* been so suspended held insufficient. (107)

Libel complained of: — "A B and C are a gang who live by card-sharping." Pleas: not guilty, and a justification giving several specific instances in which persons named had been cheated by the trio at cards. *Held*, by Cockburn, C. J., when two specific instances were proved, that the plea was proved in substance, and not necessary to prove other instances alleged. (108)

Libel complained of was headed.— "How Lawyer B treats his clients," followed by a report of a case in which *one* client of Lawyer B had been badly treated. That particular case was proved to be correctly reported. *Held*, insufficient to justify the heading, which implied that Lawyer B *generally* treated his clients badly. (109)

Libel complained of exposed the "homicidal tricks of those impudent and ignorant scamps who had the audacity to pretend to cure all diseases with one kind of pill;" it also asserted that "several of the rotgut rascals had been convicted of manslaughter, fined, and imprisoned for killing people with enormous doses of their universal vegetable boluses," and characterized the plaintiffs' system as "one of wholesale poisoning." It was proved at the trial that plaintiffs' pills, when taken in large doses, as recommended by plaintiffs, were highly dangerous, deadly and poisonous, that two persons had died in consequence of taking large quantities of them; and that the people who had administered these pills were tried, convicted, and imprisoned for the manslaughter of these two persons. Held a sufficient justification, although the expressions "scamps," "rascals," and "wholesale poisoning" were not fully substantiated: the main charge and gist of the libel being amply sustained. (110)

It is libellous to publish a highly-coloured account of judicial proceedings mixed with the reporter's observations and conclusions upon what passed in Court, containing an insinuation that plaintiff had committed

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(105) McPherson v. Daniels, 10 B. & C., 263; 5 M. & R., 251; Odgers Lib. & Sl., 3rd Ed., 187.

(106) See sections 291, 292 and 293, *ante*, and comments thereon.

(107) Clarkson v. Lawson, 6 Bing., 266; 3 M. & P., 605; 6 Bing., 587; 4 M. & P., 356; Goodburne v. Bowman, 9 Bing., 532; Clark v. Taylor, 2 Bing. N. C., 654.

(108) R. v. Labouchere, 14 Cox C. C., 419. And see Willmett v. Harmer and another, 8 C. & P., 695.

(109) Bishop v. Latimer, 4 L. T., 775; Chalmers v. Shackell, 6 C. & P., 475; Clement v. Lewis and others, 7 Moore, 200; 3 B. & Ald., 702.

(110) Morrison v. Harmer, 3 Bing. N. C., 767; Edsall v. Russell, 4 M. & Gr., 1090; 12 L. J. C. P., 4.

perjury, and it is no justification to pick out such parts of the libel as contain an account of the trial, and to plead that such parts are true and accurate, leaving the extraneous matter unjustified. (111)

A rumour was current on the Stock Exchange that the Chairman of the S. E. R. Co. had failed; and the shares of the company consequently fell; thereupon the defendant said. "You have heard what has caused the fall —I mean, the rumour about the S. Eastern chairman having failed? *Held*, that a plea that there was in fact such a rumour was no answer to the action. (112)

See the special provisions of sections 689 and 719, *post*, as to the empannelling of the jury and as to the trial and verdict in Libel cases; and see section 832 as to right of the Court to condemn a defendant, when convicted of libel, to pay the costs and expenses of the prosecution, and as to the right of a defendant, acquitted on a charge of libel, to recover costs against a private prosecutor.

**Criminal informations.** — We have already seen, that *finding the indictment* includes *exhibiting an information*, and that a *Criminal Information* in this sense means an accusation of crime made and tried, without the intervention of a grand jury, in cases of offences which tend to disturb the public peace, or to interfere with good government, — such as, seditious or blasphemous libels, or other libels in which the general public are interested, official corruption, etc. (113)

Criminal informations are of two kinds; one, — called an information *ex officio*, — being laid by the Attorney-General or Solicitor-General, and the other being made by the Master of the Crown Office, (114) at the instance of some private individual. (115)

Archbold describes an information, *ex officio* as "a formal written suggestion of an offence committed, filed by the Sovereign's Attorney-General, (or, in the vacancy of that office, by the Solicitor-General), (116) in the Queen's Bench (now it will be the King's Bench) Division of the High Court of Justice, without the intervention of a grand jury."

Odgers says, that informations *ex officio* are, as a rule, confined to libels of so dangerous a nature as to call for immediate suppression by the officers of the State; especially blasphemous, obscene, or seditious libels, or such as are likely to cause immediate outrage and public riot and disturbance; and which, therefore, render it expedient for the Attorney-General himself to take the initiative.

Archbold cites a case, in which informations *ex officio* were filed in 1858 against the directors of a banking company for a conspiracy to defraud the shareholders by false reports of the pecuniary condition of the bank. (117)

An information *ex officio*, (118) is filed in the Crown Office, *without any*

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(111) Stiles v. Nokes, 7 East, 493.

(112) Watkin v. Hall, L. R., 3 Q. B., 396; 37 L. J. Q. B., 125; Richards v. Richards, 2 Moo. & Rob., 557.

(113) See p. 3, *ante*.

(114) NOTE: In Canada, the proper officer would be the Clerk of the Crown.

(115) Arch. Cr. Pl. & Ev., 21st Ed., 124-126; and Odgers Lib. & Sl., 3rd Ed., 449, 450.

(116) R. v. Wilkes, 4 Burr., 2527.

(117) R. v. Brown and others, Arch. Cr. Pl. & Ev., 21st Ed., 122.

(118) For Form, see Schedule of Forms at the end of First Division, *post*.

*leave* previously obtained of the Court for that purpose. The defendant, after appearance upon application to the Court, is entitled to a copy of the information, free of expense. If the information be not brought to trial within twelve calendar months next after a plea of not guilty has been pleaded, the defendant may, after twelve days' notice to the Attorney-General or Solicitor-General, apply to the court in which the prosecution is depending, and obtain its authorization to bring on the trial, and having obtained such authorization he may bring it on accordingly, unless a *nolle prosequi* be entered.

Archbold describes an information by the Master of the Crown Office as "a formal written suggestion of an offence committed, filed in the Queen's (now the King's) Bench Division of the High Court of Justice, at the instance of an individual, *with the leave of the Court*, by the Master of the Crown Office, without the intervention of a grand jury."

Criminal informations, therefore, which are not *ex officio*, and, not filed, as such, by the Attorney-General, cannot be filed without an express order of the Court, that is, an order (in England), of the Queen's Bench (now the King's Bench) Division, of the High Court of Justice, or, (in Canada), of a Superior Court of Criminal jurisdiction, granted in open Court.

The practice is for Counsel to move the Court upon proper affidavits for an order *nisi* calling upon the defendant to show cause why an information should not be granted. The prosecutor must consent to waive his civil remedy by action, if need be, and be prepared to go through with the criminal proceedings to conviction. The affidavits should be carefully drawn up; for no second application can be made on amended or additional affidavits. (119) They should contain legal evidence to convince the court that it would be sufficient to justify a grand jury in returning a true bill for the offence complained of. Where, for instance, the affidavits merely showed that the annexed copy of the *Newcastle Daily Chronicle*, the newspaper containing the libel, had been purchased from a salesman, in the office of that paper, and that in a footnote at the end of that copy the defendant was stated to be the printer and publisher of the newspaper, and the relator believed him so to be; it was held that this was no legal evidence of publication; and the rule was discharged. (120) If the defendant keeps an office or shop at which copies of the paper can be purchased, then an affidavit by a person who purchased a copy of the libel at such office or shop will be the best evidence of a publication by the defendant, and also that most easily obtainable. That the purchase was made expressly for the purpose of enabling such affidavit to be sworn is no objection. (121)

The prosecutor must also swear to his innocence in all particulars of any specific charge made against him in the libel.(122) Unless he does this, the Court will not interpose, but will leave the prosecutor to proceed by way of indictment in the ordinary course. (123) In cases where the libel contains no specific charge there would of course be no necessity for such an affidavit. (124)

If a general charge be made and a specific instance alleged, the affidavit must expressly negative not only the general charge, but also the specific instance. (125)

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(119) R. v. Franceys, 2 A. & E., 49.
(120) R. v. Stanger, L. R., 6 Q. B., 352; 40 L. J. Q. B., 96.
(121) Duke of Brunswick v. Harmer, 14 Q. B., 189; 19 L. J. Q. B., 20.
(122) R. v. Webster, 3 T. R., 388.
(123) R. v. Bickerton, Str., 498.
(124) R. v. Williams, 5 B. & Ald., 595.
(125) R. v. Aunger, 12 Cox C. C., 407.

The affidavits should be sworn with *no* heading or title; and should not contain irrelevant or improper matter. If the prosecutor abuses the alleged libeller or shows an *animus* against him, the court will very probably reject the application. (126)

The order *nisi*, if granted, should be drawn up "*Upon reading*" the alleged libel and the affidavits and all other documents to which it is desired to refer on the argument.

When the rule *nisi* is drawn up, it should be served, *personally*, upon the defendant.

In shewing cause against the rule the defendant generally files affidavits in reply to those filed in support of the information; and it is open to him to maintain that the libel is true.

If the order be discharged on the merits the court generally gives the defendant his costs; and no second application can be made, even on additional affidavits; (127) except under very peculiar circumstances, as where the only person who had made an affidavit on behalf of the defendant, against the rule, has been since convicted of perjury in respect of such affidavit. (128)

Although the prosecutor cannot make a second application for a criminal information, after the first application has been dismissed, he has still the right to proceed, in the ordinary way, before the police magistrates, in order to have the offender committed for trial by indictment. (129)

If the rule is made absolute, the prosecutor is then required to enter into recognizances to effectually prosecute the information. The information must then be drawn up setting out the offence with the same precision as in an indictment; and, as soon it is filed, a copy of it must be served on the defendant; who must appear within a time to be fixed; or, in default of his appearance, he may be apprehended under a Bench Warrant. The case is then brought to trial in due course, in the same way as any ordinary trial upon an indictment.

With regard to criminal informations of the class which are not *ex officio*, the offence in relation to which an application is made for one must be such an offence as calls for prompt and immediate interference before the court will grant it. There must be some evidence that the ordinary remedies by action or indictment are insufficient in the particular case; and in cases, for instance, where, upon the hung of a criminal information for criminal libel, it appears, that, the prosecutor relator has himself libelled the party complained of, (130) or that he has, in any way, invited or provoked the publication of which he complains,(131)or that he has had an opportunity, (of which he has not availed himself), of expressing his disapproval of its terms, (132) or that he has demanded and received explanations from the defendant, (133) or that he has been, himself, guilty of any misconduct in relation to the matter, a rule giving leave to prosecute the information will be refused, unless the public have, in the particular instance in hand, a direct and independent interest in the prompt suppression of the libels. (134)

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(126) R. v. Burn, 7 A. & E., 190.
(127) R. v. Smithson, 4 B. & Ad., 862.
(128) R. v. Eve & Parlby, 5 A. & E., 780.
(129) R. v. Cockshaw, 2 N. & M., 378.
(130) R. v. Nottingham Journal, 9 Dowl., 1042.
(131) R. v. Larrieu, 7 A. & E., 277.
(132) R. v. Lawson, 1 Q. B., 486.
(133) *Ex parte* Doveton, 7 Cox C. C., 16.
(134) R. v. Casey, 13 Cox C. C., 310.

The Court, in granting leave to prosecute a criminal information, formerly took into account the rank and dignity of the person libelled, and informations have been granted for imputing that the children of a marquis were bastards; (135) that a peer had married an actress; (136) that a naval captain was a coward, a bishop a bankrupt, a peer a perjurer, etc., etc. But, now, it is settled that rank and station confer no superior claim to the summary interference of the Court. A peer is no more entitled to a criminal information when his *private* character is attacked than the humblest subject of the King. (137) Odgers gives an instance in which a criminal information was obtained by a grocer, (138) and another in which it was granted to a housekeeper. (139)

The Courts, however, have, of late years, been very chary of granting criminal informations; and, as a rule, both in England and in Canada, they will only be granted, now, where the applicant holds some public office; or where the libel tends to obstruct the course of justice, or to prejudice the fair trial of any accused person. (140)

If there be general reflections on a body or class, no particular individual being specially attacked, and if the reflections are such as tend to cause outrage or lead to violence, an information will be granted; as, where the general body of clergymen in a particular diocese were libelled; (141) or, where the libel was on the Jews, and some Jews in consequence were ill-used by the mob. (142) In Osborn's case, the publication complained of, was a sensational account of a cruel murder by certain Jews said to have lately arrived from Portugal, and then living near Broad street, London. They were said to have burnt a woman and a new-born baby, because the baby's father was a Christian. Certain Jews who had arrived from Portugal, and who then lived in Broad street, were attacked by the mob, barbarously treated, and their lives endangered. A criminal information was granted, although it was objected that it did not appear precisely who were the persons accused of the murder.

The application for a criminal information must be made promptly; or the delay will be ground for refusing it.

## ILLUSTRATIONS.

A county court judge illegally refused to hear a barrister who appeared before him. The barrister memorialized the Lord Chancellor. Obtaining no redress, he applied to the Court of Queen's Bench for a criminal information. This would have been granted him, had he not previously applied to the Lord Chancellor. (143)

An Irish Q. C., in addressing the jury as counsel in a cause, made a fierce attack on the plaintiff, an attorney. This attack was pertinent to the issue and not malicious; but the observations were unusually harsh

(135) R. v. Gregory, 8 A. & E., 907.
(136) R. v. Kinnersley, 1 Wm. Bl., 294.
(137) R. (pros. Vallombrosa) v. Labouchère, 12 Q. B. D., 320; 53 L. J. Q. B., 362; 15 Cox C. C., 415.
(138) R. v. Benfield, 2 Burr., 980.
(139) R. v. Tanfield, 42 J. P., 423.
(140) R. v. Watson and others, 2 T. R., 199; R. v. Joliffe, 4 T. R., 285; R. v. White, 1 Camp., 359; *Ex parte* Duke of Marlborough, 5 Q. B., 955; 13 L. J. (M. C.), 105. See, also, R. v. Biggs, 2 Man. L. R., 18.
(141) R. v. Williams, 5 B. & Ald., 595.
(142) *Anon.*, 2 Barn., 138; R. v. Osborn, 2 Barn., 166; Kel., 230.
(143) R. v. Marshall, 4 E. & B., 475.

and irritating. The plaintiff won the action, and then wrote to the Q. C., calling on him to retract the charges. The Q. C. refused; thereupon plaintiff wrote the Q. C. a letter couched in the most offensive language, and obviously intended to provoke a duel. The Court made the rule for a criminal information absolute; but ordered that the information should not issue without further order. (144)

Lord George Gordon was tried in 1787 and convicted upon an information charging him with libelling Marie Antoinette, Queen of France, and "her tool" the French Ambassador in London. He was fined £500 and sentenced to two year's imprisonment, and at the expiration of that time to find sureties for his good behaviour. This he could not do, so he remained in prison till he died on November 1st, 1793. (145)

The *Courier* published the following passage: — "The Emperor of Russia is rendering himself obnoxious to his subjects by various acts of tyranny, and ridiculous in the eyes of Europe by his inconsistency. He has now passed an edict prohibiting the exportation of timber, deals, and other naval stores. In consequence of this ill-timed law, upwards of 100 sail of vessels are likely to return to this country without freights." This was deemed a libel upon the Emperor Paul I. An information was granted, and the proprietor of the *Courier* was fined £100, sentenced to six months' imprisonment, and to find sureties for good behaviour for five years from the expiration of that term. The printer and publisher were also sentenced to one month's imprisonment. (Lord Kenyon, C. J.) (146)

A Queen's Counsel obtained a criminal information for libellous verses and for a caricature imputing to him professional misconduct in the conduct of a case. (147)

The solicitors to a railway company were refused a rule for a criminal information for a libel on them by the directors, imputing extortion and fraud. They were left to bring an action. (148)

A French refugee in England wrote a stilted poem about the apotheosis of Napoléon Bonaparte, then First Consul of the French Republic, suggesting that it would be an heroic deed to assassinate him. He was held, upon a criminal information, amenable to the English Criminal Law, although the libel was purely political, affected no one in the British Isles, and attacked the man who was England's greatest enemy at the time. The jury found him guilty; but war broke out again between England and France soon afterwards, and no sentence was ever passed. (149)

For Forms of Criminal Informations and pleadings, see Schedule of Forms at the end of First Division, *post*.

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(144) R. v. Kiernan, 7 Cox C. C., 6; 5 Ir. C. L. R., 171; R. v. Jackson, 10 Ir. L. R., 120.
(145) R. v. Lord George Gordon, 22 How St. Tr., 177.
(146) R. v. Vint. (1799), 27 How St. Tr., 627.
(147) Sir W. Garrow's Case, 3 Chit. Cr. Law, 884.
(148) Ex parte Baxter, 28 J. P., 326.
(149) R. v. Jean Peltier, 28 How St. Tr., 617.

# TABLE OF OFFENCES UNDER TITLE V.

## INDICTABLE OFFENCES.

| No. | Sec. | Offence. | Punishment. | Tribunal. |
|---|---|---|---|---|
| 1 | 215 | Neglecting duty to provide necessaries | Three years | General or Quarter Sessions. |
| 2 | 216 | Abandoning children under two years of age | Three years | do |
| 3 | 217 | Causing bodily harm to apprentices or servants | Three years | do |
| 4 | 231 | Murder | Death | Sup. Court Cr. Juris. |
| 5 | 232 | Attempt to commit murder | Life | do |
| 6 | 233 | Threats to murder | Ten years | do |
| 7 | 234 | Conspiracy to murder | Fourteen years | do |
| 8 | 235 | Accessory after the fact to murder | Life | do |
| 9 | 236 | Manslaughter | Life | Gen. or Quarter Sess. |
| 10 | 237 | Aiding and abetting suicide | Life | do |
| 11 | 238 | Attempt to commit suicide | Two years | do |
| 12 | 239 | Neglecting to obtain assistance in child birth | Life or Seven years | do |
| 13 | 240 | Concealing dead body of child | Two years | do |
| 14 | 241 | Wounding with intent | Life | do |
| 15 | 242 | Unlawful wounding | Three years | do |
| 16 | 243 | Shooting at H. M's vessels. Wounding public officer | Fourteen years | do |
| 17 | 244 | Disabling or drugging with criminal intent | Life and whipping | do |
| 18 | 245 | Endangering life by poison, etc. | Fourteen years | do |
| 19 | 246 | Administering poison with intent to injure | Three years | do |
| 20 | 247 | Causing bodily injuries by explosives | Life | do |
| 21 | 248 | Attempting bodily injury by explosives | Life or fourteen years | do |
| 22 | 249 | Setting spring guns and man traps | Five years | do |
| 23 | 250 | Intentionally endangering persons on railways | Life | do |
| 24 | 251 | Negligently endangering persons on railways | Two years | do |
| 25 | 252 | Negligently causing bodily injury | Two years | do |
| 26 | 253 | Injuring persons by furious driving | Two years | do |
| 27 | 254 | Preventing the saving of person shipwrecked | Seven years | do |
| 28 | 256 | Sending unseaworthy ships to sea | Five years | do |
| 29 | 257 | Taking unseaworthy ships to sea | Five years | do |
| 30 | 259 | Indecent assaults on females | Two years and whipping | do |
| 31 | 260 | Indecent assault on males | Ten years and whipping | do |
| 32 | 262 | Assault causing actual bodily harm | Three years | do |
| 33 | 263 | Aggravated assaults, assault on public or peace officer, etc. | Two years | do |
| 34 | 264 | Kidnapping | Seven years | do |
| 35 | 265 | Common assault | One year or $100 fine | (1) do |
| 36 | 267 | Rape | Death or life imprisonment | Sup. Court Cr. Juris. |
| 37 | 268 | Attempt to commit rape | Seven years | do |
| 38 | 269 | Defiling girl under fourteen | Life and whipping | Gen. or Quarter Sess. |
| 39 | 270 | Attempt to defile girl under fourteen | Two years and whipping | do |
| 40 | 271 | Killing unborn child | Life | do |
| 41 | 272 | Procuring abortion | Life | do |
| 42 | 272 | Woman procuring her own miscarriage | Seven years | do |
| 43 | 274 | Supplying means of procuring abortion | Two years | do |
| 44 | 276 | Bigamy | Seven years (second offence fourteen years) | do |
| 45 | 277 | Feigned marriages | Seven years | do |
| 46 | 278 | Polygamy | Five years and $500 fine | do |

(1) This offence is also triable in a summary manner, and is then punishable by a fine of $20 and costs, or two months imprisonment, with or without h. l.

## INDICTABLE OFFENCES. *(Continued).*

| No. | Sec. | Offence. | Punishment. | Tribunal. |
|---|---|---|---|---|
| 47 | 279 | Solemnization of marriage without lawful authority | Fine (2) or two years or both | Gen. or Quarter Sess. |
| 48 | 280 | Solemnization of marriage contrary to law | Fine (2) or one year | do |
| 49 | 281 | Abduction of a woman | Fourteen years | do |
| 50 | 282 | Abduction of an heiress | Fourteen years | do |
| 51 | 283 | Abduction of an unmarried girl under sixteen | Five years | do |
| 52 | 284 | Stealing children under fourteen | Seven years | do |
| 55 | 300 | Extortion by libel | Two years, or $500 fine or both | Sup. Court Cr. Juris. |
| 56 | 301 | Publishing libel knowing it to be false. | Two years, or $400 fine or both. | do |
| 57 | 302 | Defamatory libel | One year, or $200 fine or both | do |

(2) See sec. 934, *post*, as to regulation of fine.

See comments at the end of the list of indictable offences under Title II, *ante* p. 126, as to Summary trials of indictable offences, Fines, Sureties, Suspension of sentence, Restitution, Compensation and Costs.

## NON-INDICTABLE OFFENCES.

| No. | Sec. | Offence. | Punishment. | Tribunal. |
|---|---|---|---|---|
| 1 | 255 | Leaving unguarded holes in ice and excavations | Fine or imprisonment, with or without h. l. or both (1) | Summary. |
| 2 | 265 | Common assault | $20 fine or 2 months with or without h. l. (2) | do |

(1) See secs. 934 and 951, *post*, as to regulation of fine

(2) This is also an indictable offence. See above list of indictable offences.

# TITLE VI.

## OFFENCES AGAINST RIGHTS OF PROPERTY AND RIGHTS ARISING OUT OF CONTRACTS, AND OFFENCES CONNECTED WITH TRADE.

Upon the subject of this Title the Royal Commissioners have, at pages 25 to 27 of their Report upon the English Draft Code, the following special remarks: —

"Offences against rights of property must be committed, either, by wrongfully taking property, by fraudulently deceiving the owners of property, or by the mischievous destruction of property; in other words, by THEFT, by CHEATING, or, by MISCHIEF.

"Theft may be either *simple* or *aggravated*. *Simple theft* is so closely connected with certain kinds of fraud that the two subjects run into each other. *Theft aggravated by violence* is either *robbery* or *extortion*; and theft accompanied by wilful trespass on a dwelling-house is either *burglary* or *house-breaking*.

"The receiving of goods dishonestly obtained is usually associated with theft. We have therefore placed it next after theft.

"Mischief is a distinct subject, and follows fraud.

"The present title includes and re-enacts, in substance, the provisions of the Larceny Act, the Forgery Act, the Coinage Offences Act, and the Malicious Mischief Act, (24-25 Vict., cc. 96, 97, 98, 99). (1) It also includes some provisions, less comprehensive, which occur in other Acts, — in particular the provisions of two sections of the Post Office Act, (7 Will. 4, & 1 Vict., c. 36, ss. 28, 47), (2) part of the Trade Marks Act, (25-26 Vict., c. 88), (3) the Personation Act, (37-38 Vict., c. 36), (4) and the provisions of the Fraudulent Debtors' Acts for England and Ireland, (32-33 Vict., c. 62, and 35-36 Vict., c. 57). (5)

(1) The corresponding Canadian Acts are R. S. C., c. 164; c. 165; c. 167; and c. 168. (See Schedule Two, *post*, as to their repeal.)
(2) R. S. C., c. 35, ss. 79, 80, 81, 83, 88, 90. (Repealed.)
(3) 51 Vic., (Dom.), c. 41, ss. 2, 5, 19, 20, 21, 22. (Partly repealed.)
(4) R. S. C., 165, ss. 9, 41. (Repealed.)
(5) R. S. C., 173, ss. 27, 28. (Repealed.)

"The changes made by the present Title relate, principally, to the *common law* as to theft.

"The present statute law is substantially contained in the 24-25 Vict., c. 96: which recognizes and continues the old, (and, as it seems to us unreasonable), distinctions between stealing animals *feræ naturæ*, or things attached to or savoring of the realty, (which were not at common law the subject of larceny), and stealing other property.

"There is good reason for holding that capturing wild animals in the enjoyment of their natural liberty, though on another's land, should not be considered stealing; but, why should stealing one of the deer or valuable foreign birds in the Zoological Gardens be treated differently from stealing a sheep or a hen? And, why should it be a different offence to steal a log of timber from that which it is to cut down the tree and carry it away?

"Again, the old law as to stealing required that the property should be taken out of the possession of the owner. This rule gave rise to many complicated and highly artificial decisions; and some statutes have included, amongst thieves, bailees, servants and others who, having *lawfully* obtained possession of property, were not within the old definition, though they fraudulently appropriated to their own use the property entrusted to them; but many persons equally culpable are still beyond the reach of the criminal law. Even now, a person, who finds a purse and appropriates it, under circumstances involving all the moral guilt of theft, may, on technical grounds, escape all criminal liability.

"It is proposed to simplify the law by putting an end to all these distinctions, which are very subtle, and, many of them, arbitrary.

"The things which, according to the common use of the word *steal*, are capable of being stolen, but which, at *common law*, are *not* the subjects of larceny, may be described as, *first*, certain animals; *secondly*, documents evidencing certain rights; and *thirdly*, land and things fixed to or growing out of it.

"As to animals, one rule of the existing law is founded on the principle that to steal animals used for food or labor is a crime worthy of death, but that to steal animals kept for pleasure or curiosity is only a civil wrong. The principle has long since been abandoned; sheep stealing being no longer a capital offence; and dog stealing is a statutory offence. But the distinction (above referred to) still gives its form to the law, and occasionally produces results of a very undesirable kind. It was held, lately, for instance, that as a dog is not the subject of larceny, at common law, it was not a crime to obtain, by false pretences, two valuable pointers. (6)

(6) R. v. Robinson, Bell, 34.

"It seems, to us, that this rule is quite unreasonable, and that *all* animals, which are the subject of property should also be the subject of larceny.

"This, however, suggests the question, what wild animals are the subject of property, and how long do they continue to be so?

"This question must be considered in reference to living animals, *feræ naturæ*, in the enjoyment of their natural liberty; living animals, *feræ naturæ*, escaped from captivity; and *pigeons*, which, singularly enough, form a class by themselves.

"The existing law, upon this subject, is that a living wild animal, *in the enjoyment of its natural liberty*, is not the subject of property; but that, *when dead*, it becomes the property of the person on whose land it dies, in such a sense that he is entitled to take it from a trespasser, but not in such a sense that the person who took it away, on killing it, is guilty of theft. This is specially important in reference to game. *This state of the law we do not propose to alter.*

"As to living animals, *feræ naturæ*, IN CAPTIVITY, we think they ought to be capable of being stolen. When such an animal escapes from captivity, it appears to us that there arises a distinction which deserves recognition. If the animal is one which is commonly found in a wild state in this country, it seems reasonable that on its escape it should cease to be property. A person seeing such an animal in a field may have no reasonable grounds for supposing that it had just escaped from captivity. If, however, a man were to fall in with an animal imported at great expense, as a curiosity, from the interior of Africa, he could hardly fail to know that it had escaped from some person to whom it would probably have a considerable money value. We think that not only a wild animal in actual captivity, but also a wild animal, — which has once been captured, — should, on escaping from confinement, be the subject of larceny, unless it be an animal commonly found, in a wild state, in this country.

"Pigeons, while in a dovecot, or farmyard, ought obviously to be as much capable of being stolen as poultry. But, suppose they are away from their home, and are not distinguishable from wild pigeons? The law upon this point is not quite clear. It appears, from section 23 of 24 & 25 Vict. c. 96, that a bird so situated is not the subject of larceny, as that Act imposes a penalty of forty shillings on persons killing pigeons '*under such circumstances as shall not amount to larceny at common law;*' and no other circumstances can be imagined to which these words would apply. These distinctions will be found to be embodied in section 245. (7)

(7) See section 304, *post*, which contains the same distinctions and provisions.

"The rules that documents evidencing certain rights, and that land and things *savoring of the realty* are not capable of being stolen appear to us wholly indefensible.

"It is no doubt physically impossible to steal a legal right or to carry away a field, but this affords no ground at all for the rule that it shall be legally impossible to commit theft upon documents which afford evidence of legal rights, or upon things which, though fastened to, growing out of, or forming part of the soil, are capable of being detached from it and carried away.

"These rules have been qualified by statutory exceptions so wide and intricate that they are practically abolished, but they still give form to a considerable part of the law of theft, and occasionally produce failure of justice in cases in which the statutory exception is not quite co-extensive with the common law rule. *These rules we propose to abolish absolutely.*"

**Larceny at common law.** — The word "Larceny" is derived from "*larcyn*" (Norm. Fr.) and "*latrocinium*" (Lat.); and simple larceny, that is, larceny at common law, or, as Blackstone (8) calls it, "plain theft, unaccompanied with any other atrocious circumstance," is generally defined as the wrongful taking and carrying away of the personal property of another, with a felonious intent to convert it to the taker's own use, without the consent of the owner. (9)

On the subject of larceny at common law and on the subject of theft by conversion, and other fraudulent misappropriations, the Royal Commissioners have, at pages 27 and 28 of their Report on the English Draft Code, the following speclai observations: —

"It is essential to larceny at common law that there should be a felonious *taking*; which has been understood to mean a taking out of the possession of the owner. This rule has given rise to vast technicality.

"First, there is the question, what is the precise meaning of the word *taking* or *carrying away*, considered as a physical operation; and there are many cases, on this point, which run into very minute distinctions. On the whole it is thought desirable to require that, in order to constitute theft *by taking*, there should be at least an actual moving of the thing stolen. The existing law on that point is accordingly unaltered by the Draft Code. This is a matter of small importance as such questions arise very rarely.

"Technicalities of more importance connected with *taking* are those which have led to the distinction between theft and embezzlement.

(8) 4 Bl. Com., 229.

(9) R. v. Thurborn, 1 Den. C. C., 388; R. v. Middleton, L. R., 2 C. C. R., 38; R. v. Macgrath, L. R., 1 C. C. R., 205; R. v. Jones, 2 C. & K., 236; R. v. Hamman, 2 Leach, 1089.

"The immediate consequence of the doctrine that a *wrongful taking* is of the essence of theft, is, that, if a person obtains possession of a thing innocently, and afterwards fraudulently misappropriates it, he is guilty of no offence.

"This doctrine has been qualified by a number of statutory exceptions, each of which has been attended with difficulties of its own.

"The *first of these exceptions* is contained in the statute which provides that a clerk or servant, or person employed in the capacity of a clerk or servant, who embezzles property received on behalf of his msater shall be deemed to have stolen it. This enactment was interpreted as creating a new offence distinct from ordinary theft ; and a great number of cases involving considerations technical and subtle to the last degree have been decided on various points connected with it; and it was found necessary for the legislature to interfere further in order to prevent many failures of justice.

"Clerks and servants, however, formed only one class of persons who had opportunities of committing breaches of trust for which the common law provided no punishment. Bankers, merchants, brokers, solicitors, factors and other agents might and did commit similar offences ; and *another great exception* in the rule of the common law was made to include such cases.

"These enactments are elaborate and intricate, and present special difficulties of their own. The existing law will be found in 24-25 V., c. 96, ss. 75 and following. (10) The first Act on the subject was passed in the reign of George III.

"The case of bailees, singularly enough, remained unprovided for after the rest: and a carrier stealing a parcel entrusted to him for carriage committed no crime till the fraudulent conversion of chattels, money and valuable securities by bailees was made larceny, by 20-21 V., c. 54. (See now 24-25 V., c. 96, s. 3). (11)

"The common law rule, — though thus nearly eaten up by exceptions, — still survives as to all persons who come innocently into possession of the property of others, otherwise than as clerks, servants, bankers, merchants, brokers, solicitors, factors, and other agents and bailees. The case of the finder of goods, already referred to, furnishes an instance.

"This state of the law is, obviously, most objectionable, not only on account of its extreme intricacy and technicality, but also because the numerous exceptions made to the common law rule are inconsistent with the principle on which that rule depends.

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(10) Corresponding with R. S. C., c. 164, ss. 52-55, and ss. 61, 63, 64. (Repealed.)

(11) Corresponding with R. S. C., c. 164, s. 4. (Repealed.)

"We have therefore defined theft in such a manner as to put *wrongful taking* and *all* other *means of fraudulent* misappropriation on the same footing.

"The definition, *properly expounded* and *qualified*, will, we think, be found to embrace every act which, in common language, would be regarded as theft, and it will avoid all the technicalities referred to as arising out of the common law rules, as well as out of the intricate and somewhat arbitrary legislation, the course of which we have sketched above.

"The provisions of the Bill on this subject differed considerably, — in language, — from those of the Draft Code; but they were framed with the same objects, and would have effected the same objects in another way. The Bill treated theft, criminal breach of trust, and obtaining money by false pretences as *three* ways of committing *one* offence — termed '*fraudulent misappropriation.*' These offences were so defined that they would have covered the same ground as theft, false pretences and criminal breach of trust as defined by the Draft Code; but many things, which, according to the Draft Code, are theft, would according to the Bill have been criminal breaches of trust.

"The Draft Code defines the offence of *obtaining* property *by false pretences* substantially in accordance with the present law, and '*criminal breach of trust*' is retained as a distinct offence. The other cases of '*fraudulent misappropriation*' are denominated '*theft.*'

"The crimes of *obtaining* goods, money, or credit *by false pretences*, and of *criminal breach of trust* are, in point of mischief and moral guilt, much the same as theft, but, from their nature they require separate clauses to define them.

"The crime of embezzlement, wherever the subject matter of it is a chattel or other thing which is to be handed over in specie, will come within the definition of theft; but where the subject matter is not to be handed over in specie, but may be accounted for by handing over an equivalent, it requires separate provisions, which will be found in sections 249, 250 and 251. (12)

"It is essential to all these offences that there should be the *animus furandi*, — that guilty intention which makes the difference between a trespass and a theft."

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(12) The equivalents of these sections 249, 250 and 251 of the English Draft Code are sections 308, 309 and 310, *post*.

PART XXIV.

## THEFT.

**303. Things capable of being stolen.** — Every inanimate thing whatever which is the property of any person, and which either is or may be made movable, shall henceforth be capable of being stolen as soon as it becomes movable, although it is made movable in order to steal it: Provided, that nothing growing out of the earth of a value not exceeding twenty-five cents shall (except in the cases hereinafter (1) provided be deemed capable of being stolen.

This section is identical with section 244 of the English Draft Code, and, opposite to the proviso thereof, the Royal Commissioners have a marginal note in the following terms: —

"The existing law is shortly this ; At common law nothing which grows out of or is fixed to the earth is the subject of larceny. But by 24-25 V., c. 96, s. 33, punishments are provided for stealing trees, saplings and shrubs, of the value of more than one shilling; by sec. 36, *all plants whatever* growing in gardens, etc., are protected: and by section 37, (2) all plants cultivated for any of the purposes specified in the text of the section, wherever they may grow, are protected. These provisions appear substantially to make all vegetable productions the subject of larceny, except things worth less than one shilling growing elsewhere than in gardens, and not cultivated for the purposes mentioned.

In theft, the value of the thing stolen is immaterial, — subject, of course, to the proviso above contained in section 303 with regard to things growing out of the earth. But, although, (apart from most things growing out of the earth), the value of the article stolen is immaterial, it must be of some value, and if it be of any value, however trifling, it will be sufficient. It is not necessary that it should be of the value of any coin known to the law. (3) Nor is it necessary that it should be of value to third persons, if valuable to the owner. (4) Thus, where A was violently attacked by robbers, who took from him a piece of paper containing a memorandum respecting some money that a person owed him, it was held to be robbery: Gurney, B., remarking, — "If anything, however insignificant its value, was taken away from the prosecutor by violence, that is sufficient to constitute robbery. In cases of robbery, the value is immaterial ; and the

(1) See sections 341 and 342, *post*, for *exceptions* to the general rule that a thing growing out of the earth must, in order to be capable of being stolen, be of the value of at least 25c.

(2) These sections 33, 36 and 37 of the Imperial Act, 24-25 Vic., c. 96, correspond with sections 19, 23 and 24 of the R. S. C., c. 164, (now repealed).

(3) R. v. Morris, 9 C. & P., 349.

(4) R. v. Clarke, 2 Leach, 1036.

prosecutor, by carrying this memorandum in his pocket, shewed that he considered that it was of some value to himself." (5)

Water supplied by a water company to a consumer, and standing in his pipes, may be the subject of larceny. (6)

**304. Animals capable of being stolen.** — All tame living creatures, whether tame by nature or wild by nature and tamed, shall be capable of being stolen; but tame pigeons shall be capable of being stolen so long only as they are in a dovecote or on their owner's land.

2. All living creatures wild by nature, such as are not commonly found in a condition of natural liberty in Canada, shall, if kept in a state of confinement, be capable of being stolen, not only while they are so confined but after they have escaped from confinement.

3. All other living creatures wild by nature shall, if kept in a state of confinement, be capable of being stolen so long as they remain in confinement or are being actually pursued after escaping therefrom but no longer.

4. A wild living creature shall be deemed to be in a state of confinement so long as it is in a den, cage or small enclosure, stye or tank, or is otherwise so situated that it cannot escape and that its owner can take possession of it at pleasure.

5. Oysters and oyster brood shall be capable of being stolen when in oyster beds, layings, and fisheries which are the property of any person, and sufficiently marked out or known as such property.

6. Wild creatures in the enjoyment of their natural liberty shall not be capable of being stolen, nor shall the taking of their dead bodies by, or by the orders of, the person who killed them before they are reduced into actual possession by the owner of the land on which they died, be deemed to be theft.

7. Every thing produced by or forming part of any living creature capable of being stolen, shall be capable of being stolen.

This section is to the same effect as section 245 of the English Draft Code.

Opposite to the clause corresponding with sub-section 4 of the above section, the Royal Commissioners have the following: —

"This is intentionally worded so as not to include deer in a large park."

**305. Theft Defined.** — Theft or stealing is the act of *fraudulently* and *without colour of right taking*, or *fraudulently* and *without colour of right converting to the use of* any person, anything capable of being stolen, *with intent* —

(5) R. v. Bingley, 5 C. & P., 602.
(6) Ferens v. O'Brien, 15 Cox C. C., 332.

(*a*) to *deprive* the owner, or any person having any special property or interest therein, *temporarily* or *absolutely* of such thing or of such property or interest; or

(*b*) to *pledge* the same or deposit it as security; or

(*c*) to *part with it under a condition* as to its return which the person parting with it may be *unable to perform;* or

(*d*) to *deal with* it in such a manner that it *cannot be restored* in the condition in which it was at the time of such taking and conversion.

2. The taking or conversion may be fraudulent, although effected without secrecy or attempt at concealment.

3. It is immaterial whether the thing converted was taken for the purpose of conversion, or whether it was, at the time of the conversion, in the lawful possession of the person converting.

4. Theft is committed when the offender moves the thing or causes it to move or to be moved, or begins to cause it to become movable, with intent to steal it.

5. Provided, that no factor or agent shall be guilty of theft by pledging or giving a lien on any goods or document of title to goods intrusted to him for the purpose of sale or otherwise, for any sum of money not greater than the amount due to him from his principal at the time of pledging or giving a lien on the same, together with the amount of any bill of exchange accepted by him for or on account of his principal.

6. Provided, that if any servant, contrary to the orders of his master, takes from his possession any food for the purpose of giving the same or having the same given to any horse or other animal belonging to or in the possession of his master, the servant so offending shall not, by reason thereof, be guilty of theft. R. S. C., c. 164, s. 66.

The phrase "*without color of right*," forming part of the above definition of theft, seems to be intended to take the place of the word *feloniously* which in connection with the common law definition of larceny is usually said to mean "without color of right." (7)

From the above definition itself and from the above quoted explanations of the subject by the Royal Commissioners, it will be seen that THEFT is not restricted to what, under the common law, constituted the offence of larceny, — the principal ingredient of which was, as we have seen, the physical asportation or taking and carrying away of an article of personal property out of the possession and against the will of the owner, for the purpose of converting it to the taker's own use, or of depriving the owner of it, — but that it is extended to and made to cover all other means of fraudulent conversion or misappropriation of another's personal property; so, that, THEFT, as a general term, includes not only every thing and every act amounting to larceny under the common law, as ONE of the different

(7) R. v. Thurborn, 1 Den., 388; 2 C. & K., 831; R. v. Guernsey, 1 F. & F., 394.

ways in which the offence can be committed, but all other fraudulent conversions and misappropriations of any specific article of personal property as ANOTHER method of committing theft; the essential ingredient of larceny at common law,—namely, the *taking* and *carrying away* of the thing out of the owner's possession and against his will,—being no longer necessary, but any fraudulent conversion or misappropriation of any article or thing belonging to another being sufficient to constitute theft, whether, at the time of the fraudulent conversion or misappropriation thereof, the article or thing is in the lawful possession of the offender or not.

With regard to the fraudulent conversion or misappropriation of things which, when converted or misappropriated, are in the offender's lawful possession, a distinction is drawn between the case of a chattel or thing which the offender should hand over in specie but which, instead of so handing over, he fraudulently converts or misappropriates,—(his offence in this case being ordinary theft by conversion as defined in the above section, 305),—and the case of a chattel or thing which is *not* to be handed over in specie but may be accounted for by handing over an equivalent, and which the offender, instead of so handing over its equivalent, has fraudulently converted or misappropriated,—(his offence, in the latter case, being dealt with by the special provisions of sections 308, 309 and 310, *post*).

But, whether the act of theft be by fraudulently taking a thing from the owner against his will for the purpose of converting it or depriving the owner of it, or it be by fraudulenting converting or misappropriating it while in the lawful possession of the offender, the essence of the offence will still be the intent with which the act is done. In other words, the *taking* or the *conversion*, as the case may be, must be *without color of right* and with intent to deprive the owner of it, or to pledge it, etc.

For instance, if A were to place his horse and cart opposite to the door of B's premises, and B, not wishing to have them there, were to lay hold of the horse and lead it away, and leave it and the cart at a short distance from where it originally stood, there would be a taking by B of the horse and cart into his temporary possession, but no intent to deprive A of his property, B's intent being merely to remove the horse and cart from opposite to his own door, (where they were in A's possession), to another place away from B's door, where they are left in A's possession and ownership.

If the sheep of A stray into the flock of B, and B not knowing it, drive them home along with his own flock, and shear them, this is no theft; but it would be otherwise if B did any act for the purpose of concealing the sheep of A; for that would indicate that he drove them away to his own home knowing them to be the sheep of another. (8)

If, under color of having a claim for arrears of rent, A distrains the cattle of B, his tenant, this may amount to a civil wrong,—a trespass, for instance under the common law of England as to civil matters,—but no theft. (9)

If A having done work upon an article, returns it to B the owner, and then, on a dispute arising between them as to the price to be paid for the work done on the article, A takes and carries off the article against B's will, honestly intending to hold it as security for the amount which is alleged to be due to him, this is no theft, although in fact it turn out that there was nothing due to him. (10) The facts in this case were these: A

(8) 1 Hale, 506.
(9) 1 Hale, 509.
(10) R. v. Wade, 11 Cox C. C., 549.

had been instructed by B's wife to repair an umbrella. After the repairs were finished, and the umbrella had been returned to B's wife, a dispute arose as to the bargain made. A thereupon carried away the umbrella as security for the amount claimed by him to be due for repairing it. Blackburn, J., left it to the jury to say whether the taking was an honest assertion of right, or only a colorable pretence to obtain possession of the umbrella. Verdict, not guilty.

A creditor who violently assaults his debtor, and so then and there forces him to pay him his debt cannot be convicted of theft, there being no intent to steal. (11)

A and B took two horses out of C's stable at night without his leave, and, having ridden them a distance of about thirty miles, left them at an inn desiring care to be taken of them and saying that they should return in three hours. A and B were taken the same day at a distance of fourteen miles from the inn walking in a direction from it. The jury returned a verdict of guilty, but at the same time found specially that A and B meant merely to ride the horses the thirty miles, and to leave them there, without an intention to retain them or otherwise dispose of them. Ten of the Judges held, that this was no larceny, as there was no intention in the prisoners to change the property or make it their own. (12) But see subsection (*a*) of the above section, 305, by which the taking of anything with intent to deprive its owner of his property therein *temporarily*, is rendered sufficient to constitute theft.

Where a person stole some goods and also took a horse to enable him to get off more readily with the goods but with no intent to steal it, it was held not to be a felonious stealing of the horse. (13)

Where the servant of a tanner took out of his master's warehouse dressed skins of leather with intent to bring them in and charge them as his own work (which they were not), and to get paid by the master for them, it was held no larceny. (14)

A, was supplied by B, his master with pig iron to put into a furnace to be melted, he, A, being paid according to the weight of the metal which ran out of the furnace into bars. A, put in other iron belonging to B, whereby the weight of the melted iron being thus increased he gained a larger remuneration. *Held*, that, if A, did this with the felonious intent of converting the iron to a purpose for his own profit, it was a larceny. (15)

A, took away goods belonging to B, a young woman for the mere purpose of inducing her to call upon him for them, so that he might have an opportunity of soliciting her to commit fornication with him. *Held*, not to be a felonious taking. (16)

A, met B, whom A, knew to be a poacher and seized him; B, being rescued, seized A's gun and ran away with it, and was subsequently heard to say that he would sell it, and the gun was never afterwards heard of. Vaughan B, upon an indictment for stealing the gun told the jury that it would not be larceny if B, took the gun under an impression then on his mind that it might be used by A, so as to endanger his B's life, and not with an intention of disposing of it, although he might afterwards heve determined to dispose of it. The jury found that B, had no intention to

(11) R. v. Hemmings, 4 F. & F., 50.
(12) R. v. Philips, 2 East P. C., 662, 663.
(13) R. v. Crump, 1 C. & P., 658.
(14) R. v. Holloway, 1 Den., 370; 2 C. & K., 942; R. v. Poole, Dears. & B., 345; 27 L. J., M. C., 53.
(15) R. v. Richards, 1 C. & K., 532.
(16) R. v. Dickinson, R. & R., 420.

dispose of the gun at the time he took it, and acquitted him. (17) This would now be theft, — by conversion subsequent to the rightful taking, — under the terms of the above section, 305, sub-section 3 of which declares that it is immaterial whether the thing converted was taken for the purpose of conversion or whether it was, at the time of the conversion, in the lawful possession of the person converting.

A, to screen B, an accomplice who was indicted for horse stealing, broke into C's stable where the horse was and took it away and backed it into a coal-pit and killed it. It was contended at the trial that this was not larceny because the taking was not with an intention to convert the horse to the use of the taker, *A, animo furandi et lucri causâ*. A majority of seven judges held it to be larceny, and six of that majority were of opinion that to constitute larceny it was not essential that the property should be taken *lucri causâ*, if it be fraudulent and with intent to wholly deprive the owner of the property; but some of the majority even thought that the object A had in view, — namely, to screen his accomplice, — was a benefit, and that, therefore, the taking was *lucri causâ*. (18)

The prisoners, who were farm servants, opened the granary of their master by means of a false key, and took thereout two bushels of beans to give to their master's horses, *in addition to the quantity* usually allowed for the purpose. This was held by a majority of the judges to be larceny: it was said by some of the judges that the additional quantity of beans taken and given to the horses, would diminish the work of the men who had to look after the horses, and that, therefore, the *lucri causâ*, to give themselves ease, was an ingredient in the offence. (19) Cases of this kind are now expressly excepted: it being declared by sub-section 6 of the above section, 305, that, if any servant, against his master's orders, takes from the master's possession any food to give to any of the master's horses or other animals, such servant shall be guilty of no offence.

**Theft by taking.** — Under the terms of sub-section 4 of the above section, 305, *theft by taking* is committed as soon as the offender moves the thing, or causes it to move or to be moved, or begins to cause it to become movable, with intent to steal it.

This is somewhat similar, though perhaps a little wider, than the common law rule under which a bare removal of the thing was sufficient to make it larceny. (20) For instance, if a man were leading another's horse out of a field and were apprehended while doing so, or if a guest stealing goods in an inn had removed them from his chamber and carried them downstairs, it was, under the common law, a sufficient taking to constitute larceny. (21)

Where a thief, intending to steal some plate, took it out of a chest in which it was and laid it down upon the floor, but was surprised before he could make off with it, it was held a sufficient taking; (22) and where, with the intention of stealing a cask of wine, the thief removed it from the head to the tail of the wagon upon which it lay, it was also held sufficient. (23)

A drew a book from B's inside pocket, so that the book was about an inch from the top of the pocket, when B suddenly put up his hand, upon

(17) R. v. Holloway, 5 C. & P., 524.
(18) R. v. Cabbage, R. & R., 292.
(19) R. v. Morfitt, R. & R., 307; See R. v. Gruncell, 9 C. & P., 365; R. v. Handley C. & Mar., 547; R. v. Privett, 1 Den., 193; 2 C. & K., 114.
(20) 4 Bl. Com., 231.
(21) 3 Inst., 108, 109.
(22) R. v. Simpson, Kel., 31; 1 Hawk., c. 33, s. 25.
(23) R. v. Walsh, 1 Moo. C. C., 14.

which, while the book was still about B's person, A let go his hold of the book and it fell back into B's pocket. *Held*, a sufficient asportation to constitute larceny. (24)

The transfer, by a letter-carrier, of a letter from his pouch to his pocket was held a sufficient asportation. (25)

Where the thief was unable to carry off the goods on account of them being attached by a string on the counter, (26) or to carry off a purse on account of some keys attached to the strings of it getting entangled in the owner's pocket, (27) it was held, in these cases, that there was not a sufficient carrying away to constitute larceny, but that to render the asportation complete, in such cases, there must be a severance.

It may be, however, that under sub-section 4 of the above section, 305, these cases would now be held to be covered so as to make them *theft by taking;* for that sub-section makes it a sufficient taking as soon as the offender moves the thing or causes it to move or begins to cause it to move.

Of course under the common law, — (and the same thing holds good yet), — whenever there was no actual asportation, the offender might be prosecuted for an attempt to steal, or he could, upon an indictment for the larceny, be convicted, under statutory law to that effect, of the attempt, if the evidence established an attempt; and the same thing can be done, now, in the case of an indictment for theft. (See section 711, *post.*)

The following cases of larceny, — or what we should now call *theft by taking*, — seem to have been decided upon the principle that there was not only, at the time of the taking, an intent, on the part of the offender, to deprive the owner of his property, but, that, although there was, in some of the cases, what seemed to be a parting with the possession of the goods or money, there was no *real* and *absolute* parting with them, but, that, at the time of the offender taking them, the property and right of possession therein still remained, in reality, with the owner, — there being either some trick, artifice or device used by the offender to get hold of the money or goods and no intention on the part of the owner to relinquish his property and right of possession in them, or the parting with the money or goods to the offender being by some servant or employee of the owner without the owner's authority, or there being a larceny of the money or goods by the servant or employee, himself, while in care of them, — as a butler in charge of his master's plate, or a shepherd in charge of his master's sheep, and so on, the possession of the servant being deemed in law to be the possession of the master.

**Taking by means of a trick.** — Where a person, having the *animus furandi*, obtains possession of goods by means of some trick, artifice or device, it is considered larceny under the common law, even though there is an actual delivery, if the owner had no intention to part with his entire right of property but only with the temporary possession of the goods.

A, at a race meeting, made a bet with B, who was given odds upon a certain horse, — the money for which B backed the horse being deposited by the latter with A. The horse won; but, during the race, A had fraudulently decamped with the money. *Held*, that, as it appeared that B parted with his money intending, in the event of the horse winning, that it should be returned to him, while A received it fraudulently, never intending to

(24) R. v. Thompson, 1 Moo. C. C., 78.
(25) R. v. Poynton, L. & C., 247; 32 L. J. (M. C.), 29.
(26) *Anon*, 2 East, P. C., 556.
(27) R. v. Wilkinson, 1 Hale, 508.

deliver it back in any event, there was no contract by which the property in the money could pass to A, and that, therefore, there was evidence of larceny by a trick. (28)

Where A obtained from B, a silversmith, two cream-ewers, in order that C, a customer of the silversmith, with whom A said he lived, might select one, and absconded with them, it was held to be larceny, because the temporary possession only and no right of property was parted with. (29)

A, agreed to discount, for B, a bill which the latter gave, for that purpose, to A, who told B that if he then sent a person with him to his (A's) lodging, he would pay over the amount less discount and commission; a person was sent, accordingly, but upon reaching his lodgings, A left the messenger there and went out on pretence of getting the money, and never returned. The judge left it to the jury to say whether A obtained possession of the bill with intent to steal it and whether B meant to part with his property in the bill before he should have received the money for it. The jury found in the affirmative on the first proposition and in the negative on the second, and found A guilty. Conviction upheld. (30)

A offered to give B gold for bank notes, and, on B laying down some bank notes for the purpose of having them so changed into gold, A took them up and went away with them, promising to return with the notes, but he never returned. Wood B. said the property in the notes had never been parted with at all, and left it to the jury to say whether A had the *animus furandi* at the time when he took the notes, and said that if they were of that opinion there was a larceny. (31)

A went to B's shop and said C wanted some shawls to look at. B gave her, A, five shawls, which she converted to her own use. *Held*, that as the property in the shawls would continue in B until the selection would be made by C, it was larceny if C did not send for them; but there being no evidence that C did *not* send for them, A was acquitted, because it was assumed, in the absence of such evidence, that C did send for the shawls, that A therefore received the shawls properly, and only conceived the design of wrongfully converting them to her own use after she had rightfully obtained possession. (32) This would now be *theft by conversion* under section 305, sub-section 3.

A prevailed on B, a tradesman, to take goods to a certain place, where he said the price would be paid for them, and afterwards induced him to leave the goods in the care of C from whom A got them without paying the price. B swore that he did not intend to part with the goods until they were paid for; and the jury found that A *ab initio* intended to get the goods without paying for them. *Held* to be larceny. (33)

A gypsy, who obtained and kept money or goods by a false pretence of witchcraft,—the person from whom she obtained them merely intending to part with the possession and expecting them to be returned,—was held guilty of larceny. (34)

A in presence of B, picked up, in the street, a purse containing a receipt for £147, for a "*rich brilliant diamond ring*," and also the ring itself. It was then proposed by A, that the ring should be given to B on the latter depositing his watch and some money, as a security that he would return

(28) R. v. Buckmaster, 20 Q. B. D., 182; 57 L. J., M. C., 25.
(29) R. v. Davenport, M. S., 1 Arch. Peel's Acts, 5.
(30) R. v. Aickles, 2 East P. C., 673; 1 Leach, 294.
(31) R. v. Oliver, 4 Taunt., 274. See R. v. Rodway, 9 C. & P., 784.
(32) R. v. Savage, 5 C. & P., 143.
(33) R. v. Campbell, 1 Moo. C. C., 179.
(34) R. v. Bunce, 1 F. & F., 523.

the ring as soon as his proportion of the value should be paid to him by A. Accordingly B deposited his watch and money, which were taken away by A's confederates. The ring turned out to be worth only ten shillings and B's watch and money were never returned. It was left to the jury to say whether or not this was an artful and preconcerted scheme to get possession of B's watch and money; and the jury, finding that it was so, convicted A. (35)

In another case, on the defendant being convicted under the same circumstances as the above, the question was reserved for the opinion of the judges, nine of whom were of opinion that this practice of *ring dropping* amounted to larceny; because, although, in such cases, the possession of the thing obtained was parted with, the property in it was not. (36)

A, B and C, decoyed D into a public-house, and there introduced a card game called *cutting*, and one of them prevailed on D, who did not play on his own account, to cut the cards for him, and then under pretence that D had cut the cards for himself, as a player, and lost, another of them swept D's money off the table and went off with it. This was considered to be a case in which it should be left to the jury to determine *quo animo* the money was obtained, and that it would be larceny should they find that the money was obtained upon a preconcerted plan to steal it. (37)

A, at a fair, agreed to sell a horse to B for £23, of which £8 was to be paid to A, down, and the balance upon delivery. B handed £8 to A who signed for it a receipt stating that the balance was to be paid upon delivery. A never delivered the horse to B, but caused it to be removed from the fair under circumstances shewing that he never intended to deliver it. *Held*, that A was rightly convicted of larceny of the £8, by a trick, on the ground that B had no intention to part with his property in the £8 until A had fulfilled his part of the bargain, which he never intended to do. (38)

A induced B, by fraud, to buy from him a dress, at the price of 25 shillings, he having promised that if she (B) would do so, he would give her another dress worth twelve shillings, and he then took out of her hand a guinea, she being taken by surprise, and neither consenting nor resisting, and he gave her a dress worth much less than a guinea, and refused to give her the other dress which he had promised. It being found by the jury that this was part of A's scheme to obtain the money by means of a pretended sale, it was held to be larceny. (39)

A went into a shop and asked for change for half a crown and the shopman gave him two shillings and six pence; A then held out the half crown and the shopman just took hold of it by the edge but never actually got it into his custody, and A ran away with the change and the half crown. *Held* to be larceny of the change; but Parke, J., doubted whether an indictment would lie for stealing the half crown. (40)

A and B went into C's shop; A put down six pence in silver and six pence in copper, and asked C to give him, in exchange for that money, a one shilling piece, upon which C took, from her money drawer, a one shilling piece which she put on the counter beside A's money; A while all the money lay there then said, to C, that she might as well take the whole of

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(35) R. v. Patch, 1 Leach, 238.
(36) R. v. Moore, 1 Leach, 314; 2 East P. C., 679. See R. v. Watson, 2 Leach, 640.
(37) R. v. Horner, 1 Leach, 270; Cald., 205. See, also, R. v. Robson, R. & R., 413.
(38) R. v. Russett, [1892] 2 Q. B., 312; 17 Cox C. C., 534.
(39) R. v. Morgan, Dears., 395.
(40) R. v. Williams, 6 C. & P., 390.

the money thus lying on the counter and give him a two shilling piece for it. C thereupon took a two shilling piece, from her drawer and put it on the counter, expecting to receive for it two shillings of A's money. A then picked up the two shilling piece and went away with it. C did not discover her mistake till she was putting the coins from the counter into the money till.—B having distracted her attention by asking the price of some article. *Held*, that C never intended to part with her property in the two shilling piece till she should receive two shillings of A's money, and that the offence was larceny. (41)

In another *ringing the changes* case, A and B fraudulently induced C, a barmaid, to pay over to them money of her master without having received from them the proper change, and having no intention of or knowledge that she was so doing: *Held*, guilty of larceny. (42)

Where a hosier, by the defendant's desire, took a parcel of silk stockings to his lodgings and out of them the defendant picked out six pairs which were laid on the back of a chair, and the defendant then sent the hosier back to his store for some articles, and while he was absent absconded with the stockings; the Judges held this, to be larceny, the defendant having clearly obtained the goods *animo furandi*. (43)

Where A, in presence of B, picked up a purse containing a watch chain and two seals which A and a confederate represented to be gold and worth £18, and B purchased A's share for £7, intending to part with the property in the money as well as the possession of it, Coleridge, J., held that this was not larceny. (44)

Where A, by means of what is known as the *purse trick*, induced B to give him a shilling for a purse by showing B three shillings and then making it appear as if he, A, had dropped them into the purse whereas in fact he had only dropped in three half pence, it was held, that the prisoner had been guilty, if at all, of obtaining the shilling by means of a false pretence, and could not be convicted of larceny. (45)

A,—who had bargained for goods for which, by the custom of trade, the price should have been paid before they were taken away,—took them away without the consent of B the owner, and, at the time he bargained for them, A did not intend to pay for them but meant to get them into his own possession and dispose of them for his own benefit. *Held* to be larceny. (46)

Where A, intending *ab initio* to get goods by fraud, had them put into his cart upon the express condition that they should be paid for before being taken out of the cart, and then took them out of the cart without paying for them. *Held* to be larceny. (47)

Where an automatic box, the property of a company, was placed in a public passage and was so constructed that, upon a penny being placed in it, through a slot, a cigarette was ejected from it; and where the prisoner, instead of putting in a penny, put into the box a metal disc of the size of a penny and so obtained a cigarette, he was held guilty of larceny. (48)

Where the prisoner went to an inn on a fair day, and desired the ostler to bring out his horse, and, upon the ostler saying he did not know which

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(41) R. v. McKale, L. R., 1 C. C. R., 125; 37 L. J. (M. C.), 97.
(42) R. v. Hollis, 12 Q. B. D.; 53 L. J. (M. C.), 38.
(43) R. v. Sharples, 1 Leach, 93; 2 East P. C., 675.
(44) R. v. Wilson, 8 C. & P., 111.
(45) R. v. Solomons, 17 Cox C. C., 93.
(46) R. v. Gilbert, 1 Moo. C. C., 185.
(47) R. v. Pratt, 1 Moo. C. C., 250; R. v. Cohen, 2 Den., 249. See, also, R. v. Slowly, 12 Cox C. C., 269.
(48) R. v. Hands, 16 Cox C. C., 188.

was his horse, went into the stable, and pointing to a mare, said it was his, and the ostler brought out the mare which the prisoner attempted to mount, but could not, the mare being frightened; upon which he desired the ostler to lead the mare out of the yard, which was done; but, before he could mount, the prisoner was detected and secured, Garrow, B., held this to be larceny. (49)

Where A hired a horse of B, he, A, stating that he did so for the purpose of taking a journey; and it turned out that, instead of going the journey, A sold the horse in Smithfield market on the same day, it was left to the jury to say whether he hired the horse for the purpose of stealing it or whether he hired it really for the purpose of taking the journey and afterwards changed his intention; and the jury, being of the former opinion, found him guilty. Seven of the judges were afterwards clearly of opinion that the offence was larceny. (50)

And the same thing was held where the defendant hired the horse in the name of another person. (51) And where the defendant hired a post-chaise, with intent to convert it to his own use, and never returned it; upon being indicted for it, twelve months afterwards, as for a larceny, it was held that it clearly amounted to that offence, although the vehicle was not hired for any definite time. (52)

It seems, however, that in order to constitute a larceny at common law by a party to whom goods had been delivered on hire, there must have been not only an original intention on the part of the hirer to convert them to his own use but also a subsequent *actual* conversion by him of the goods hired, and that a mere agreement by the hirer to accept a sum of money offered for the hired goods by a third party, who did not intend to accept the goods except on condition of his suspicions as to the honesty and right of the hirer to sell being removed, — was held not to amount to an actual conversion. (53)

**Taking from an unauthorised servant of the owner.** — Where a defendant obtained some mail bags from the post-master at a post office, by pretending that he was the mail guard, and then ran away with them, the jury, being of opinion that he obtained possession of them with intent to steal them, found him guilty; and the judges upheld the conviction. (54) In this case, the property in the mail bags did not pass, for the postmaster had no property in them to part with. (55)

Where the defendant, *animo furandi*, obtained goods from the servant of a carrier, by falsely pretending to be the person to whom the goods were directed, it was holden to be larceny; because the servant had no authority to part with the goods to any but the right person. (56)

A carrier's servant left goods at the house of the defendant by mistake but without any inducement from the defendant, who afterwards knowing that they had been left there by mistake and did not belong to him, converted them to his own use. *Held* to be larceny. (57)

Where A. intending to sell his horse, sent B, his servant, with it to a fair, — B, however, being a mere messenger to take the horse there and

(49) R. v. Pitman, 2 C. & P., 423.
(50) R. v. Pear, 1 Leach, 212. See R. v. Banks, R. & R., 441.
(51) R. v. Charlewood, 1 Leach, 409; 2 East P. C., 689.
(52) R. v. Semple, 1 Leach, 420.
(53) R. v. Brooks, 8 C. & P., 295.
(54) R. v. Pearce, 2 East P. C., 603.
(55) 2 East P. C., 673.
(56) R. v. Longstreet, 1 Moo. C. C., 137.
(57) R. v. Little, 10 Cox C. C., 559.

having no authority to sell or deal with it in any way, and C, by fraud, induced B to part with possession of the horse under color of an exchange for another, intending all the while to steal it, it was held to be larceny. (58)

A, having a deposit of eleven shillings in a post office savings bank, and, having obtained a warrant or order to withdraw ten shillings of it, went to the post office, where he presented the order, together with his deposit book, to B, a clerk of that department, who, by mistake, instead of looking at the letter of advice for ten shillings connected with A's order or warrant, referred to another letter of advice,—one for £8 - 16 - 10,—and, under this mistake, he placed on the counter this larger sum of money which A took up; and, after B had entered the amount, £8 - 16 - 10, in the deposit book as paid, A went away, taking the money with him. At the trial, the jury found that A had the *animus furandi* at the moment of taking up the money from the counter and returned a verdict of guilty. *Held*, by a majority of the judges, (eleven in number), that A was rightly convicted of larceny; and they supported this holding on various grounds; 1, that the postmaster-general, through B, the clerk, had by mistake, formed a mere intention to pass over the property in the money to A, but that this mistaken intention did not actually pass it, and that A was aware of the mistake and had the *animus furandi* at the time he took up the money; 2, that B, the clerk, having only a limited authority under the letter of advice to the extent of ten shillings, had no authority to part with the property in the larger amount to A; and, 3, that possession of the money was not completely parted with when it was placed on the counter and when A, *animo furandi*, took it up. It was, however, held, by a minority of the judges, (four in number), that the money was not taken *invito domino*, that the general authority of the clerk authorized the parting with the possession and property in the entire sum of money laid on the counter, and that there was no larceny. (59)

A and B ordered goods of C, who sent them to the house of A and B, by his (C's) servant, D, with strict injunctions not to part with them without receiving the price of them. On arriving with the goods at A and B's house, A and B gave to D a cheque which they knew to be worthless, upon which D left the goods. *Held* to be larceny. (60)

If, in this case, C, the owner, had himself carried the goods and parted with them in the way in which his servant did, it would, no doubt, have been a case of obtaining the goods by false pretences and not larceny; or, if the servant had had a general authority to act, it would have been the same as if C himself had acted; but the servant had only a limited authority, which he exceeded. (61)

**Stealing by a servant of his master's goods entrusted to him.**—Where a person, employed to drive cattle or to take them to a particular place for a special purpose and bring them back, sells them, this,—seeing that he had the custody merely and not the right to the possession or property which remained in the master,—is larceny at common law; (62) although the intention to convert them was not conceived until after they were delivered to him. (63)

If a man having purchased corn on board a vessel, send his clerk or light-

(58) R. v. Sheppard, 9 C. & P., 121.
(59) R. v. Middleton, L. R., 2 C. C. R., 38; 42 L. J., M. C., 73.
(60) R. v. Stewart, 1 Cox C. C., 174.
(61) Arch. Cr. Pl. & Ev., 21st Ed., 389.
(62) R. v. Stock, 1 Moo., 87; R. v. McNamee, 1 Moo., 368.
(63) R. v. Harvey, 9 C. & P., 353.

erman with his barge for the purpose of landing it, and the clerk or lighterman appropriate a part of the corn, this is also larceny at common law. (64)

An unauthorized gift by a servant of goods entrusted to him by his master is as much larceny at common law as if he sold or pawned them. (65)

**No larceny where thing freely parted with.** — It is clear that, under the common law, not only is it no larceny if the owner himself, of his own free-will, part with his property in the goods taken; (66) but the same principle applies whenever the servant, from whom goods are obtained, has a general authority to act for his employer, and, while acting under such general authority, willingly parts with the goods, the person to whom they are thus delivered not being guilty of larceny.

For instance, where a person obtained money from the cashier of a bank by presenting, knowing it to be forged, a forged order purporting to be drawn by one of the bank's customers, it was held not to be larceny; because the cashier voluntarily parted with the money, and was acting within the scope of his general authority. (67)

Where the defendant bought goods and desired them to be sent with a bill and a receipt, and the shopman, who brought them, left them, upon the defendant handing him two bills, which turned out to be mere fabrications, the judges held this not to be larceny, because the prosecutor had parted with the property, as well as the possession, upon receiving what was deemed at the time by his servant to be payment. (68)

Where a pawn-broker's clerk, who had a general authority from his master, to act in his business, delivered up a pledge upon receiving a parcel which he supposed to contain diamonds, and under that belief parted with the pledge entirely, but the parcel contained stones of no value, it was held to be no larceny. (69)

The question of whether, — when property was given by the owner to a person under a mistake of which the person receiving it was not aware at the time of its reception, — the person so receiving it was guilty of larceny by afterwards converting it to his own use, was fully argued before the Court of Crown Cases Reserved, whose decision shewed that the judges were equally divided as to whether the prisoner was legally convicted or not; and the remarks of a few of the judges seemed to indicate that there was an impression that even the innocent reception of the sovereign, coupled with its subsequent fraudulent appropriation, might amount to larceny; but this was not the real ground upon which the Court was divided, as will be seen below. The facts were these. The prisoner had asked the prosecutor for the loan of a shilling; and the prosecutor having given him a sovereign believing it to be a shilling, the prisoner was prosecuted and convicted of having, — by keeping the sovereign, — stolen it. On the one hand, it was considered by some of the judges that the facts shewed that

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(64) R. v. Abrahat, 2 Leach, 829.

(65) R. v. White, 9 C. & P., 344.

(66) R. v. MacGrath, L. R., 1 C. C. R., 205; R. v. Lovell, 8 Q. B. D., 185; R. v. Harvey, 1 Leach, 467; 2 East, P. C., 669; R. v. Adams, R. & R., 225; R. v. Coleman, 2 East, P. C., 672; R. v. Thomas, 9 C. & P., 741; R. v. Atkinson, 2 East, P. C., 673; R. v. Adams, 1 Den., 38; Arch. Cr. Pl. & Ev., 21st Ed., 385, 386.

(67) R. v. Prince, L. R., 1 C. C. R., 150; R. v. Lovell, 8 Q. B. D., 185.

(68) R. v. Parkes, 2 Leach, 614; 2 East, P. C., 671; Arch. Cr. Pl. & Ev., 386.

(69) R. v. Jackson, 1 Moo. C. C., 119; see R. v. Barnes, 2 Den., 59; 20 L. J., (M. C.), 34; R. v. Essex, Dears. & B., 371; 27 L. J. (M. C.), 20.

the prisoner, when he took the coin, was under the same mistaken belief as the prosecutor, namely, that it was a shilling; while, on the other hand, it was considered by the other judges that the facts shewed that, at the very instant of receiving it, the prisoner was aware of the coin being a sovereign and of the owner being under the mistaken belief that it was a shilling. The Court were unanimous in holding that the prisoner was not guilty of larceny as a bailee, but were equally divided as to whether he was guilty of larceny at common law; and the conviction stood. Seven of the fourteen judges were of opinion that the facts did *not* shew an *innocent* reception of the sovereign and that therefore the prisoner was rightly convicted of larceny; but the other seven judges considered that the facts did shew an *innocent* reception of the sovereign and that such innocent reception coupled with the subsequent fraudulent appropriation of the coin by the prisoner did not constitute larceny. (70)

In some later cases the old rule of the common law, that the innocent receipt of a chattel coupled with its subsequent fraudulent appropriation does not amount to larceny, has been confirmed. (71)

Thus, where a man handed to the prisoner a £10 note in mistake for a £1 note, and the prisoner took it under the same mistake, and, afterwards, on discovering the error, kept it, it was held that he could not be indicted for larceny. (72)

But under section 305 of our Code, the subsequent fraudulent appropriation of the thing thus innocently received will amount to theft by conversion.

**Larceny or theft of lost things.** — With regard to the larceny of lost things, the general rule under the common law seems to have been that if a person found goods which had been actually lost or reasonably supposed by him to have been lost, and appropriated them, with intent to take the entire dominion over them, really believing, when he took them, that the owner could *not* be found, it was not larceny; but if he took them with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner *could* be found, it was larceny. (73) It was necessary that the prisoner, *at the time of finding*, should believe that the owner could be ascertained, and without this, an intention to appropriate, at the time of the finding, did not make the prisoner guilty of larceny, although he ascertained the name of the owner before converting to his own use. (74)

It will be seen that, now, under section 305, a finder of lost goods will render himself liable to prosecution for *theft by conversion*, if after finding the goods he discover the name of the owner and do not restore them, but converts them to his own use, although at the time of finding them he neither knew the owner nor believed nor had reasonable grounds for believing that the owner could be found.

The following are some of the cases decided under the old rule.

On an indictment for stealing a bank note, the jury found that the prosecutor had dropped the note in the defendant's shop, that the defendant

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(70) R. v. Ashwell, 16 Q. B. D., 190; 55 L. J., M. C., 65; 16 Cox C. C., 1.
(71) R. v. Flowers, 16 Q. B. D., 643; 55 L. J., M. C., 179; R. v. Hehir, 18 Cox C. C., 267.
(72) R. v. Hehir, 18 Cox C. C., 267.
(73) 3 Inst., 108; 1 Hawk., c. 33, s. 2.
(74) R. v. Thurborn, 1 Den., 388; 2 C. & K., 831; R. v. Dixon, Dears., 580; 25 L. J. (M. C.), 39; R. v. Christopher, Bell, 27; 28 L. J. (M. C.), 35; R. v. Kerr, 8 C. & P., 176; R. v. Reed, C. & Mar., 306; R. v. York, 1 Den., 335; R. v. Matthews, 12 Cox C. C., 489.

had found it there, that, at the time he picked it up, the defendant did not know and had no reasonable means of knowing who the owner was, that he afterwards acquired knowledge who the owner was, and that, after having acquired this knowledge, he converted it to his own use; and they found further that the defendant intended, when he found the note, to take it to his own use, and deprive the owner of it whoever he was, *and that he believed, when he found it, that the owner could be discovered. Held*, that, upon these findings, the defendant was rightly convicted. (75)

A's child, having found six sovereigns in the street, brought them to A, who counted them and told some bystanders that the child had found a sovereign. A and her child then went down the street to the place where the child had picked up the money, and found a half-sovereign and a bag. About two hours afterwards, A was told that a woman had lost some money, upon which she told her informant to mind her own business, and gave her half a sovereign.

*Held* by the majority of the Irish Court of Criminal Appeal, that this case could not be distinguished from R. v. Glyde, *post;* that there was nothing to show that, at the time the child brought her the money, A knew that it had an owner, or, to show that she was under the impression that the owner could be found; and her conviction for larceny was quashed. (76)

A put 900 guineas in a secret drawer in a bureau, and died. B, her son and executor, lent the bureau to his brother, C, who, after keeping it several years, sold it to D, who gave it out to be repaired by E, who found the money. *Held* to be such a taking, by E, out of the possession of A, as to constitute larceny. (77)

If a cabman converted to his own use a parcel left by a passenger in his cab, by mistake, it was larceny, by the common law, if he knew the owner, or if he took him or set him down at a particular place where he could have enquired for him. (78)

A found a sovereign on the highway, believing it had been accidentally lost, but, with a knowledge that he was doing wrong, he at once determined to appropriate it, notwithstanding that it should become known to him who the owner was. The owner was speedily made known to A, who however refused to deliver up the sovereign. There was no evidence that he believed, at the time of finding the sovereign that A could ascertain who the owner was, and he was therefore held not guilty of larceny. (79)

Under section 305, sub-section 3, this would now be *theft by conversion.*

In every case in which there is any mark upon the property by which the owner may be traced, and the finder, instead of restoring the property, convert it to his own use, such conversion amounted, at common law, to larceny. (80)

**Larceny or theft of things not lost but mislaid.** — In every case where the property was not, properly speaking, lost, but only *mislaid*, under circumstances which would enable the owner to know where to look for and find it, the person finding and appropriating property so mislaid was held guilty of larceny under the common law.

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(75) R. v. Moore, L. & C., 1; 30 L. J. (M. C.), 77.
(76) R. v. Deaves, 11 Cox C. C., 227. See, also, R. v. Knight, 12 Cox C. C., 102.
(77) Cartwright v. Green, 8 Ves., 405; 2 Leach, 952.
(78) R. v. Wynne, 2 East P. C., 664; 1 Leach, 413; R. v. Lamb, 2 East P. C., 664; R. v. Lear, 1 Leach., 415 *n.*
(79) R. v. Clyde, L. R., 1 C. C. R., 139; 37 L. J., M. C., 107.
(80) R. v. Pope, 6 C. & P., 346; R. v. Mole, 1 C. & K., 417.

A purchaser at the prisoner's stall, left his purse in it. A stranger pointed out the purse to the prisoner, supposing it to be the latter's, when the prisoner took up the purse and put it in her pocket, and afterwards concealed it. On the return of the owner, the prisoner denied all knowledge of it. Upon an indictment for larceny, the jury found that the prisoner took up the purse knowing that it was not her own and intending at the same time to appropriate it to her own use, but that she did not know, then, who was the owner of it. She was held properly convicted, and that the purse so left was not lost property but mislaid. (81)

A bought a bureau at an auction and afterwards discovered in a secret drawer of it a purse of money, which he appropriated to his own use. *Held*, that, if he had express notice that the bureau only, and not its contents if any, were sold to him, or, if he had no reason to believe that anything more than the bureau itself was sold, the abstraction of the money was a felonious taking, and amounted to larceny, but that if he had reasonable ground for believing that he bought the bureau with its contents, if any, he had a colorable right to the property, and there was no larceny. (82)

A, a boy, found a lost cheque, which B, by some pretence, got from him, and kept in hopes of obtaining a reward, but not being satisfied with the reward offered by the owner he refused to deliver it either to the owner or to A. *Held*, that B, could not be convicted of stealing the cheque either from the owner or from A. (83)

**Theft by conversion.** — It is generally laid down that any act which is an interference with the dominion and right of property of another is a conversion. (84) A conversion does not mean a destruction of the goods nor does it necessarily import an acquisition of property by the defendant or a total or absolute loss of the goods to the owner, but it consists in any wrongful act by which the defendant deprives the owner of his goods either wholly or for a time. (85) To constitute a fraudulent conversion, the owner must be deprived of his property or money by an adverse using or holding. (86)

Under the terms of section 305, theft by conversion is committed when ever a person, already in possession of a specific article of personal property with the owner's consent, fraudulently and without color of right converts it to his own use or to the use of any other person than the owner of it, with intent to deprive the owner of it, either *temporarily* or *absolutely*, or with intent to deprive any person having any special property or interest therein, temporarily or absolutely of such special property or interest, or with intent to pledge the same or to part with it under a condition, as to its return, which he may not be able to perform, or to so deal with it that it cannot be restored.

As we have already seen, the doctrine of the common law is that a *wrongful* taking out of the possession of the owner is of the essence of theft, and that, if a person rightfully and innocently obtains possession of a thing and afterwards fraudulently misappropriates it, he is guilty of no criminal offence; and, as we have also seen, this doctrine was, from time to time, qualified by a number of statutory exceptions, the first of which was contained in the statutes which provided for the punishment of clerks, servants and other employees who embezzled property received by them on

(81) R. v. West, 24 L. J., M. C., 4.
(82) Merry v. Green, 7 M. & W., 623; 10 L. J., M. C., 164.
(83) R. v. Gardner, L. & C., 243; 32 L. J., M. C., 35.
(84) Hollins v. Fowler, L. R., H. of L. Cas., 757, 766.
(85) 2 Stark. Ev., 839; 2 Saund., 46, 47.
(86) 10 Am. & Eng. Ency., L., 994. R. v. Chapman, 1 C. & K., 119.

behalf of their employers; this exception to the general rule being followed by statutes passed for the punishment of bankers, merchants, brokers, solicitors, factors, and other agents, who committed similar offences, and for the punishment of bailees for fraudulently converting any chattel, money or valuable security entrusted to them.

The effect of section 305 is to put all persons whomsoever, — whether they are or are not clerks, servants, employees, bankers, merchants, brokers, solicitors, factors, agents or bailees, — upon the same footing, and to make every person whomsoever, — without any distinction, — guilty of theft by conversion, (or what may, perhaps, be more properly termed embezzlement), when, having become *rightfully* possessed of something belonging to another, he, instead of handing it over, in specie, or instead of doing with it what he was entrusted to do, fraudulently, and, without color of right, converts it to his own use or to the use of any other person than the owner. In other words, *embezzlement* by clerks, servants or other employees, *fraudulent conversion* by bankers, merchants, brokers, solicitors, factors or other agents, of property entrusted to them for safe custody, etc., and *larceny by bailees* are three only of the various ways of committing the offence of *theft by conversion*, treated of by section 305. So, that, it may not be out of place to briefly review some of the authorities on these three subjects.

**Embezzlement.** — Embezzlement, when defined in a general way, — without regard to its application to a particular class, such as clerks, servants or other employees, — is said to be the fraudulent appropriation or conversion of the property or goods of another by one who has the rightful possession of them or who is entrusted with their possession at the time of the conversion. (87)

The main distinction between *larceny* by a clerk, servant or other employee and embezzlement by a clerk, servant or other employee was that, to constitute embezzlement, the money or other property appropriated by the offender must, at the time of its appropriation, never have been, even constructively, in the possession of the master; for if, at the time of being taken and appropriated, it was already in the master's possession, either actually or constructively, the servant's offence amounted to larceny and not embezzlement. (88) For instance, if an employee opened his master's money drawer, or desk or safe, containing money belonging to his master and abstracted and appropriated any of such money, or if the master handed money to the servant to pay out for him, and the servant appropriated it, the servant in each of these cases committed larceny; but, if a debtor of the master paid a debt to the master's servant, and the latter kept the money and appropriated it to his own use, this was embezzlement. (89)

The usual presumptive evidence of a servant having embezzled money received by him for his master is that he never accounted to his master for it, or that he denied having received it.

If, instead of denying the appropriation of the money, the party in rendering his account admits it, alleging a right in himself, however unfounded, or setting up an excuse, however frivolous, he is not guilty of embezzlement; (90) even though he afterwards abscond and do not pay over the money. (91)

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(87) 10 Am. & Eng. Ency. L., 2nd Ed., 978.

(88) R. v. Goodenough, Dears., 210; R. v. Hawkins, 1 Den., 584; R. v. Smith, R. & R., 267; R. v. Murray, 1 Moo. C. C., 276; R. v. Watts, 2 Den., 15.

(89) R. v. Betts, Bell, 90; 28 L. J., M. C., 69; R. v. Masters, 1 Den., 332; 2 C. & K., 930.

(90) R. v. Norman, C. & Mar., 501.

(91) R. v. Creed, 1 C. & K., 63.

But where it is the servant's duty to account for and pay over at stated times the moneys received by him, his not doing so, wilfully, is embezzlement; although he do not actually deny the receipt of them. Thus, upon an indictment charging the prisoner with the embezzlement of £4-8-6 on November 4th, of £4-9-8 on November 28th, and of £1 on December 18th, it appeared that the prisoner was in the employ of the prosecutrix in her business of a baker and was authorized to receive moneys due for bread, and that, in payment for quantities of bread, he received the three sums in question on the three days above mentioned, and had never paid any of them over to the prosecutrix. The prisoner had never denied receiving the moneys, but it was his duty on the evening of every day to render to the prosecutrix a verbal account of all moneys received by him on her account in the course of that day and to immediately pay them over to her. It was submitted for the defence that there was no embezzlement, as there was no denial of the receipt of any of the monies, and that the mere omission to pay them over was not embezzlement; but Coleridge, J., held, that, as it was the prisoner's duty every evening to account for and pay over all moneys received by him in the course of the day, his wilful omission to pay them over was clearly quite equivalent to a denial of their receipt and constituted embezzlement. (92) And, even where no precise time can be fixed at which it was the servant's duty to pay the moneys over, his not accounting for them, if found by the jury to have been done fraudulently, is equally an embezzlement. (93)

Where, upon an indictment for embezzlement, the Crown Counsel, in opening the case, stated that the prisoner had been a shopman in the employ of the prosecutrix, and that it would be proved, that there was a deficiency in the prisoner's accounts, Alderson, B., said, "It is not sufficient to prove at the trial a general deficiency in account. Some specific sum must be proved to be embezzled in like manner as in larceny, some particular article must be proved to have been stolen." (94)

**Fraudulent conversion by bankers, etc.** — Certain trust money, which had been invested on mortgage, was paid off, and was left in the hands of the defendant, the solicitor to the trust, who thereupon wrote to the person beneficially interested informing him of the money being paid and asking how he would like to have it invested, — whether in the funds or on mortgage. In answer, the beneficiary wrote to the defendant as follows, —"Will consult G at once about the money, and let you know. I do not wish it placed in the funds." About the date of these letters, it was clear that the defendant fraudulently appropriated the money to his own use. *Held*, upon the prosecution of the defendant, under section 76 of the Imperial Act, 24-25 Vic., c. 96, for fraudulently converting property entrusted to him for safe keeping that he was guilty of that offence. (95)

But, where a solicitor was entrusted by a client with money to invest on mortgage on the client's behalf, and, instead of doing so, he fraudulently appropriated the money to his own use, it was held, on a prosecution under the same section, that the defendant was not entrusted with the money "for safe custody." (96)

Where, on a prosecution of a banker, etc., for the fraudulent conversion of money entrusted to him for a specific purpose, it was alleged that there was a specific direction to invest the money in the funds, it was held,

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(92) R. v. Jackson, 1 C. & K., 384.
(93) R. v. Welch, 1 Den., 199; 2 C. & K., 296.
(94) R. v. Lloyd Jones, 8 C. & P., 288. See, also, R. v. Chapman, 1 C. & K., 119, and R. v. Wolstenholme, 11 Cox C. C., 313.
(95) R. v. Fullagar, 14 Cox C. C., 370.
(96) R. v. Newman, 8 Q. B. D., 706; 51 L. J., M. C., 87.

that such an allegation was not supported by evidence of a direction to invest in the funds, *in the event of any unexpected accident occurring*.(97)

The prisoner was an agent employed to sell goods on commission for the prosecutors. During the employment, the prosecutors wrote to the prisoner, "We will send H, B and P, their bills at the end of the month, and the same day that you receive the money from the customers you must remit it to us. We will attend to your order, as our arrangements were to remit us, as soon as you received it." After getting this letter, the prisoner received from three different customers, — *not H, B or P*, — three different sums of money, which he converted to his own use. *Held*, that the above letter was not a direction in writing as to the application of the three sums so converted, as the letter probably only referred to the accounts of H, B and P, and further that the prisoner had not, (within the meaning of section 75 of the Imperial Act, 24-25 Vic., c. 96), been *entrusted* with the three sums mentioned in the indictment as they had never been actually or constructively in the possession of the prisoner and therefore they could not be said to have entrusted the prisoner with them. (98)

The prosecutor by letter instructed the prisoner, a stock broker, to buy for him on the following day certain stock at 90, to hold for a rise, the time to close to be left open, and he enclosed a cheque for £21, "the cover and commission." On the day following, the price of the stock was higher than the limit prescribed in the letter, (namely 90), and the prisoner paid the cheque into his own bank, without purchasing stock, and he subsequently spent the money for his own use. *Held*, that the prisoner was rightly convicted on an indictment, under 24-25 Vic., c. 96, s. 75, charging him that having been entrusted, as a broker and agent, with a security for payment of money with a direction in writing to apply it for a specific purpose, in violation of good faith and contrary to the terms of such direction, he converted it to his own use. (99)

The defendant, a broker, who from time to time gratuitously made investments, on the Stock Exchange, as agent for the prosecutrix, wrote to her enclosing a contract note for three Japanese bonds at £112 each, saying he was fortunate in securing them for her and asking her to ratify what he had done. The contract-note was in the form of a sold-note from the defendant to the prosecutrix. The prosecutrix wrote him in reply, saying she had received the contract-note and she enclosed a cheque for £336 in payment. The cheque was payable to the defendant and endorsed and cashed by him, but he never paid for the bonds and applied the proceeds of the cheque to his own purposes. *Held*, that the letter from the prosecutrix saying that she "enclosed the cheque for £336 in payment," was a sufficient direction, under section 75 of the 24-25 Vic., c. 96, to apply the cheque or its proceeds to take up the Japanese bonds by paying the seller, if not already delivered to the defendant, and if already received by the defendant, by paying himself, and that the conviction of the defendant should be confirmed. (100)

An attorney, employed to raise money on mortgage of property, found a mortgagee, prepared the mortgage, got it executed, obtained the mortgage money and handed over the mortgage deed to the mortgagee. He paid over to the mortgagor a portion only of the mortgage money and fraudulently converted the remainder to his own use. *Held*, that as the attorney was not entrusted with the mortgage deed or with the money for safe custody, and as there was no direction in writing to apply the proceeds of

(97) R. v. White, 4 C. & P., 46.
(98) R. v. Brownlow, 14 Cox C. C., 216.
(99) R. v. Cronmire, 16 Cox C. C., 42.
(100) R. v. Christian, L. R., 2 C. C. R., 94.

the mortgage deed, and as the mortgage could not be said to have been transferred by him in violation of good faith and contrary to the object or purpose for which he was entrusted with it, he did not come within the 75th or 76th sections of the Imperial Act, 24-25 Vic., c. 96. (101)

**Larceny as a bailee.**—Even before the passing of the statutes relating to larceny by bailees, it was held that, although goods were in the first instance obtained without a felonious intent, yet if the possession of them was obtained by means of a trespass, the subsequent fraudulent appropriation of them during the continuance of the same transaction, was larceny. As, where a man, driving a flock of sheep from a field, drove with them a sheep belonging to another person, without knowing at the time that he did so, but afterwards, on discovering the fact, sold that sheep and appropriated the proceeds of the sale to his own use, he was held to be rightly convicted of larceny. (102)

A man could not be convicted of larceny as a bailee unless the bailment was to re-deliver the very same chattel or money. (103)

The prosecutor placed a sum of money in the hands of the prisoner for the purpose of purchasing coals for the prosecutor from a colliery company. The prisoner did not buy any coals, but fraudulently appropriated the money to his own use. On these facts he was held rightly convicted of larceny as a bailee. (104)

A carter was employed by the owner of a cargo of coals to load the coals in the carter's own cart from the vessel and deliver specified quantities thereof to persons whose names were on a list given to him. He sold two loads of the coals fraudulently to persons whose names were not on the list, and appropriated the money to his own use. *Held*, that he was guilty of larceny as bailee of the two loads. (105)

The prosecutor delivered to the prisoner two brooches to sell for him at £200 for one, and £150 for the other, and the prisoner was to have them for a period not exceeding ten days for that purpose. After the expiration of the ten days the prisoner sold the brooches with other jewellery for £250, but arranged with the buyer that he might redeem the brooches for £110 by a certain time. The prisoner was held to be guilty of larceny as a bailee of the brooches, it having been his duty, after the ten days had expired without his effecting a sale, to return the brooches, in specie to the prosecutor. (106)

Where the prisoner a commission agent was entrusted by the prosecutors with silk for sale and it was his duty, at the end of six months to send in an account for the entire six months, and to return the unsold silk, and before the end of the six months, he appropriated the silk to his own use, he was held to be rightly convicted of larceny as a bailee. (107)

Where the prisoner was indicted for larceny as bailee of a coat, and the evidence was that the prosecutor had lent the coat to wear for a day and that some few days afterwards the prisoner left the town and was found wearing the coat on board a vessel bound for Australia, Martin, B., stopped the case on the ground that there was no evidence of a conversion sufficient to satisfy the statute. "The determination of the bailment."

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(101) R. v. Cooper, L. R., 2 C. C. R., 123.
(102) R. v. Riley, Dears., 149.
(103) R. v. Hoare, 1 F. & F., 647; R. v. Garrett, 2 F. & F., 14; R. v. Hassell, L. & C., 58.
(104) R. v. Aden, 12 Cox C. C., 512.
(105) R. v. Davies, 10 Cox C. C., 239.
(106) R. v. Henderson, 11 Cox C. C., 593.
(107) R. v. Richmond, 12 Cox C. C., 495.

said His Lordship, "must be something analagous to larceny, and some act must be done inconsistent with the purposes of the bailment. (108)

The drawer of an accomodation bill for £30 received it from the acceptor upon an arrangement to get it cashed and pay over to the latter all the proceeds except £3, which the drawer was to retain for his trouble. Instead of carrying out this arrangement the drawer handed the bill to one of his creditors who was pressing him for payment of a debt of £10, in order that the creditor might discount the bill and retain out of it his debt of £10 and then hand over the balance to the drawer. The creditor, however, did not carry out this arrangement and detained the bill. On these facts it was held that, although the drawer was a bailee of the bill within the meaning of the statute, yet there was no conversion of it by him analagous to larceny, and that therefore an indictment against him for larceny as bailee of the bill could not be sustained. (109)

Whilst in treaty with a firm of solicitors for the transfer of a public house license, the prisoner was required by them to give security for the purchase money before they would assist him in procuring a transfer. To enable him to give the required security, the prosecutor accepted three bills of exchange drawn upon him by the prisoner, which it was agreed that the prisoner should deposit with the solicitors, by way of security, and that he should not negociate or use them for any other purpose, and if the transfer was not effected that he should return them to the prosecutor. The prisoner who, — instead of depositing the bills with the solicitors, — applied two of them to other purposes for his own benefit, was held not to have been a bailee of the bills within section 3 of 24-25 Vic., c. 96. (110)

But a person who receives a bill of exchange for the purpose of getting it discounted and handing the proceeds over to another and instead of getting it discounted endorses it as his own to a creditor in payment of his account, intending to pay the property in the bill absolutely to the creditor is a bailee of a valuable security and guilty of a fraudulent conversion of the same to his own use. (111)

Where a person has been entrusted by another with a valuable security with instructions to raise thereon a loan for such other person, and, after having effected the loan and received the proceeds in cash, misappropriates the latter to his own use, he may be convicted of larceny as a bailee of the money so received. (112)

**306. Theft of Things under Seizure.** — Every one commits theft and steals the thing taken or carried away who, whether pretending to be the owner or not, secretly or openly, takes or carries away, or causes to be taken or carried away, without lawful authority, any property under lawful seizure and detention by any peace officer or public officer in his official capacity. (*As amended by the Criminal Code Amendment Act 1900*).

* The amendment made to this section is the addition of the words "by any peace officer or public officer in his official capacity."

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(108) R. v. Jackson, 9 Cox C. C., 505.
(109) R. v. Weeks, 10 Cox C. C., 224.
(110) R. v. Cosser, 13 Cox C. C., 187.
(111) R. v. Oxenham, 46 L. J., M. C., 125.
(112) R. v. Governor of Holloway Prison; Ex Parte George; 18 Cox C. C., 631; 66 L. J., Q. B., 830.

Under the section as it stood before this amendment, it was held that, an hotel guest, — who, without the leave of the hotel keeper, removed his effects after the hotel keeper had for non-payment of his charges for board and lodging, placed them under lawful seizure and detention, by locking them up and notifying the guest thereof, — was guilty of theft of the effects so removed by him, although he was permitted by the hotel keeper to have free access to the room. (113)

The amendment excludes such civil cases as this from the operation of the section, by restricting it to property under lawful seizure and detention by a *peace officer* or a *public officer* in his official capacity.

The prisoner and three others purchased of a Company certain goods, in part payment of which they gave a receipt note which stipulated that the ownership of the goods should remain in the Company until payment of the note. The note was discounted by the Company in the Bank as an ordinary promissory note, and not being met at maturity the Company took it up by substituting a renewal. The renewal note not being paid when due, the Company sent out their bailiff and seized the goods under the original note. The prisoner, with assistance, retook the goods; and a charge was laid against him under the above section, 306. At the trial it was objected that, the original note being paid by the renewal, the property became vested in and the ownership passed to the makers; and the objection was maintained and the prisoner acquitted. (113*a*)

Since the above mentioned amendment, such a seizure, not being by a peace officer or a public officer in his official capacity, would, in any case, be no foundation for such a charge.

Offences against section 306 are punishable under section 356, *post*, which enacts that the punishment for stealing, in cases in which no punishment is otherwise provided, shall be seven years, and, in case of the offender having been previously convicted of theft, ten years.

**307. Theft of Animals.** — Every one commits theft, and steals the creature killed who kills any *living creature* capable of being stolen with intent to steal the carcase, skin, plumage or any part of such creature.

The stealing of cattle is punishable, under section 331, *post*, by fourteen years' imprisonment; and according to the above section, 307, the same punishment will be applicable to the offence of *killing* cattle with intent to steal the carcase, etc., thereof.

See section 331A, *post*, as to the punishment of *Cattle frauds*.

The stealing of dogs, birds and domestic animals, etc., is punishable under section 332, *post*.

Section 499, clause (*b*), *post*, makes it an indictable offence, punishable by fourteen years' imprisonment, to wilfully *destroy* or *damage* any cattle, by killing, maiming, poisoning or wounding.

See comments under sections 331 and 332, *post*.

**308. Theft by Agent.** — *Every one* commits theft who, having received any money or *valuable security* or other thing whatsoever, on terms requiring him to account for or pay the same, or the pro-

(113) R. v. Hollingsworth, 2 Can. Cr. Cas., 291.
(113*a*) R. v. Walker, 32 C. L. J., 300.

ceeds thereof, or any part of such proceeds, to any other person, though not requiring him to deliver over in specie the identical money, valuable security or other thing received, *fraudulently converts* the same to his own use, or *fraudulently omits to account for* or pay the same or any part thereof, or to account for *or pay* such proceeds or any part thereof, which he was required to account for or pay as aforesaid.

2. Provided, that if it be part of the said terms that the money or other thing received, or the proceeds thereof, shall form an item in a debtor and creditor account between the person receiving the same and the person to whom he is to account for or pay the same, and that such last mentioned person shall rely only on the personal liability of the other as his debtor in respect thereof, the proper entry of such money or proceeds, or any part thereof, in such account, shall be a sufficient accounting for the money or proceeds, or part thereof so entered, and in such case no fraudulent conversion of the amount accounted for shall be deemed to have taken place.

For the meaning of the word "*valuable security*," see section 3 (*cc*), *ante*.

Where a prisoner was indicted and convicted under the above section, 308, on a charge of having received from one Snelgrove $338, the property of one Scott on terms requiring him to account for and pay it to Scott, and of having, instead thereof, fraudulently converted it to his own use, it was contended for the prisoner that, as no terms were imposed by Snelgrove, from whom the prisoner received the money, there was no offence. *Held*, on a reserved case, that the section does not mean "terms imposed by the person paying the money," but terms on which the defendant, when he receives it, holds it. (114)

Offences against this section 308 and against sections 309 and 310, are punishable under section 320, *post*, by fourteen years' imprisonment; and section 357, *post*, provides that when, in cases of theft, the value of the article exceeds $200, two years shall be added to the term of imprisonment.

**309. Theft by holder of power of attorney.** — *Every one* commits theft who, being entrusted, either solely or jointly with any other person, with any power of attorney for the sale, mortgage, pledge or other disposition of any *property*, real or personal, whether capable of being stolen or not, fraudulently sells, mortgages, pledges or otherwise disposes of the same or any part thereof or fraudulently converts the proceeds of any sale, mortgage, pledge or other disposition of such property, or any part of such proceeds, to some purpose other than that for which he was intrusted with such power of attorney. R. S. C., c. 164, s. 62.

This section is somewhat similar to section 77 of the Imperial Statute, 24-25 Vic., c. 96, which is as follows: — "Whosoever, being entrusted,

(114) R. v. Unger, 14 C. L. T., 294.

either solely or jointly with any other person, with any power of attorney for the sale or transfer of any property, shall fraudulently sell or transfer or otherwise convert the same or any part thereof to his own use or benefit or the use or benefit of any person other than the person by whom he was so entrusted, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court to any of the punishments which the Court may award as hereinbefore last mentioned." (Penal servitude for any term not exceeding seven years and not less than three years).

**310. Theft by misappropriating proceeds held under direction.** —*Every one* commits theft who, having received, either solely or jointly with any other person, any money or *valuable security* or any power of attorney for the sale of any *property*, real or personal, with a *direction* that such money, or any part thereof, or the proceeds, or any part of the proceeds of such security, or such property, shall be applied to any purpose or paid to any person specified in such direction, in violation of good faith and contrary to such direction, fraudulently applies to any other purpose or pays to any other person such money or proceeds, or any part thereof,

2. Provided, that where the person receiving such money, security or power of attorney, and the person from whom he receives it, deal with each other on such terms that all money paid to the former would, in the absence of any such direction, be properly treated as an item in a debtor and creditor account between them, this section shall not apply *unless such direction is in writing.*

See section 3 (*r*), *ante*, for the meaning of the word "property."

The English Commissioners have, opposite to the section of their Draft Code corresponding with the above section 310 of our Code, a marginal note stating that the proviso of this section diminishes the number of cases in which the direction to dispose of the money, etc., must be in writing, and in their marginal note they add a reference to the cases of *R. v. Cooper* and *R. v. Tatlock*, which are two out of a number of decisions shewing the necessity for the special wording of the provisions of this section 310.

In Cooper's Case, the defendant was indicted under sections 75 and 76 of the Imperial Statute, 24-25 Vic., c. 96. Section 75 of that Act provides that "whosoever having been entrusted (*etc.*) as a *banker, merchant, broker, attorney, or other agent*, with any money or security for the payment of money, *with any direction in writing* to apply, pay or deliver such money or security, or any part thereof respectively, or the proceeds or any part of the proceeds of such security, for any purpose, or to any person specified in such direction, shall, — in violation of good faith and contrary to the terms of such direction, — in anywise convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted, such money, security or proceeds, or any part thereof respectively; and whosoever, having been intrusted, (*etc.*), *as a banker*, (*etc.*), with any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, (*without any authority to sell, negociate, transfer or pledge*) shall, — in violation of good faith, and contrary to the object or purpose for which such chattel, security or power of attorney shall have been intrusted to him, — sell, negociate, transfer, pledge, or in any manner con-

vert to his own use or benefit or the use or benefit of any person other than the person by whom he shall have been so intrusted, such chattel, (*etc.*), shall be guilty of a misdemeanor, etc.;" and section 76 enacts that, "whosoever *being a banker, merchant, broker, attorney or agent*, and being intrusted, either solely or jointly with any other person, with the property of any other person *for safe custody*, shall, with intent to defraud, sell, negociate, transfer, pledge or in any manner convert or appropriate the same, or any part thereof, to or for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, shall be guilty of a misdemeanor," etc.

It appears that the defendant was an attorney, who was employed to raise money on security of property, and, having found a mortgagee willing to make the loan, he prepared the mortgage deed, got it executed by the mortgagor, obtained the money from, and handed over the deed to the mortgagee. He then paid over to the mortgagor, a portion only of the money, and fraudulently converted the rest of it to his own use. *Held*, — upon these facts,— that as the defendant was not entrusted with the deed or the money, *for safe custody*, and, as there was *no direction in writing* to apply the proceeds of the mortgage deed, and, as the deed could not be said to have been transferred in violation of good faith and contrary to the object or purpose for which it was entrusted to him, the defendant did not come within the 75 and 76 sections of 24-25 Vic., c. 96. (115)

In Tatlock's case, the defendant was indicted, under the second clause of section 75 of 24 and 25 Vic., c. 96, for that, being entrusted as a broker with valuable securities for a special purpose, *without authority to sell* negociate, transfer or pledge them, he unlawfully and contrary to the purpose for which the securities were entrusted, converted to his own use a portion of the proceeds.

It appears that the defendant was an insurance broker, and, as such, had effected, for the prosecutor, some insurances on a ship; that, the ship having been lost, the prosecutor sent the policies and other documents, necessary to recover from the insurers the amount of the loss, to the defendant, who subsequently, on two different days, received cheques for the amounts of two policies; that the cheques were payable to the defendant's order, and he paid them into his own bank, to his own credit. The defendant did not pay over to the prosecutor any of the money so received by him, but gave various excuses for not doing so; and he afterwards filed a petition, for liquidation of his own affairs, in bankruptcy; his balance at his bankers, being then much less than the amount received by him on the policies. The defendant was convicted on these facts; but it was held that the conviction was wrong, on the following grounds: — by Cockburn, C. J., on the ground, that, even assuming that the defendant could have been properly convicted if there had been evidence that he received the moneys with the intention of embezzling them, he could not at any rate be convicted in the absence of such evidence and in the absence of any finding to that effect; by Kelly, C. B., and Pollock, B., on the ground that in the absence of evidence of the previous course of dealing between the parties and of what the duty of the prisoner was as to handing over or accounting for the money received, the conviction could not be upheld; and by Bramwell, Amphlett and Field, J.J., on the ground that the second branch of the 24 and 25 Vic., c. 96, section 75, applied only to the case of an agent, who, — being entrusted with securities, *without authority to obtain money upon them*, — wrongfully appropriates the securities, or wrongfully obtains money upon them and appropriates the money. (116)

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(115) R. v. Cooper, L. R., 2 C. C. R., 123; 43 L. J. (M. C.), 89.

(116) R. v. Tatlock, 2 Q. B. D., 157; 46 L. J., M. C., 7. See, also, *R. v. White R. v. Newman, etc.*, cited at pp. 360, 361, *ante;* and see *R. v. Portugal*, 16 Q. B. D., 487 and R. v. Kane, 70 L. J., Q. B., 143.

These sections 75 and 76 of the above mentioned Imperial Statute,—which are the same in effect as sections 60 and 61, R. S. C., c. 164 (now repealed),—relate expressly to bankers, merchants, brokers, attorneys, and agents; and to bring an offender within the provisions thereof it appears, according to the above cases, to have been necessary, that in connection with one of the clauses, there must have been a dealing with the entrusted money, etc., against the terms of some *written direction*, that in relation to another clause there must have been a selling, etc., *without any authority* to do so, and that in regard to the third clause the entrusted money must have been delivered to the banker, etc., *for safe custody*, in the absence of the essentials necessary to convict under the other clauses.

The law is now framed so as to apply not only to bankers, merchants, brokers, attorneys and agents, but to all persons whomsoever, and so that it shall not be essential (in connection with sections 308 and 310) that the direction, if any, must be *in writing*, nor that the conversion or other wrongful dealing must in order to be theft, be against some direction *in writing;* but that, if there is no direction in writing, it shall be sufficient to shew that the conversion or other wrongful dealing was against a verbal direction.

The prosecutors, being in need of additional capital, advertized that they required from £10,000 to £15,000. The prisoner replied to the advertisement, and, at a subsequent interview with the prosecutors, he represented himself to be a broker or money lender and bill discounter; whereupon the prosecutors agreed that he should draw upon them some bills for a certain amount and endeavor to get them discounted, it being stipulated in an agreement drawn up between them that the prosecutors were to receive 80 per cent of the proceeds of the bills. The prosecutors handed to the prisoner two documents in the form of bills of exchange except that they had no drawer's name and signature thereto, but having the prosecutors' acceptance written across each of them. The prisoner procured the drawer's name thereto, and got the bills discounted, and converted the proceeds to his own use. *Held*, that the acceptances were, when the prisoner received them from the prosecutors, valuable securities for the payment of money and that the prisoner was rightly convicted under section 75 of the 24-25 Vic., c. 96. (117)

**311. Theft by owners, co-owners, partners, etc.**— Theft may be committed by the owner of anything capable of being stolen against a person having a special property or interest therein, or by a person having a special property or interest therein against the owner thereof, or by a lessee against his reversioner, or by one of several joint owners, tenants in common, or partners of or in any such thing against the other persons interested therein, or by the directors, public officers or members of a public company, or body corporate, or of an unincorporated body or society associated together for any lawful purpose, against such public company or body corporate or unincorporated body or society. R. S. C., c. 164, s. 58.

See section 356, *post*, as to punishment.

**312. Concealing gold or silver with intent to defraud partner in mining claim.** — Every one commits theft who, with intent to

(117) R. v. Bowerman, 60 L. J., M. C., 13; [1891] 1 Q. B., 112.

defraud his co-partner, co-adventurer, joint tenant or tenant in common, in any mining claim, or in any share or interest in any such claim, secretly keeps back or conceals any gold or silver found in or upon or taken from such claim. R. S. C., c. 164, s. 31.

See section 354, *post*, as to punishment.

See section 571, *post*, which authorizes the issuing of search warrants to search for gold, etc., alleged to be concealed.

**313. Husband and wife.** — No husband shall be convicted of stealing, during cohabitation, the property of his wife, and no wife shall be convicted of stealing, during cohabitation, the property of her husband; but while they are living apart from each other either shall be guilty of theft if he or she fraudulently takes or converts anything which is, by law, the property of the other in a manner which, in any other person, would amount to theft.

2. Every one commits theft who, while a husband and wife are living together, knowingly —

(*a*) assists either of them in dealing with anything which is the property of the other in a manner which would amount to theft if they were not married; or

(*b*) receives from either of them anything the property of the other, obtained from that other by such dealing as aforesaid.

"By the *present* law, a husband or wife cannot steal from his wife or her husband, even if they are living apart, although by *recent statutes* the wife is capable of possessing separate property. So long as cohabition continues this seems reasonable: but when married persons are separated, and have separate property it seems to us to follow that the wrongful taking of it should be theft. This section is also framed so as to put an end to an unmeaning distinction by which it is a criminal offence in an adulterer to receive from his paramour the goods of her husband but no offence in any one else to receive such goods from the wife." (Eng. Commrs' Rep., p. 28).

The *recent statutes* above referred to by the English Commissioners, as having reference to the separate property of married women, are the Married Women's Property Act of 1870 and Amendments thereto made up to 1878, when the Royal Commissioners made their Report. Since that date an important change has been made, in England, in regard to married women, by the passing of the Married Women's Property Act of 1882 (45, 46 Vic., c. 78), which almost abolished, as far as property is concerned, the legal distinction between married and unmarried women, by giving to a married woman the fullest powers of acquiring, holding, and disposing of property as her own separate property, and that, too, without the old formality of the intervention of a trustee by means of a deed of settlement, *ante* or *post* nuptial. The statute enacts, that, "Every woman whether married before or after this act shall have in her own name, against all persons whomsoever, including her husband, the same civil remedies and also, (subject as regards her husband to the proviso hereinafter contained), the same remedies and redress by way of criminal proceedings, for

the protection of her own separate property, as if such property belonged to her as a *feme sole:* * * * provided that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act, *while they are living together*, as to or concerning any property claimed by her," etc.

## PART XXV.

## RECEIVING STOLEN GOODS.

**314. Receiving property obtained by any indictable offence.** — Every one is guilty of an indictable offence, and liable to fourteen years' imprisonment, who receives or retains in his possession anything *obtained by any offence punishable on indictment*, or by any acts wheresoever committed, which, if committed in Canada after the commencement of this Act, would have constituted an offence punishable upon indictment, knowing such thing to have been so obtained. R. S. C., c. 164, s. 82.

For the meaning of the phrase, "having in one's possession," see section 3 (*k*), *ante*.

Section 627, *post*, provides that any accessory after the fact and any receiver of stolen property may be prosecuted *whether the principal offender or thief has or has not been prosecuted or convicted*, and, that any number of receivers of different parts of property which has been stolen may be tried together.

Other provisions with regard to receivers are contained in sections 715, 716 and 717, *post*.

These sections 715, 716 and 717, are re-enactments of sections 200, 203 and 204, R. S. C., c. 174; and provisions to the same effect are contained in the Imperial Statutes 24-25 Vic., c. 96, section 94, and 34-35 Vic., c. 112, (The Prevention of Crimes Act, 1871), section 19.

In a prosecution against a receiver of stolen goods, the thief is a competent witness to prove the stealing of the goods and indeed to prove the whole case, (1) but, where the only evidence against the alleged receiver is that of the thief, the presiding judge will advise the jury to acquit. (2) The mere fact that the stolen goods were found upon the alleged receiver's premises on the day of the theft is not sufficient to confirm the evidence of the thief so as to make it proper to convict. In this case, Chief Baron Pollock, said, "There is no evidence here either of the theft or of the guilty knowledge, except the evidence of the thief. He proves the theft, the possession and the guilty knowledge, but there is nothing to confirm him, except a fact which is quite consistent with his story being false, for he might have put the goods in the prisoner's premises without the prisoner's knowledge. The evidence is not therefore such as would make it safe or proper to convict, and the jury ought to acquit." (3)

The confession of the thief (unless made in the presence of and assented to by the alleged receiver) is not evidence against the person charged with the receiving. (4)

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(1) R. v. Haslam, 1 Leach, 418. See R. v. Patram, 2 East P. C., 783.
(2) R. v. Robinson, 4 F. & F., 43.
(3) R. v. Pratt, 4 F. & F., 315.
(4) R. v. Cox C. C., 1 F. & F., 90; R. v. Turner, 1 Mood. C. C., 347.

It is competent to a person charged with receiving stolen property to disprove the guilt of the alleged thief. (5)

Where an indictment charged that a certain evil disposed person feloniously stole certain goods, and that C D and E F feloniously received them, knowing them to be stolen, it was held good against the receivers as for a substantive felony. (6)

The goods stolen must be proved to have been received by the defendant; and though there be proof of a criminal intent to receive and a knowledge of the goods being stolen, if the *exclusive* possession of them still remains with the thief, the alleged receiver cannot be legally convicted of receiving. (7) But a person having *joint* possession with the thief may be convicted as a receiver. (8)

In Robinson's case, in which the prisoner was indicted for stealing and receiving a mixture, it appeared that the thief had stolen two kinds of grain, — some oats and some peas, — and, after having mixed them so as to constitute a mixture, he had sold the mixture to the prisoner who was charged with receiving the mixture knowing it to have been stolen. *Held*, that the prisoner could not be convicted of receiving a mixture knowing it to have been stolen, the evidence of the thief, if believed at all, being that he stole pure oats and pure peas, and not a mixture, the Judge remarking, moreover, that it would be perilous to convict a person as receiver upon the sole evidence of the thief. (9)

A person who assists in the stealing of a thing is a principal offender, and cannot, in respect of the assistance he renders, be treated as a receiver of the thing so stolen with his assistance. So, that, where A entered a bar where B was barman, and, — after exchanging with B, signs of recognition, — A took refreshments for which he put down, in payment, a two shilling piece, whereupon, in A's presence, B took, from his master's money, eighteen shillings and six pence which he handed, as change, to A, who went off with it, — it was held that these circumstances did not warrant A's conviction for receiving, but that the facts should have been left to the jury as evidence that A was a principal offender and an accomplice with B in the theft. (10)

In a case in which A was indicted for stealing pork and in which B was indicted for receiving it, it appeared that they both went together to the premises of A's employer, where the pork was kept, and that A took the pork from a tub and brought it outside and gave it to B; and Lord Campbell, C. J., said, "Assuming, as we are bound to do from the case submitted to us, that the prisoner, (referring to B), was a principal in the second degree, he could not take the property from himself." (11)

And in a case where a man had committed larceny in a room in a house where he lodged and had thrown, out of the window, to an accomplice waiting in the street to receive it, a bundle containing the stolen property, the Judges held that the accomplice was a principal and that the conviction of him as a receiver was wrong. (12)

Where a person has merely rendered some aid in carrying the goods off, just after being stolen, he is an accessory under the common law, and, as

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(5) Fost., 365.
(6) R. v. Caspar, 2 Mood. C. C., 101; 9 C. & P., 289.
(7) R. v. Wiley, 2 Den., 37; 20 L. J. (M. C.), 4.
(8) R. v. Smith, Dears., 494; 24 L. J., M. C., 135.
(9) R. v. Robinson, 4 F. & F., 43. And, see section 317, *post*.
(10) R. v. Coggins, 12 Cox C. C., 517.
(11) R. v. Perkins, 5 Cox C. C., 554; 2 Den., 450; 21 L. J., M. C., 152.
(12) R. v. Owen, 1 Moo. C. C., 96.

such, a principal, under our Code; as where A and B broke into a warehouse, and stole thereout a quantity of butter, which they carried along the street thirty yards, and then fetched C, who being apprised of the robbery, assisted in carrying the property away. (13)

Where A, knowing that goods had been stolen, directed B, his servant, to receive them into his premises, and B, in pursuance of that direction afterwards received them, in A's absence, B also knowing that they had been stolen, they were held to be indictable jointly. (14)

Two or more persons may be indicted jointly for receiving stolen property, though each successively received at different times the whole of what was stolen; and it makes no difference whether the goods were received direct from the thief or from intermediate persons. (15)

The actual manual possession or touch of the goods is not necessary to the completion of the offence of receiving; it is sufficient if the goods are in the actual possession of a person over whom the defendant has a control, so that they would be forthcoming if the defendant ordered it. (16) [See section 317, *post;* and see also, the last clause of section 3 (*k*) at page 4, *ante.*] And there may be a conviction for receiving against a person who,—though he personally never had manual possession of the goods,—was present aiding and abetting another receiver who obtained actual possession of them. (17)

Where three persons were charged with larceny, and two others as accessories, in separately receiving portions of the stolen goods, and the indictment contained also two other counts, each charging one of the alleged receivers separately with a substantive felony, in separately receiving a portion of the stolen goods, it was held that, though the principals were acquitted, the receivers might be convicted on the last two counts of the indictment. (18)

If a husband, knowing that his wife has stolen goods, receives them from her, he may be convicted of receiving. (19)

Husband and wife were indicted jointly for receiving, and the jury found them both guilty. The jury also found that the wife received the goods apart from and without the knowledge or control of the husband, although he afterwards became aware of the receipt of the goods by his wife. *Held*, that this finding did not warrant the conviction of the husband. (20)

The offence of receiving is not comprised in the offence of theft. So that where a defendant was tried under the provisions respecting the speedy trial of indictable offences upon a charge of house breaking accompanied by theft and the evidence did not prove this offence, but the prosecution

(13) R. v. King, R. & R., 332; See R. v. McMakin, *Id.*; R. v. Dyer, 2 East, P. C., 767; R. v. Attwell, *Id.*, 768. See, also, R. v. Campbell, *cit.* at p. 60, *ante*. But see R. v. McIntosh and McIntosh v. R., (Que. Jud. Rep., 2 Q. B., 357, Que. Jud. Rep., 3 Q. B., 287, 14 C. L. T., 329), a case tried before the Code, in which it was held that a fraudulent appropriation by the principal and a fraudulent receiving by the accessory might take place at the same time and by the same act.

(14) R. v. Parr, 2 M. & Rob., 346.

(15) R. v. Reardon, L. R., 1 C. C. R., 31; 35 L. J. (M. C.), 171.

(16) R. v. Smith, Dears, 494; 24 L. J. (M. C.), 135.

(17) R. v. Rogers, 37 L. J. (M. C.), 83. See section 317, *post*.

(18) R. v. Pulham, 9 C. & P., 280; R. v. Hayes, 2 M. & Rob, 156.

(19) R. v. McAthey, L. & C., 250; 32 L. J. (M. C.), 35; R. v. Woodward, L. & C., 122; 31 L. J. (M. C.), 91.

(20) R. v. Dring, Dears. & B., 329.

contended that a case of receiving was made out, it was held that the power under section 713, *post*, to convict for an offence other than that charged, can only be exercised when the offence charged contains all the ingredients of the one proved, and, that according to that rule, the offence of receiving stolen goods was not comprised in that of house breaking accompanied by theft, the latter crime being that of carrying away the goods of another and the crime of receiving being that of receiving goods stolen by another person, (other than the receiver), with knowledge of them having been stolen. (20*a*)

The fact of the defendant's knowledge of the goods being stolen or obtained by some indictable offence, when he received them, may be proved either directly, by the evidence of the principal offender, or it may be proved circumstantially by shewing, for instance, that the defendant bought them very much under their value, or denied that they were in his possession, or the like. (21)

And to show guilty knowledge other instances of receiving goods belonging to the prosecutor, from the same person, may be proved; (22) even though they be the subject of other indictments and antecedent to the receiving in question. (23)

Evidence that, on former occasions, portions of the commodity stolen had been missed by the prosecutor and that the defendants, the alleged thief and receiver, had after such occasions been found selling such a commodity, and that which was sold on the last of these occasions being identified as part of that missed by the prosecutor, was held admissible in proof of the guilty knowledge. (24)

Upon a trial for stealing and for receiving, it is legal, under section 716, to prove that there was found in the prisoner's possession other property stolen within the preceding period of twelve months although such other property is the subject of another indictment against him to be tried at the same term or sitting of the court; (25) but it has been held in England, that, under the first paragraph of section 19 of the Prevention of Crimes Act, (which first paragraph is the same as our law as contained in section 716), it was not sufficient merely to prove that "other property stolen within the preceding twelve months" had *at sometime*, during the twelve months, been dealt with by the prisoner, but that it must be proved that such *other property* was found in the prisoner's possession at the time when he was found in possession of the property forming the subject matter of the indictment. (26) Therefore, where the prisoner was indicted for receiving stolen goods, and, to shew guilty knowledge, evidence was tendered to prove that, a short time previously, the prisoner had sold for half its value, and had otherwise disposed of, other property stolen within the preceding twelve months, *Held*, that the statute did not extend to such evidence, which, therefore, was inadmissible. (27)

A, a boy, stole from B, his master, an article, which, after being so stolen, was taken from A, in the presence of B; after this it was, with B's consent, delivered back to A, in order to leave him at liberty to sell it to C, to whom he, A, had been in the habit of selling similar articles stolen.

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(20*a*) R. v. Lamoureux, 21 C. L. T., 49; 4 Can. Cr. Cas., 101.
(21) 1 Hale, 619.
(22) R. v. Dunn, 1 Moo. C. C., 146. See, also, section 716, *post*.
(23) R. v. Davis, 6 C. & P., 177. See, also, (as to evidence of previous convictions for receiving), section 717, *post*.
(24) R. v. Nicholls, 1 F. & F., 51.
(25) R. v. Jones, 14 Cox C. C., 3.
(26) R. v. Carter, 12 Q. B. D., 522; 53 L. J. (M. C.), 96.
(27) R. v. Drage, 14 Cox C. C., 85.

A, upon thus receiving back the article, sold it accordingly, to C; who, being indicted for receiving it, of an evil-disposed person, knowing it to be stolen, was convicted, and, notwithstanding objection made, was sentenced. (28) But it has been since held that this case is not law, and that a defendant is not liable to conviction, under such circumstances, inasmuch as the goods when received were not *stolen goods*. (29)

A, after stealing some goods sent them, by railway, in a parcel addressed to B. C, an officer of the railway company, from information received, examined the parcel at the railway station of the place of destination, and stopped it before its delivery to B. It was called for by A, the thief, on the day of its arrival at the railway station and refused to him. Next day, a porter of the Company by C's direction, took the parcel to a house which A had designated; and it was there received by B. *Held*, that B could not be convicted of receiving, as the goods had ceased to be stolen goods at the time when he received delivery of them from the railway porter sent by C to deliver them. (30)

This is expressly declared to be the law, by section 318, *post*.

Although section 3 (*e*), *ante*, includes in the definition of *property* not only the property originally in a person's possession or control but "also any property into or for which the same has been converted or exchanged, and any thing acquired by such conversion or exchange, whether immediately or otherwise," it will, in cases where the stolen goods have been altered, or converted into something else, between the time of the theft and the receiving, be as well to draw the indictment so as to correspond with the fact. For instance, A and B were indicted, the one for stealing, the other for receiving six notes of £100 each; A stole the notes, changed them into notes of £20, some of which £20 notes he gave to B: *Held*, that B could not be convicted; for he did not receive the £100 notes notes stolen, and alleged by the indictment to have been stolen; (31) therefore if the goods stolen have been altered between the time of the stealing and that of the receiving, so as to pass into a new denomination, etc., the indictment should correspond with the fact. Where A was indicted for sheep-stealing, and B was charged with receiving "twenty pounds of mutton part of the goods," etc., it was held good. (32)

Recent possession of stolen property is evidence either that the person in possession stole it, or that he received it knowing it to be stolen, according to the circumstances of the particular case. Where a prisoner was found in recent possession of stolen property, of which he could give no satisfactory account, and where, from the circumstances, it might reasonably be inferred that he was not the thief, it was held that there was evidence for the jury that he received the property knowing it to have been stolen. (33) And where a woman was charged with stealing and also with receiving, and the evidence consisted of the fact of the stolen property having been found concealed on her person at ten o'clock in the morning after the night on which it was stolen, and of her having made two contradictory statements as to how she became in possession of it, and the jury acquitted her of larceny but convicted her of receiving, the evidence was held sufficient to sustain the conviction. (34)

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(28) R. v. Lyons, C. & Mar., 217.
(29) R. v. Dolan, Dears., 463; 24 L. J. (M. C.), 59; R. v. Hancock, 14 Cox C. C., 119.
(30) R. v. Schmidt, L. R., 1 C. C. R., 15; 35 L. J. (M. C.), 94.
(31) R. v. Walkley, 4 C. & P., 132. See, also, R. v. Robinson, *cit. ante*, p. 371.
(32) R. v. Cowell, 3 East P. C., 617, 781.
(33) R. v. Langmead, L. & C., 427.
(34) R. v. McMahon, 13 Cox (C. C. R., *Irish*), 275.

**315. Receiving stolen post letter or post letter bag.**— Every one is guilty of an indictable offence and liable to five year's imprisonment who receives or retains in his possession, any post letter, post letter bag, or any chattel, money or valuable security, parcel or other thing, the stealing whereof is hereby declared to be an indictable offence, knowing the same to have been stolen. R. S. C., c. 35, s. 84.

Section 4, *ante*, gives to the expressions "post-letter," and "post-letter bag," the meanings assigned to them by the Post Office Act, which meanings will be found on page 8, *ante*.

Section 624, *post*, provides that, in the case of any offence in relation to a post-letter or a post-letter bag or other mailable matter, chattel, money or valuable security sent by post, the property thereof may, in the indictment, be laid in the Postmaster-General.

See sections 627, 715, 716 and 717, and comments thereon, under section 314, at p. 370, *ante*.

The section relating to punishments for *stealing* a post-letter, a post-letter bag, or for stealing any chattel, money, or valuable security therein, etc., are 326, 327 and 328, *post*. See comments under these sections.

**316. Receiving property obtained by offence punishable summarily.** — Every one who receives or retains in his possession anything, knowing the same to be unlawfully obtained, the stealing of which is punishable, on summary conviction, either for every offence or for the first and second offence only, is guilty of an offence, and liable, on summary conviction, for every first, second or subsequent offence of receiving, to the same punishment as if he were guilty of a first, second or subsequent offence of stealing the same. R. S. C., c. 164, s. 84.

**317. When receiving is complete.** — The act of receiving anything unlawfully obtained is complete as soon as the offender has, either exclusively or jointly with the thief or any other person, possession of or control over such thing, or aids in concealing or disposing of it.

See comments and cases on pp. 371-374, *ante*.

Section 836 provides that the Court may, for the loss of any property, which a person may have suffered through any offence, award him a money compensation, in the shape of a judgment debt against the offender. This applies to theft, receiving, and malicious injuries to property, etc.

Section 837 provides, that, wherever a prisoner has been convicted either summarily or otherwise, of theft, or receiving, etc., a person who has innocently bought and paid the prisoner for the property may be reimbursed out of any money found upon and belonging to the prisoner; and section 838, *post*, provides that property stolen or criminally obtained may, at the trial of the offender, be ordered to be restored to the owner.

**318. Receiving after restoration to owner.** — When the thing unlawfully obtained has been restored to the owner, or when a

legal title to the thing so obtained has been acquired by any person, a subsequent receiving thereof shall not be an offence although the receiver may know that the thing had previously been dishonestly obtained.

This had already been held to be the law in several English cases. For instance, a parcel was entrusted by a consignor to a firm of common carriers for delivery to a consignee. Whilst at the carriers' depot, it was removed, by one of the carmen, from one platform to another, and there redirected by him to the prisoners. The attention of the superintendent of the carriers having been called to this circumstance the latter directed the parcel to be sent, with a special delivery sheet, in a van, accompanied by detectives, to the address placed upon the parcel by the carman; and the prisoners, having received it at that address, were prosecuted by the carriers. The indictment contained a count against the carman for larceny and another count against the prisoners for receiving. The carman pleaded guilty to the theft; but it was held that, the prosecutors having taken possession of the property after it was stolen by their carman but before being received by the prisoners, the latter could not be convicted of receiving it knowing it to have been stolen. (35)

## PART XXVI.

## PUNISHMENT OF THEFT AND OFFENCES RESEMBLING THEFT COMMITTED BY PARTICULAR PERSONS IN RESPECT OF PARTICULAR THINGS IN PARTICULAR PLACES.

**319. Clerks and Servants.** — (As amended by 57-58 V., c. 57). Every one is guilty of an indictable offence and liable to fourteen years' imprisonment, who —

(*a*) being a clerk or servant, or being employed *for the purpose or in the capacity of a clerk or servant*, steals anything *belonging to* or *in the possession of his master or employer:* or

(*b*) being a cashier, assistant cashier, manager, officer, clerk or servant of any bank, or savings bank, steals any bond, obligation, bill obligatory or of credit, or other bill or note, or any security for money, or any money or effects *of* such bank *or lodged or deposited with* any such bank; or

(*c*) being employed in the service of Her Majesty, or of the Government of Canada or the Government of any province of Canada, or of any *municipality*, steals anything in his possession *by virtue of his employment*. R. S. C., c. 164, ss. 51, 52, 53, 54 and 59.

For the definition of *municipality*, see section 3 (*p*), *ante*, p. 5. Clause (*a*), of section 319 corresponds with section 67 of 24-25 Vic., c. 96.

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(35) R. v. Villensky, 61 L. J., M. C., 218; [1892] 2 Q. B., 597. See, also, the cases of *R. v. Dolan* and *R. v. Schmidt*, *cit.* at p. 374, *ante*.

It is not necessary that the goods stolen should be the property of the master, in order to punish the offender under this clause. The words are "*belonging to or in the possession of* the master.

With reference to clause (*b*), the thing alleged to be stolen by a cashier or other officer or employee of a bank, may be either, anything *belonging* to the bank or anything *lodged or deposited with* such bank.

In the case of a government employee or of an employee of any municipality, the theft must be of something in his possession *by virtue of his employment*, in order to be punishable under section 319, clause (*c*).

The main distinction between *theft*, by a clerk or other employee, and *embezzlement*, by a clerk or other employee, seems to have been that, in order to be embezzled, the money, etc., in question, must not at the time of its misappropriation by the employee have reached the master's own possession; because if it had once reached the master's possession, either *actually* or *constructively*, the servant's offence would, at common law, have been larceny. (1)

For instance, where the defendant's duty was to place, every night, in his employer's safe, in an office where he conducted his employers' business, (though this office was in his own house), the monies received by him on their account and not used during the day, it was held, that, by placing the money there, the defendant determined his own exclusive possession of it, and that by afterwards taking some of it out of the safe, *animo furandi*, he was guilty of larceny. (2)

On the other hand, where the clerk and head manager of an Insurance Company, having, in the course of the Company's business, received from the managers of branch offices, several cheques payable to his own order, which it was his duty to endorse and hand over to the company's cashier, but which he endorsed and cashed, appropriating the proceeds to his own use, it was held to be embezzlement. (3)

This distinction was, for all practical purposes, rendered immaterial in prosecutions against clerks and servants, by the passing of special legislation, enacting, that, a defendant, indicted for embezzlement, might, if the facts adduced in evidence, disclosed a larceny, be convicted of the latter offence, and *vice versâ*. But, as we have already seen, the distinction is now swept away, entirely; and *embezzlement*, is simply treated as one of a number of ways of committing *theft*. If the defendant cannot be shewn to be the clerk or servant of the prosecutor, he may, instead of being convicted, as such, under section 319, be convicted of the theft, without regard to any capacity in which he was acting when he committed it, and, according to the nature or description of the thing stolen, he may be punished under the particular section of the Code applicable thereto; or, if it be something for which no punishment is otherwise provided, he will be punishable under section 356, *post*.

It is provided, by section 626, *post*, that any number of distinct charges of theft, not exceeding three, alleged to have been committed within six months from the first to the last of such offences, may be tried at one and the same time.

Although the distinction between theft and embezzlement has been completely removed, questions may still arise, in prosecutions for theft, as they formerly did in cases of embezzlement, as to whether the defendant is a clerk or servant or other employee, within the terms of, and punishable

(1) R. v. Goodenough, Dears., 210; R. v. Peck, 2 Russ., 180; R. v. Smith, R. & R., 267; R. v. Hawkins, 1 Den., 584.
(2) R. v. Wright, Dears. & B., 431; 27 L. J. (M. C.), 65.
(3) R. v. Gale, 2 Q. B. D., 141; 46 L. J. (M. C.), 134.

under section 319. It has been held that the question of, whether the defendant is or is not a clerk or servant, is one of fact for the jury; (4) and there are, upon the question, many English cases, which will be in point, inasmuch as the English Statute, upon which these cases have arisen, is, although it relates to embezzlement, to the same effect, as, and almost in the very language of clause (*a*) of our section 319, in its reference to clerks and servants. The words of the English Act are "whosoever being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant." (5)

A female servant is within the meaning of the enactment. (6) And so is an apprentice, although under age. (7)

A son, who lives with his father and performs for him duties usually performed by a clerk, has been held to be "employed for the purpose or in the capacity of a clerk or servant," within the meaning of the law, although he received no salary, and although there was no contract binding him to go on doing these duties. (8)

A person who was employed as accountant and treasurer to overseers of the poor and whose duty it was to receive and pay out monies coming to and going out from such overseers, was held to be a clerk or servant, within the statute. (9)

A collector of poor and other rates, within the parish of St. Paul, Covent Garden, was held to be rightly described as servant to the committee of management of the affairs of the parish; although he was elected by the vestrymen of the parish; (10) and an assistant overseer elected by the parishioners who fix his duties and salary was held rightly described, as the servant of the inhabitants of the parish, in an indictment charging him with embezzling monies collected by him for the poor-rate. (11)

A clerk of a savings bank was held to be properly described as a clerk to the trustees, though elected by the managers. (12) Such a clerk is now covered, in common with all bank cashiers, managers, officers, clerks or servants, by the express terms of clause (*b*) of the above section 319.

The mode by which the defendant is paid or receives remuneration for his services is immaterial. If he is a clerk or servant or *is employed for the purpose or in the capacity of a clerk or servant*, he is within the law.

A, — who was employed as a master of a barge, to carry out and sell coals, and was allowed, as remuneration for his labor, a portion of the profits, after deducting the price of the coals at the colliery, — took a quantity of coals, sold them, received the price, and absconded with the money. *Held*, by a majority of the judges, that he was a servant within the meaning of the English Statute. (13)

A was employed as a traveller by B, the prosecutor, to take orders and collect money; his remuneration being a percentage upon the orders he got; he paying his own expenses; he did this not only for B, but was em-

(4) R. v. Negus, L. R., 2 C. C. R., 34; 42 L. J. (M. C.), 62.
(5) 24 and 25 Vic., c. 96, section 68.
(6) R. v. Smith, R. & R., 267.
(7) R. v. Mellish, R. & R., 80.
(8) R. v. Foulkes, L. R., 2 C. C. R., 150; 44 L. J. (M. C.), 65.
(9) R. v. Squire, R. & R., 349; R. v. Townsend, 1 Den., 167; 2 C. & K., 168; R. v. Adey, 1 Den., 578; 19 L. J. (M. C.), 149.
(10) R. v. Callahan, 8 C. & P., 154.
(11) R. v. Carpenter, L. R., 1 C. C. R., 29; 35 L. J. (M. C.), 169.
(12) R. v. Jenson, 1 Moo. C. C., 434.
(13) R. v. Hartley, R. & R., 139.

ployed by other persons also. *Held*, that he was a clerk to B, within the meaning of the act. (14)

Where the cashier of a firm had, besides a salary, a percentage on the profits of the firm's business, but was not liable for the firm's losses, and had no control over the management of the business, it was held that he might be indicted, as a servant, for embezzling the firm's monies. (15)

The distinction to be drawn between a clerk or servant, and an agent, seems, according to the cases, to be this: for instance, a commercial traveller, whether paid by commission or salary, who is under orders to go here and there, or is bound to devote the whole or, at least, some portion of his time to the service of his employer, is a clerk or servant, or person employed for the purpose or in the capacity of a clerk or servant; but a person who is not under orders to go here and there, and who is not bound to devote any portion of his time to the service of his principal, but who may get business for his principals in consideration of a commission, or abstain from getting business for them, as he chooses, is not such a clerk or servant. Thus where A was employed by B to solicit orders and collect moneys, for which work he was paid by commission, he being at liberty to get orders when and where he pleased, but to be exclusively in the employ of B and to give the whole of his time to B's service, he was held to be B's servant. (16) And A would still have been B's servant if he was a traveller under orders to go here and there, even although he might have been at liberty to obtain orders for other persons besides B, and so was not bound to devote all his time to B's service. (17) But where A was employed by B and C, as their agent for the sale of coals on commission, and to collect monies in connexion with his orders, but was at liberty to dispose of his time as he thought best, and to get or abstain from getting orders as he might choose, he was held not to be a clerk or servant within the statute. (18)

The test whether a person is a clerk or servant of his alleged master is — Was he under the control of and bound to obey his alleged master? And where A was employed to solicit orders for B and was to be paid a commission on the sums received through his means, and he was at liberty to apply for orders whenever he thought most convenient, but was not to employ himself for any other persons than B, it was held that these facts did not shew him to be a clerk or servant. (19)

The distinction between this last case and R. v. Bailey, (*supra*), is that in R. v. Bailey the prisoner was under the prosecutor's control, having to devote *his whole time* to the service, while, in R. v. Negus, although the prisoner was not to employ himself for any other persons than the prosecutor, he might go away to amuse himself whenever he liked. (20)

A and B employed C, who carried on an independent business as an accountant and debt collector, to collect certain debts for them at a commission on the amount received, the time and mode of collecting the debts being in C's discretion, and it being *his duty to pay over the amounts received by him* to A and B, *as soon as he had received them*. *Held*, that C

(14) R. v. Carr, R. & R., 198; R. v. Hoggins, R. & R., 145; R. v. Tite, L. & C., 29; 30 L. J. (M. C.), 142. See, also, R. v. Turner, 11 Cox C. C., 551.
(15) R. v. Macdonald, L. & C., 85; 31 L. J. (M. C.), 67.
(16) R. v. Bailey, 12 Cox C. C., 56.
(17) R. v. Tite, *supra*.
(18) R. v. Bowers, L. R., 1 C. C. R., 41; R. v. Maybe, 11 Cox C. C., 150; R. v. Marshall, 11 Cox C. C., 490.
(19) R. v. Negus, L. R., 2 C. C. R., 34; 42 L. J. (M. C.), 62.
(20) See Rem. of *Bovill*, C. J., and *Blackburn*, J., L. R.,(2 C. C. R.), 35.

was not employed in the capacity of a clerk or servant to A and B. (21) In view of the fact that C was bound to pay over the amounts collected as soon as he received them, it seems likely that if he failed to do so and converted them to his own use or omitted to properly account for them, he might, now, be held criminally liable, under section 308, *ante*, or under section 310, *ante*, if that part of the transaction, which made it his duty to pay over the collections as soon as received, were in the shape of a direction in writing.

The employment need not be permanent, A agreed to let B, (when he had nothing else to do), carry out parcels, for which work B was to be paid whatever A pleased. During the course of this employment, A gave B an order to receive £2, which B collected and converted to his own use. B was held to be a servant within the meaning of the Act: (22) and where a drover who was employed to drive two cows to a purchaser and receive the purchase price, embezzled it, he was held to be a servant. (23)

A, a member of and secretary to, a society fraudulently withheld money received by him from a member to be paid to the trustees of the society, and, when prosecuted for embezzlement, was held properly described as the clerk and servant of the trustees, although the money ought in the ordinary course to have been received by the steward, and although the articles of the society were not enrolled, and the society, was not conducted strictly according to the act of parliament. (24) But a mere unpaid treasurer of a friendly society, not appointed by the trustees of the society is not a clerk or servant of the trustees, in whom the monies of the society are vested. (25) In Tyree's case, Bovill, C. J., said, "The trustees have all the monies of the society vested in them, by statute, as well as by one of their rules, and the prisoner must account to them; but this does not make him their servant. The treasurer is an accountable officer, but not a servant." And previously to the 31 and 32 Vic., c. 116, (which made a co-partner or co-owner indictable for stealing partnership or joint property), the secretary, (also a member) of a friendly society established under the 18 and 19 Vic., c. 63, for which no trustees had been appointed could not be convicted on an indictment for embezzling the society's monies, the property in the monies being laid in A B (one of the members of the society), and others, (the rest of the members) and the prisoner being described as the servant of A B and the others; because the "others" would have comprised himself, and the indictment would thus have charged him, as his own servant, with embezzling his own money. (26)

See section 311, *ante*, as to theft by partners and co-owners.

It has been held that, in England, a person cannot be convicted as clerk or servant to a society which, by reason of administering an unlawful oath to its members, is an unlawful combination and confederacy. (27)

A society in the nature of a friendly society, (although not enrolled or certified under the Friendly Societies Act), some of whose rules are in restraint of trade, and therefore void, is not an illegal society in the sense of being disabled from prosecuting a servant for stealing its funds. (28)

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(21) R. v. Hall, 13 Cox C. C., 49.

(22) R. v. Spencer, R. & R., 299; R. v. Smith, R. & R., 516.

(23) R. v. Hughes, 1 Moo. C. C., 370.

(24) R. v. Hall, 1 Moo. C. C., 474; R. v. Miller, 2 Moo. C. C., 249; R. v. Proud, L. & C., 97.

(25) R. v. Tyree, L. R., 1 C. C. R., 177; 38 L. J. (M. C.), 58.

(26) R. v. Diprose, 11 Cox C. C., 185; R. v. Taffs, 4 Cox C. C., 169; R. v. Bren, L. & C., 346.

(27) R. v. Hunt, 8 C. & P., 642. See, as to unlawful oaths, etc., sections 120, 121 and 122, and remarks thereon, *ante*.

(28) R. v. Stainer, L. R., 1 C. C. R., 230; 29 L. J. (M. C.), 54. See, also, R. v. Tankard, 63 L. J., M. C., 61; [1894] 1 Q. B., 548.

The prisoner, — who was one of the directors of a limited Company carrying on the business of advertizing contractors, — entered into an agreement with them by which he was to be employed as their manager at a weekly salary. His duties were to canvass for orders for advertizing, to superintend the bill posting, to collect the moneys due to the Company and to pay them over to the cashier as and when he collected them; and he was to be allowed a guinea a week for travelling expenses. The prisoner was convicted upon an indictment charging him with having embezzled money received by him for and on account of the Company. *Held*, that the fact that he was a director was not inconsistent with his being also a clerk or servant of the Company, and that he was properly convicted. (29)

The usual presumptive evidence of the misappropriation, by a clerk, of money, etc., received by him on his employer's account is that he has never accounted to his master for the money, etc., so received by him, or that he denied having received it. Where it was the servant's duty to account for and pay over at stated times, the money received by him, his not doing so wilfully was held to be an embezzlement; (30) and would now be theft. And even where no precise time could be fixed at which it was the defendant's duty to pay the moneys over, his not accounting for them, if found by the jury to have been done fraudulently, was held to be equally an embezzlement. (31)

"It is not sufficient to prove a general deficiency in account. Some specific sum must be proved to be embezzled, in like manner as, in larceny, some particular article must be proved to have been stolen." (32)

A defendant, who was employed by the City of Montreal as a Market Clerk was accused and convicted of stealing $810 belonging to the said City, the trial judge, however, suspending sentence until the opinion of the Court of Appeal was obtained upon a reserved case, which shewed that when market stalls became vacant they were put up to auction, the amount bid being a "bonus" distinct from the rent; and a custom had arisen of exacting a payment of $25 to $50 when a stall changed hands before the expiration of its lease; and these amounts had been received by the defendant but not handed over to the City. *Held*, that the charge was not sustainable under section 319 (*c*), because it did not state that the moneys came into the defendant's possession "by virtue of his employment," and that the charged could not be sustained as one of theft, simply, under section 305 or section 319 (*a*) or any other provision of the Code, for then it would be necessary to prove that the moneys were the property of the City of Montreal, — a point which was immaterial under section 319 (*c*), and that the facts, as stated in the reserved case, shewed that the City had no right to the possession of the monies. Conviction quashed. (32*a*)

With reference to prosecutions against government and municipality employees under sections 319 (*c*), and 321, the property in the thing in question may be laid in His Majesty or in the municipality, as the case may be. (See section 623, *post*.)

**320. Agents and attorneys.** — Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who steals anything by any act or omission amounting to theft under the

(29) R. v. Stuart, 63 L. J., M. C., 83; [1894] 1 Q. B., 310.
(30) R. v. Jackson, 1 C. & K., 384.
(31) R. v. Welch, 1 Den., 199; 2 C. & K., 296; R. v. Wortley, 2 Den., 333.
(32) Rem. of Alderson, B., in R. v. Lloyd Jones, 8 C. & P., 288. See, also, R. v. Chapman, 1 C. & K., 119; R. v. Wolstenholme, 11 Cox C. C., 313.
(32*a*) R. v. Tessier, 21 C. L. T., 48.

provisions of sections three hundred and eight, three hundred and nine and three hundred and ten.

See pp. 364-366, *ante*.

**321. Public servants refusing to deliver up chattels, books, &c. lawfully demanded.** — Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, being employed in the service of Her Majesty or of the Government of Canada or the Government of any province of Canada, or of any municipality, and intrusted by virtue of such employment with the keeping, receipt, custody, management or control of any chattel, money, valuable security, book, paper, account or document, refuses or fails to deliver up the same to any one authorized to demand it. R. S. C., c. 164, s. 55.

See section 3 (*cc*), *ante*, for definition of "Valuable Security."

Since the accession of King Edward VII, the words, "His Majesty" will be substituted for "Her Majesty" in this section and in section 325, *post*. (See the *Interpretation Act*, at p. 9, *ante*.)

**322. Tenants and lodgers.** — Every one who steals any chattel or fixture let to be used by him or her in or with any house or lodging is guilty of an indictable offence and liable to two years' imprisonment, and if the value of such chattel or fixture exceeds the sum of twenty-five dollars to four years' imprisonment. R. S. C., c. 164, s. 57.

The indictment for an offence against this section may be in the same form as if the offender were not a tenant or lodger. (See section 625, *post*.)

As to wilful injuries to houses, etc., by tenants, etc., see section 504, *post*.

**323. Testamentary instruments.** — Every one is guilty of an indictable offence and liable to imprisonment for life who, either during the life of the testator or after his death, steals the whole or any part of a *testamentary instrument*, whether the same relates to real or personal property, or to both. R. S. C., c. 164, s. 14.

A "testamentary instrument" includes will, codicil, or other testamentary writing or appointment, as well during the life of the testator whose testamentary disposition it purports to be as after his death, whether the same relates to real or personal property, or both. (See section 3 (*aa*), (*ante*.)

**324. Documents of title to lands or goods.** — Every one is guilty of an indictable offence and liable to three years' imprisonment who steals the whole or any part of any *document of title to lands or goods*. R. S. C., c. 164, s. 13.

The expression "*document of title to goods*" includes any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate, warrant or

order for the delivery or transfer of any goods or valuable thing, bought and sold note or any other document used in the ordinary course of business as proof of the possession or control of goods, authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of such document to transfer or receive any goods thereby represented or therein mentioned or referred to. (Section 3 (*g*), *ante*.)

The expression "*document of title to lands*" includes any deed, map, paper or parchment, written or printed, or partly written and partly printed, being or containing evidence of the title, or any part of the title, to any real property, or to any interest in any real property, or any notarial or registrar's copy thereof, or any duplicate instrument, memorial, certificate or document authorized or required by any law in force in any part of Canada respecting registration of titles and relating to such title. (Section 3 (*h*), *ante*.)

The above definition of "document of title to goods" is exactly the same as is contained in the Imperial Statute, 24-25 Vic., C. 96, section 1.

**325. Judicial or official documents, etc.** — Every one is guilty of an indictable offence and liable to three years' imprisonment who steals the whole or any part of any record, writ, return, affirmation, recognizance, *cognovit actionem*, bill, petition, answer, decree, panel, process, interrogatory, deposition, affidavit, rule, order or warrant of attorney, or of any original document whatsoever of or belonging to any court of justice, or relating to any cause or matter begun, depending or terminated in any such court, or of any original document in any wise relating to the business of any office or employment under Her Majesty, and being or remaining in any office appertaining to any court of justice, or in any government or public office. R. S. C., c. 164, s. 15.

See section 353, *post*, by which the same punishment is awarded, for fraudulently destroying, cancelling concealing or obliterating any document of title or any valuable security, testamentary instrument or judicial, official, or other document, as for stealing any of them.

**326. Stealing post letter bags, etc.** — Every one is guilty of an indictable offence and liable to imprisonment for life, or for any term not less than three years, who steals —

(*a*) a post letter bag; or

(*b*) a post letter from a post letter bag, or from any post office, or from any officer or person employed in any business of the post office of Canada, or from a mail; or

(*c*) a post letter containing any chattel, money or valuable security; or

(*d*) any chattel, money or valuable security from or out of a post letter. R. S. C., c. 35, ss. 79, 80 and 81.

**327.** Every one is guilty of an indictable offence and liable to imprisonment for any term not exceeding seven years, and not less than three years, who steals —

(*a*) any post letter, except as mentioned in paragraph (*b*) of section three hundred and twenty-six ;

(*b*) any parcel sent by parcel post, or any article contained in any such parcel; or

(*c*) any key suited to any lock adopted for use by the Post Office Department, and in use on any Canada mail or mail bag. R. S. C., c. 35, ss. 79, 83 and 88.

**328.** Every one is guilty of an indictable offence and liable to five years' imprisonment who steals any printed vote or proceeding, newspaper, printed paper or book, packet or package of patterns or samples of merchandise or goods, or of seeds, cuttings, bulbs, roots, scions or grafts, or any post card or other mailable matter (not being a post letter) sent by mail. R. S. C., c. 35, s. 90.

See section 4, *ante*, p. 8 for the definitions of post letter, etc.

See section 624, as to how the ownership of articles stolen is to be laid in the indictment, etc.

Section 89, (which is unrepealed), of the R. S. C., chap. 35, has the following provision against opening post letters, etc.: —

"Every one who unlawfully opens, or wilfully keeps, secretes, delays or detains, or procures, or suffers to be unlawfully opened, kept, secreted or detained, any post letter bag or any post letter,— whether the same came into the possession of the offender by finding or otherwise howsoever, — or after payment or tender of the postage thereon, if payable to the person having possession of the same, neglects or refuses to deliver up any post letter to the person to whom it is addressed or who is legally entitled to receive the same, — is guilty of a misdemeanour."

An offence against this section will be punishable, under section 951, *post*, by five years' imprisonment; seeing that chap. 181, R. S. C., — relating to punishments, — is repealed.

An unsealed letter, delivered by the post-mistress at G, to the defendant the letter carrier between that place and L, with directions to obtain, at the L post-office, a money-order for £1, and, after enclosing it in the letter, to post the letter at L, was held to be, while in the defendant's possession, a post-letter. (33)

Where a servant, who was sent with a letter and a penny to pay the postage, finding the door of the receiving house shut, put the penny inside the letter, fastened it by means of a pin, and then put the letter in the unpaid letter-box, it was held that a messenger in the post-office who stole the letter with the penny in it might be convicted of stealing a post-letter containing money, though the money was not put in for the purpose of being conveyed by post to the person to whom the letter was addressed.(34)

(33) R. v. Bickerstaff, 2 C. & K., 761.
(34) R. v. Mence, C. & Mar., 234.

But where, the post-office being at an inn, the person sent to put a letter, containing bank-notes, into the post, took it to the inn, with money to pre-pay the postage, and laid the letter and the money in it upon a table in the lobby of the inn, in which the letter box was, and pointed out the letter to the female servant at the inn, (not authorized to receive letters), who said "she would give it to them," and she stole the letter and its contents, it was held that this was not a post-letter and that the servant who stole it could only be convicted of ordinary larceny and not of stealing a post-letter. (35)

Where the defendant, a person employed in the post-office, having committed a mistake in the sorting of the letters, put some letters down a water closet, in order to avoid the supposed penalty attached to such a mistake, this was held to be not only a *secreting* but a *theft* of the letters. (36)

The taking away and destroying of a post-letter in order to suppress inquiries, supposed by the defendant to be made, in it, about her character, was held to be a larceny of the letter. (37)

Taking the mail-bags off the horse during the momentary absence of the person carrying them was held to be a taking from his possession. (38)

It was the duty of a letter-carrier, on returning from his round, to bring to the post-office any letters which he had failed to deliver. A letter containing money having been given to him with other letters to deliver, on his return from his round, he brought back to the office the pouch containing some which he had failed to deliver, but he said nothing about the money-letter. Subsequently, on enquiry made of him, he produced the money-letter from his pocket; and, upon these facts, it was held that he was rightly convicted of stealing it. (39)

Where the defendant obtained the mail-bags from the post-office, pretending that he was the mail-guard and then ran away with them, the jury, being of opinion that he got possession of them with intent to steal them, found him guilty and the judges held the conviction to be right, the property in the mail-bags not having passed to the defendant when he obtained them from the postmaster, as the latter had no ownership therein to part with. (40)

A, with intent to deprive B, — to whom a letter is addressed, — of such letter, and to commit a fraud, induced C, a post-office employee, to intercept and hand over such letter while in course of transmission by post. *Held*, that A and C were both guilty of stealing the letter. (41)

An offence against section 89 (above set forth) of the R. S. C., c. 35, is punishable under section 951, *post*, of the present Code, by five years' imprisonment; seeing that chapter 181 of the R. S. C., — relating to punishments, — is repealed.

**329. Election documents.** — Every one is guilty of an indictable offence and liable to a fine in the discretion of the court, or to seven year's imprisonment, or to both fine and imprisonment who steals, or unlawfully takes from any person having the law-

(35) R. v. Harley, 1 C. & K., 89.
(36) R. v. Wynn, 1 Den., 365; 2 C. & K., 859.
(37) R. v. Jones, 1 Den., 188; 2 C. & K., 236.
(38) R. v. Robinson, 2 Stark., N. P., 485.
(39) R. v. Poynton, L. & C., 247.
(40) R. v. Pearce, 2 East P. C., 603.
(41) R. v. James, 24 Q. B. D., 439; 17 Cox C. C., 24.

ful custody thereof, or from its lawful place of deposit for the time being, any writ of election, or any return to a writ of election, or any indenture, poll-book, voters' list, certificate, affidavit or report, ballot or any document or paper made, prepared or drawn out according to or for the requirements of any law in regard to Dominion, provincial, municipal or civic elections. R. S. C., c. 8, s. 102; c. 164, s. 56.

For the law as to personation of voters at parliamentary elections, etc., see comments under section 458, *post*.

The punishment of persons wilfully destroying, injuring, obliterating or making erasures, etc., in election documents is provided for by section 503, *post*.

**330. Stealing tramway, railway or steamboat tickets.** — Every one is guilty of an indictable offence and liable to two years' imprisonment who steals any tramway, railway or steamboat ticket or any order or receipt for a passage on any railway or in any steamboat or other vessel. R. S. C., c. 164, s. 16.

In an American case, it was held, (under a statute of the State of Minnesota, making it larceny to steal railroad passenger tickets), that a conductor may be indicted for appropriating tickets, sold and issued by a railroad company, and taken up by the conductor, such tickets, after being thus taken up being the property of the company. (42)

See section 362, *post*, as to the offence of obtaining or attempting to obtain a passage on any tramway or railway or in any steam or other vessel, by means of a false ticket or order. And see section 421 (*m*), *post*, as to the forgery of tramway, railway or steamboat tickets.

**331. Cattle.** — Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who steals any cattle. R. S. C., c. 164, ss. 7 and 8.

For the meaning of the expression "Cattle," see section 3 (*d*), *ante*.

A person who kills a horse or any other cattle, with intent to steal its carcase or skin, etc., is by the terms of section 307, *ante*, guilty of stealing the animal, and is liable to the punishment of 14 years' imprisonment provided by section 331.

This section, 331, refers to *live* cattle. The stealing of *dead* cattle, — for instance, a dead cow, — or any part of it is punishable under section 356, *post*.

An indictment for stealing live animals need not state them to be alive, for the law will presume them to be so, unless the contrary be stated. If, when stolen the animal was dead, the fact should be stated; (43) unless it be an animal which has the same appellation whether it be alive or dead, in which case it need not to be stated to be dead. (44)

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(42) State v. Brin, 30 Minn., 522; Rapalge on Larc., s. 44.
(43) R. v. Edwards, R. & R., 497; R. v. Halloway, 1 C. & P., 128; R. v. Williams, 1 Moo., 107.
(44) R. v. Puckering, 1 Moo. C. C., 242.

Where a defendant removed sheep from the fold into the open field, and there killed them and took away the skins, it was held that the removing of the sheep from the fold was sufficient to constitute theft. (45)

Wilfully *destroying* or *damaging* any cattle is dealt with, and punishable by 14 years' imprisonment, under section 499 (*b*), *post;* and attempts and written threats to kill or injure cattle are punishable, under sections 500 and 502, *post*, by two years' imprisonment.

A defendant was charged and tried before a Judge, in the North West Territories, with having stolen cattle,—namely, one steer,—not exceeding in value, in the Judge's opinion, the sum of $200, and he was convicted. It was claimed, on behalf of the defendant, that, under section 67 of the N. W. T. Act, as amended by the 54-55 Vic., c. 22, section 9, he had the right to be tried by a Judge with the intervention of a jury of six; and he desired to be so tried. After the defendant's conviction, a case was reserved upon the question of whether the defendant had the right to be so tried.

It appears that section 66 of the N. W. T. Act, provides that where the charge is (*inter alia*) having committed or attempted to commit theft, embezzlement or obtaining money by false pretences, or receiving stolen property, in any case in which the property stolen (etc.) does not, in the opinion of the trial Judge, exceed $200, the charge shall be tried in a summary way, and without the intervention of a jury; and by section 67, (as amended), of the same Act, it is provided that where the person is charged with *any other* criminal offence, the same shall be tried by the Judge with the intervention of a jury of six. *Held*, that the charge being one of theft simply, the nature of the offence and the value of the property stolen were the only matters to be considered in ascertaining whether the charge was within section 66 of the N. W. T. Act, and that there was no reason for holding that the case was not within the provisions of that section, although the punishment that may be awarded on a conviction for stealing cattle is greater than that which may be awarded on a conviction for stealing certain other classes of property. (46)

**331a.** Every one is guilty of an indictable offence and liable to three years' imprisonment who—

(*a*) without the consent of the owner thereof,

(i) fraudulently takes, holds, keeps in his possession, conceals, receives, appropriates, purchases or sells, or fraudulently causes or procures, or assists in taking possession of, concealing, appropriating, purchasing or selling any cattle which are found astray; or

(ii) fraudulently, wholly or partialy obliterates, or alters or defaces, or causes or procures to be obliterated, altered or defaced, any brand, mark or vent brand on any such cattle, or makes or causes or procures to be made any false or counterfeit brand, mark, or vent brand on any such cattle; or

(*b*) without reasonable cause refuses to deliver up any such cattle to the proper owner thereof or to the person in charge thereof on behalf of such owner, or authorized by such owner to receive such cattle. (*Added by the Criminal Code Amendment Act 1900*).

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(45) R. v. Rawlins, 2 East P. C., 617.
(46) R. v. Pachal, 20 C. L. T., 192.

See section 707A, *post*, as to *prima facie* evidence of ownership of cattle bearing brands or marks which have been duly registered, and as to the burden of proving that cattle so branded or marked have come into the possession of an accused, *lawfully*.

**332. Stealing dogs, birds, beasts, etc.** — Every one who steals any dog, or any bird, beast or other animal ordinarily kept in a state of confinement or for any domestic purpose, or for any lawful purpose of profit or advantage, is, if the value of the property stolen exceeds twenty dollars, guilty of an indictable offence and liable to a penalty not exceeding fifty dollars over and above the value of the property stolen, or to two years' imprisonment, or to both, and if the value of the property stolen does not exceed twenty dollars, is guilty of an offence and liable upon summary conviction to a penalty not exceeding twenty dollars over and above such value, or to one month's imprisonment with hard labour.

2. Every one who, having been previously convicted of an offence under this section, is summarily convicted of another offence thereunder, is liable to three months' imprisonment with hard labour. (*Amended by the Criminal Code Amendment Act, 1900*).

See section 501, *post*, as to the punishment for wilfully killing, maiming or injuring any such dog, bird, beast or other animal.

A person who kills any such dog, or any bird, etc., with intent to steal the carcase, skin, plumage or other part thereof, is, by the terms of section 307, *ante*, guilty of stealing it; and will therefore be punishable under the above section, 332.

**333. Pigeons.** — Every one who unlawfully and wilfully kills, wounds or takes any house-dove or pigeon, under such circumstances as do not amount to theft, is guilty of an offence and liable, upon complaint of the owner thereof, on summary conviction, to a penalty not exceeding ten dollars over and above the value of the bird. R. S. C., c. 164, s. 10.

See remarks of English Commissioners, at p. 339, *ante*.

See also the first clause of section 304, *ante*, under which tame pigeons, while in a dovecote, or on their owner's land are capable of being stolen. The punishment would be under section 332, *ante*. Section 501, *post*, provides for the punishment of injuries to birds, etc.

**334. Oysters.** — Every one is guilty of an indictable offence and liable to seven years' imprisonment who steals oysters or oyster brood.

2. Every one is guilty of an indictable offence and liable to three months' imprisonment who unlawfully and willfully uses any dredge or net, instrument or engine whatsoever, within the limits of any oyster bed, laying or fishery, being the property of any other person, and sufficiently marked out or known as such.

for the purpose of taking oysters or oyster brood, although none are actually taken, or unlawfully and willfully with any net, instrument or engine, drags upon the ground of any such fishery.

3. Nothing herein applies to any person fishing for or catching any swimming fish within the limits of any oyster fishery with any net, instrument or engine adapted for taking swimming fish only. R. S. C., c. 164, s. 11.

Section 619 (*e*), *post*, provides that for an offence under the above section it shall be sufficient if the indictment describes the oyster bed, etc., by name or otherwise, without stating it to be in any particular county or place.

**335. Things fixed to buildings or land.** — Every one is guilty of an indictable offence and liable to seven years' imprisonment who steals any glass or woodwork belonging to *any building whatsoever*, or any lead, iron, copper, brass or other metal, or any utensil or fixture, whether made of metal or other material, or of both, respectively fixed in or to *any building whatsoever*, or any thing made of metal fixed in *any land*, being private property, or for a fence to any dwelling-house, garden or area, or in any *square or street*, or in *any place dedicated to public use or ornament*, or in *any burial ground*. R. S. C., c. 164, s. 17.

See the English Commissioners' remarks at p. 340, *ante*, and also see section 303, *ante*.

An unfinished building intended as a cart-shed, boarded up on all sides, and with a door with a lock on it, and the frame of a roof with loose gorse thrown upon it, it not being yet thatched, was held under the English Statute on this subject to be a building. (47)

An indictment for stealing lead fixed to *a certain wharf* was held to be sufficient, the wharf being proved to be in fact a building. (48)

It was held that a church yard was a place dedicated to public use, and that it was larceny to take away brass affixed to a tomb stone in the church yard; although, at that time, the words "or in any burial ground" were not in the English Statute; (49) and it has been held that the stealing of a copper sun-dial fixed on the top of a wooden post in a church yard was within the statute. (50)

**336. Stealing trees, etc.** — Every one is guilty of an indictable offence and liable to two years' imprisonment who steals the whole or any part of any tree, sapling or shrub, or any underwood, the thing stolen being of the value of *twenty-five* dollars, or of the value of *five dollars* if the thing stolen grows in any *park, pleasure ground, garden, orchard or avenue*, or in any *ground adjoining or belonging to any dwelling-house*. R. S. C., c. 164, s. 18.

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(47) R. v. Worrall, 7 C. & P., 516.
(48) R. v. Rice, Bell C. C., 87; 28 L. J. (M. C.), 64.
(49) R. v. Blick, 4 C. & P., 377.
(50) R. v. Jones, Dears. & B., 555; 27 L. J. (M. C.), 171.

**337.** Every one who steals the whole or any part of any tree, sapling or shrub, or any underwood, the value of the article stolen, or the amount of the damage done, being twenty-five cents at the least, is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty-five dollars over and above the value of the article stolen or the amount of the injury done.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence is liable, on summary conviction, to *three months'* imprisonment with hard labour.

3. Every one who, having been twice convicted of any such offence, afterwards commits any such offence is guilty of an indictable offence and liable to *five years'* imprisonment. R. S. C., c. 164, s. 19.

The words "adjoining any dwelling-house" have been held to import *actual contact;* and that therefore ground separated from a house by a narrow walk and paling, wall, or gate, was not within their meaning. (51)

The injury must be the actual injury to the tree itself, and does not include *consequential* damage; and where the evidence that the actual injury done to certain trees by the defendant was less than the statutable amount but that the injury done would necessitate the stubbing up and replacing part of an old hedge at an expense greater than the statutable amount, it was nevertheless held insufficient. (52)

As to wilful destruction of or damage to trees, vegetables, plants, etc., see sections 508, 509 and 510, *post.*

**338. Timber Found Adrift.** — Every one is guilty of an indictable offence and liable to three years' imprisonment who —

(*a*) without the consent of the owner thereof :

(i) fraudulently takes, holds, keeps in his possession, collects, conceals, receives, appropriates, purchases, sells or causes or procures or assists to be taken possession of, collected, concealed, received, appropriated, purchased or sold, any timber, mast, spar, saw-log or other description of lumber which is found adrift in, or cast ashore on the bank or beach of, any river, stream or lake ;

(ii) wholly or partially defaces or adds or causes or procures to be defaced or added, any mark or number on any such timber, mast, spar, saw-log or other description of lumber, or makes or causes or procures to be made any false or counterfeit mark on any such timber, mast, spar, saw-log or other description of lumber ; or

(*b*) refuses to deliver up to the proper owner thereof, or to the person in charge thereof, on behalf of such owner, or authorized

(51) R. v. Hodges, M. & M., 341.
(52) R. v. Whiteman, Dears., 353; 23 L. J. (M. C.), 120.

by such owner to receive the same, any such timber, mast, spar, saw-log or other description of lumber. R. S. C., c. 164, s. 87.

See section 708, *post*, as to evidence of ownership, etc.

**339. Stealing fences, stiles and gates.** — Every one who steals any part of any live or dead fence, or any wooden post, pale, wire or rail set up or used as a fence, or any stile or gate, or any part thereof respectively, is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars over and above the value of the article or articles so stolen or the amount of the injury done.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence is liable, on summary conviction to three months' imprisonment with hard labour. R. S. C., c. 164, s. 21.

**340. Failing to satisfy justice that possession of tree &c. is lawful.** — Every one who, having in his possession, or on his premises with his knowledge, the whole or any part of any tree, sapling or shrub, or any underwood, or any part of any live or dead fence, or any post, pale, wire, rail, stile or gate, or any part thereof, of the value of twenty-five cents at the least, is taken or summoned before a justice of the peace, and does not satisfy such justice that he came lawfully by the same, is guilty of an offence and liable, on summary conviction, to a penalty not exceeding ten dollars, over and above the value of the article so in his possession or on his premises. R. S. C., c. 164, s. 22.

**341. Stealing roots, plants, &c.** — Every one who steals any plant, root, fruit or vegetable production growing in any garden, orchard, pleasure ground, nursery ground, hot-house, greenhouse or conservatory is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars over and above the value of the article so stolen or the amount of the injury done, or to one month's imprisonment with or without hard labour.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence is guilty of an indictable offence and liable to three years' imprisonment. R. S. C., c. 164, s. 23.

**342.** Every one who steals any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land, open or inclosed, not being a garden, orchard, pleasure ground, or nursery ground, is guilty of an offence and liable, on summary ronviction, to a penalty not exceeding five dollars over and obove the value of the article so stolen or the amount of

the injury done, or to one month's imprisonment with hard labour.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence is liable to three months' imprisonment with hard labour. R. S. C., c. 164, s. 24.

**343. Stealing ores of metals.** — Every one is guilty of an indictable offence and liable to two years' imprisonment who steals the ore of any metal, or any quartz, lapis calaminaris manganese, or mundic, or any piece of gold, silver or other metal, or any wad, black cawk, or black lead, or any coal, or cannel coal, or any marble, stone or other mineral, *from any mine*, bed or vein thereof respectively.

2. It is not an offence to take, for the purposes of exploration or scientific investigation, any specimen or specimens of any ore or mineral from any piece of ground uninclosed and not occupied or worked as a mine, quarry or digging. R. S. C., c. 164, s. 25.

Section 312, *ante*, has reference to fraudulently concealing from a partner in a mining claim any gold or silver taken from such claim; and section 354 provides the punishment for any such concealment.

See section 571, *post*, with reference to warrants to search for unlawfully deposited gold or silver which has been mined, etc.

**344. Stealing from the person.** — Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who steals any chattel, money or *valuable security* from the person of another. R. S. C., c. 164, s. 32.

To constitute this offence, the thing must be taken either from the person of the prosecutor, or in his presence. (53) The taking *from the person* distinguishes this offence from simple theft; and it differs from robbery in the fact that, although the taking is from the person, it is not accompanied *with violence* or so done as to put the owner or possessor of the thing *in fear*.

If the goods have not been completely severed from the person of the prosecutor or completely taken into the physical possession of the offender, it seems that it would not be sufficient to constitute this offence, although the moving of the thing may, under the terms of sub-section 4 of section 305, *ante*, be sufficient to constitute simple theft.

Where A drew a book from the inside of B's coat pocket about an inch above the top of the pocket, but, whilst the book was still about B's person, B suddenly put up his hand, when A let go his hold and the book dropped back into the pocket. *Held*, not to constitute stealing from the person, but it was held to be a simple larceny. (54)

A's watch, (which he carried in his vest pocket), was fastened to a chain, the other end of which was passed through a button-hole of the vest and kept there by a watch-key. B took the watch out of A's vest pocket and

(53) R. v. Francis, 2 Str., 1015; R. v. Grey, 2 East, P. C., 708; R. v. Hamilton, 8 C. & P., 49.

(54) R. v. Thompson, 1 Mood., 78.

forcibly drew the attached chain and key out of the button-hole, but the key, after passing clear of the button-hole, caught upon a button on another part of the vest, and A's hand being, at that moment, seized, the watch and chain fell from his hand and remained there, suspended to the button on which it caught. *Held*, to be such a severance as amounted to stealing from the person; (55) and where the defendant snatched at a lady's ear-ring, and succeeded in separating it from the ear and it was afterwards found among the curls of her hair, it was held to be a severance. (56)

Where a man went to bed with a prostitute, and she, while he was asleep, stole a watch, which he had left in his hat an the table, it was held to be a stealing in a dwelling-house, and not a stealing from the person. (57)

**345. Stealing in a dwelling-house.** — Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who —

(*a*) steals in any dwelling-house any chattel, money or *valuable security* to the value in the whole of twenty-five dollars or more ; or,

(*b*) steals any chattel, money or valuable security in any dwelling-house, and by any menace or threat puts any one therein in bodily fear. R. S. C., c. 164, ss. 45 and 46.

The thing stolen must be under the protection of the house, and in order to bring the offence within the operation of clause (*a*) they must be of the value of $25; or, if they are of less than that value, they must be stolen by some menace or threat putting some one in the house in bodily fear, in which case it will come within clause (*b*).

Where a person, in his own dwelling-house, stole from another person goods of the value of £5, it was held to constitute, under the English Statute, the offence of stealing in a dwelling-house. (58)

A, a lodger, invited B an acquaintance, to sleep at his lodgings, (without the knowledge of C, the landlord of the house), and, during the night, A stole B's watch from the bed's head. *Held*, that A was properly convicted of stealing in the dwelling-house. (59)

If, although the stealing take place in a house, the thing be under the protection of the *person* of the prosecutor, at the time it is stolen, the offence will not, in that case, come within the meaning of the section; as, for instance, where the defendant procured money to be given to him for a particular purpose and then ran away with it; (60) or, where the prosecutor, by means of the *ring dropping* trick, was induced to lay down his money upon a table, in a house, and the defendant took up the money and went out of the house and carried it away. (61)

Goods left at a house, for a person supposed to reside there, will be under the protection of the house and the stealing of them will be within the

(55) R. v. Simpson, Dears., 621; 24 L. J. (M. C.), 7.
(56) R. v. Lapier, 1 Leach, 320.
(57) R. v. Hamilton, 8 C. & P., 49.
(58) R. v. Bowden, 2 Mood. C. C., 285; 1 C. & K., 147.
(59) R. v. Taylor, R. & R., 418.
(60) R. v. Campbell, 2 Leach, 264.
(61) R. v. Owen, 2 Leach, 572.

above section, 345, if their value amounts to $25 or, if the goods, not being of that value, are taken by menacing or threatening and putting some one in the house in bodily fear.

Two boxes belonging to A. who resided at No. 38, Rupert Street, were delivered by a porter, (whether by mistake or design did not appear) at No. 33 in the same street; B the occupier of the latter house, imagining that the boxes were for C, who lodged there, delivered them to him; C converted the contents of the boxes to his own use and absconded. *Held*, that the goods were within the protection of the house, and that C was rightly convicted of stealing in a dwelling-house. (62)

If one, on going to bed, put his clothes and money by his bedside, they are under the protection of the dwelling-house, and not of the person. It is a question for the court and not for the jury whether goods are under the protection of the dwelling-house or in the personal care of the owner. (63)

It seems clear that, under the express words of clause (*b*) of the above section, 345, there must be bodily fear created by an actual menace or threat, in order to bring the offence within that clause.

If the theft be proved, but not the circumstances necessary to bring the case within section 345, the defendant may be found guilty of the simple theft.

**346. Stealing by picklocks, etc.** — Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, by means of any picklock, false key or other instrument steals anything from any receptacle for property locked or otherwise secured.

**347. Stealing manufactures, etc.** — Every one is guilty of an indictable offence and liable to five years' imprisonment who steals, to the value of two dollars, any woollen, linen, hempen or cotton yarn, or any goods or articles of silk, woollen, linen, cotton, alpaca or mohair, or of any one or more of such materials, mixed with each other or mixed with any other material, while laid, placed or exposed, during any stage, process or progress of manufacture, in any building, field or other place. R. S. C., c. 164, s. 47.

Upon an indictment for stealing yarn in process of bleaching it was proved that, some time before the stealing, the yarn had been spread out upon the ground, but had been afterwards taken up from where it was spread out, and thrown into heaps, in order to be carried into the house and that, it was while it was thus in heaps, that the prisoner stole it. *Held*, that the case did not come within the statute so as to make the defendant guilty of stealing the yarn while in the process of bleaching, as it appeared there was no occasion, as part of the process to leave the yarn on the ground in the state in which it was when taken by the defendant. (64)

It has been held that goods remain in a "stage, process, or progress of manufacture," though the texture be complete, if they be not yet brought into a condition for sale.

(62) R. v. Carroll, 1 Moo. C. C., 89.
(63) R. v. Thomas, Car. Sup., 295.
(64) R. v. Hughill, 2 Russ., 225; R. v. Woodhead, 1 M. & Rob., 549.

**348. Fraudulently disposing of goods entrusted for manufacture.** — Every one is guilty of an indictable offence and liable to two years' imprisonment, when the offence is not within the next preceding section, who, having been intrusted with, for the purpose of manufacture or for a special purpose connected with manufacture, or employed to make, any felt or hat, or to prepare or work up any woollen, linen, fustian, cotton, iron, leather, fur, hemp, flax or silk, or any such materials mixed with one another, or having been so intrusted, as aforesaid, with any other article, materials, fabric or thing, or with any tools or apparatus for manufacturing the same, fraudulently disposes of the same or any part thereof. R. S. C., c. 164, s. 48.

**349. Stealing from ships, wharves, &c.** — Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who —

(*a*) steals any *goods* or *merchandise* in any vessel, barge or boat of any description whatsoever, in any haven or in any port of entry or discharge, or upon any navigable river or canal, or in any creek or basin belonging to or communicating with any such haven, port, river or canal; or

(*b*) steals any *goods* or *merchandise* from any *dock*, *wharf* or *quay* adjacent to any such haven, port, river, canal, creek or basin. R. S. C., c. 164, s. 49.

This section is to the same effect as section 63 of 24-25 Vic., c. 96.

It appears that the "goods" or "merchandise" mentioned in this section mean such goods and merchandise as are usually lodged in vessels or on wharves or quays. (65) The luggage of a passenger going by steamboat is within the enactment. (66)

The words of clause (*a*) of the section are "*in* any vessel," etc.; and, therefore, in order to bring an offender within its terms, it will be immaterial whether or not the defendant has succeeded in getting the goods away from the ship, if there has been a sufficient asportation to constitute theft; but, in order to bring a case within clause (*b*) of the section, it will be necessary to prove more than a simple theft; for the words there are "*from* any dock," etc., to satisfy which there must be an actual removal of the thing from the dock, etc., in the same manner as in the case of an indictment for stealing from the person.

**350. Stealing wreck.** — Every one is guilty of an indictable offence and liable to seven years' imprisonment who steals any wreck, R. S. C., c. 81. s, 36 (*c*)

See section 3 (*dd*), *ante*, for the definition of "wreck."

**351. Stealing on railways.** — Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who steals

(65) R. v. Grimes, Fost., 79 *n;* R. v. Leigh, 1 Leach, 52.
(66) R. v. Wright, 7 C. & P., 159.

anything *in or from* any railway station or building, or from any engine, tender or vehicle of any kind on any railway.

If the whole offence be not proved, the jury may, if the evidence warrants it, bring in a verdict of guilty of an attempt. (See section 711, *post.*)

**352. Stealing things deposited in Indian graves.** — Every one who steals, or unlawfully injures or removes, any image, bones, article or thing deposited in or near any Indian grave is guilty of an offence and liable, on summary conviction, for a first offence to a penalty not exceeding one hundred dollars or to three months' imprisonment, and for a subsequent offence to the same penalty and to six months' imprisonment with hard labour. R. S. C., c. 164, s. 98.

**353. Destroying documents.** — Every one who destroys, cancels, conceals or obliterates any document of title to goods or lands, or any *valuable security, testamentary instrument,* or *judicial, official* or *other* document, for any fraudulent purpose, is guilty of an indictable offence and liable to the same punishment as if he had stolen such document, security or instrument. R. S. C., c. 164, s. 12.

See section 3 (*g*), (*h*), (*aa*), and (*cc*), for definitions of "document of title to goods," "document of title to lands," "testamentary instrument," and "valuable security."

The *stealing* of testamentary instruments is punishable under section 323, of documents of title to land or goods, under section 324, and of judicial or official documents under section 325, *ante.*

**354. Fraudulent concealment of property.** — Every one is guilty of an indictable offence and liable to two years' imprisonment who, for any fraudulent purpose, takes, obtains, removes or conceals anything capable of being stolen.

A prisoner was tried upon an indictment containing three counts, — two of them for setting fire to a building, and the third for having unlawfully concealed a large quantity of goods his own property, for a fraudulent purpose, to wit, for the purpose of obtaining, from certain Insurance Companies, certain moneys upon the goods, as if such goods had been destroyed by fire and of then keeping the goods for his own use. The prisoner was found "not guilty" on the first two counts, but was convicted on the third count. The goods were the defendant's absolute property, and were part of his stock and of the property insured by the Insurance Companies. The Judge found that the prisoner had concealed the goods with the intention of keeping them for his own use and of obtaining, from the Insurance Companies, the full amount of the Insurance moneys, and that the purpose of the prisoner was a fraudulent purpose. It was argued for the prisoner that a man could not be legally convicted of concealing his own goods, and that the words "*takes, obtains,*" in the above section, 354, refer to the goods of another and that therefore the other words "*removes, conceals,*" must also refer to the goods of another. *Held*, that the section

was intended to cover every case, — the case of another's goods and the case of a person's own goods, — and the conviction was sustained. (67)

**355. Bringing stolen property into Canada.** — Every one is guilty of an indictable offence and liable to seven years' imprisonment who, having obtained elsewhere than in Canada any property by any act which if done in Canada would have amounted to theft, brings such property into or has the same in Canada. R. S. C., c. 164, s. 88.

This section is to the same effect as section 269 of the English Draft Code.

For definition of "property" see section 3 (*r*), *ante*.

See section 314, *ante*, as to *receiving* in Canada goods stolen or obtained out of Canada, by any indictable offence.

**356. Stealing things not otherwise provided for.** — Every one is guilty of an indictable offence and liable to seven years' imprisonment who steals anything for the stealing of which no punishment is otherwise provided or commits in respect thereof any offence for which he is liable to the same punishment as if he had stolen the same.

2. The offender is liable to ten years' imprisonment if he has been previously convicted of theft. R.S.C., c. 164, ss. 5, 6, and 85.

See section 628, *post*, as to requirements in indictment charging a previous conviction, and section 676, *post*, as to procedure thereon.

**357. Additional punishment when value exceeds two hundred dollars.** — If the value of anything stolen, or in respect of which any offence is committed for which the offender is liable to the same punishment as if he had stolen it, exceeds the sum of two hundred dollars the offender is liable to two years' imprisonment, in addition to any punishment to which he is otherwise liable for such offence. R. S. C., c. 164, s. 86.

## PART XXVII.

## OBTAINING PROPERTY BY FALSE PRETENCES AND OTHER CRIMINAL FRAUDS AND DEALINGS WITH PROPERTY.

### FALSE PRETENCES.

**358. Definition.** — A false pretence is a *representation*, either by words or otherwise, of a matter *of fact* either present or past, which representation is *known* to the person making it *to be false*.

(67) R. v. Goldstaub, 15 C. L. T., 191; 10 Man. L. R., 497. (Schofield's Case, Cald., 397, and R. v. Sutton, 2 Str., 1074, followed.)

and which is *made with a fraudulent intent* to induce the person to whom it is made to act upon such representation.

2. Exaggerated commendation or depreciation of the quality of anything is not a false pretence, unless it is carried to such an extent as to amount to a fraudulent misrepresentation of fact.

3. It is a question of fact whether such commendation or depreciation does or does not amount to a fraudulent misrepresentation of fact.

The above section is in the exact words of section 270 of the English Draft Code.

**359. Punishment for obtaining by false pretences.** — Every one is guilty of an indictable offence and liable to three years' imprisonment who with intent to defraud, by any false pretence, either *directly* or *through the medium of any contract obtained by such false pretence*, obtains anything capable of being stolen, or procures anything capable of being stolen to be *delivered* to any other person than himself. R. S. C., c. 164, s. 77.

As stated by the Royal Commissioners, in their remarks, set out at page 342, *ante*, it was necessary to assign separate provisions to this offence, although, in point of mischief and moral guilt, it is much the same as theft.

**Distinction between larceny and false pretences.** — The most intelligible distinction between the offence of theft and that of obtaining goods or money by false pretences seems to be this. In theft, the owner of the thing in question has no intention of parting with his property therein to the person taking it; while, in the case of an obtaining by false pretences, the owner does intend to part with his property therein, but his consent to part with his property therein is brought about by the false pretences made to him. (1) "If," said Parke, B., "a person, through the fraudulent representations of another, delivers to him a chattel intending to pass the property in it, the latter cannot be indicted for larceny, but only for obtaining the chattel under false pretences." (2)

But there have been some cases, held to be larceny or theft by taking, which closely resembled the offence of obtaining by false pretences. For instance, a defendant got possession at the India House of a request note by means of which he obtained a permit for a chest of tea belonging to the prosecutor, (to whom he was a perfect stranger), and the chest of tea was, thereupon, delivered to him. This was held to be larceny, notwithstanding that the possession of the tea was obtained by means of a regular request-note and permit. (3) Again, a hosier in the Haymarket having sent his apprentice with a parcel of stockings to be taken to Cheapside, the defendant met the apprentice on Ludgate Hill and asked him where he was going. The apprentice answered that he was going to Mr. Heath's; whereupon the defendant replied that he was the person, and desired the boy to give him the parcel, he handing to the boy a small parcel in return to take home to his master. The boy gave him the stockings; and it was afterwards found that the small parcel, which he took home to his master,

(1) Per Talfourd, J., — White v. Garden, 10 C. B., 927; R. v. Barnes, 2 Den., 59.
(2) Powell v. Hoyland, 6 Exch., 70; R. v. Adams, R. & R., 225.
(3) R. v. Hench, R. & R., 163.

contained nothing but old rags of no value. And this also was held to be larceny. (4)

The cases already cited, under the head of theft, (see pp. 349-353, *ante*), shew that if a servant, acting under a general authority co-equal with his master's, intentionally parts with his master's property, under a misconception fraudulently induced by false representations as to the real facts, such property is not said to be stolen, but obtained by false pretences; but, that, if the servant, having only a *limited* authority, and being precluded from parting with the property, is, nevertheless, tricked out of it, the offender thus obtaining it is guilty of theft; because the master has never consented to nor authorized the parting with it. (5)

**Essentials of the offence of obtaining by false pretences.** — To constitute the offence of obtaining by false pretences, four essentials are necessary, namely: —

1. There must be *a false statement*, which represents, as existing, something which does *not* exist, or which represents, as having happened or having existed, something which has *not* happened or has *not* existed.
2. The *offender must have known*, at the time of making the false statement or representation, *that it was false;*
3. The *goods* or *money* in question *must have been parted with* in consequence of and through the false representation; and
4. The false statement or representation must have been made *with intent to defraud.*

If a man represents as an existing fact that which is not an existing fact, and so gets the money or chattels of another, that is a false pretence; (6) it being for the jury to say whether or not the defendant, at the time he did the act, had a guilty knowledge of the quality of the act, (7) and whether or not the pretences used were the means of obtaining the property.

For instance, there is a false pretence where a person goes to a shop and falsely states that he is sent by some particular customer for such and such goods which, upon the faith of what he says, are handed to him; or where the secretary of a benefit society obtains money from one of its members by representing that a certain amount, exceeding that actually due, is owing by such member to the society; (8) or where money is obtained by means of a begging letter setting forth false statements as to the name and circumstances of the accused; (9) or where A, the accused, falsely represents that he is connected with B, a person of known opulence, and, on the faith of such representation, obtains for himself property; (10) or where C, by fraudulently pretending that a genuine £1 Irish bank note is a £5 note, obtains, from D, the full value of a £5 note in change; (11) or where E, with intent to defraud, pays, by a cheque, for goods then handed to him, he stating that he wishes to pay ready money for them, but knowing at the time that he has only a nominal balance at the bank on which the cheque is drawn, that he has no power to overdraw his account, and not intending to pay money in to meet the cheque. (12)

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(4) R. v. Wilkins, 1 Leach, 520.
(5) R. v. Prince, L. R., 1 C. C. R., 150.
(6) R. v. McGrath, L. R., 1 C. C. R., 209; R. v. Woolley, 1 Den. C. C., 559; R. v. Thompson, L. & C., 233; R. v. Lee, L. & C., 309.
(7) R. v. Francis, L. R., 2 C. C. R., 128.
(8) R. v. Woolley, 1 Den., C. C., 559.
(9) R. v. Jones, 1 Den., C. C., 551.
(10) R. v. Archer, Dears., 449.
(11) R. v. Jessop, Dears. & B., 442. And see R. v. Evans, Bell C. C., 187.
(12) R. v. Hazelton, L. R., 2 C. C. R., 134.

The false statement must be a knowingly false statement of a supposed *by-gone* or of a supposed *existing* fact, made with intent to defraud; and there must be an obtaining of the money or goods by means of that false statement. (13) A mere representation as to some *future* fact or a *false promise* by the party charged that he will do or means to do a particular act will not suffice to constitute a false pretence, (14) unless it be conjoined with a false pretence of an existing or by-gone fact. (15)

Where a carrier obtained carriage money by falsely pretending that he had delivered the goods charged for and that he had lost the receipt for their delivery, it was held that this was a false pretence. (16)

Where a manufacturer's foreman, who was in the habit of receiving, from his master, money to pay the workmen, obtained from the manufacturer, — by means of false written accounts of the men's earnings, — more than the men had really earned and more than he had paid them, the judges held this to be within the statute; they said that all cases where the false pretence creates the credit are within the Act; and here the defendant would not have obtained the excess over what was really due to the workmen, were it not for the false pretence made by the false account delivered by him to the master. (17)

It was A's duty to ascertain daily the amount of dock dues payable by B, his master, and to apply to C, his master's cashier for the amount and then pay it in discharge of the dues. On one occasion by falsely and knowingly representing to C that the amount was larger than it really was, A obtained from C this larger amount, and then paid the real amount due, appropriating the difference to his own use. *Held*, not larceny, but obtaining money by false pretences. (18)

A obtained goods by falsely stating that he wanted them for B who was a person whom he would trust with £1000, and who went out to New Orleans twice a year to take goods to his sons. *Held*, a sufficient false pretence. (19)

Obtaining as a loan, — from the drawer of a bill accepted by the prisoner and negociated by the drawer, — part of the amount, for the purpose of paying the bill under the false pretence that the prisoner was ready with the remainder of the amount, was held to be an offence within the statute, the prisoner being shewn not to be prepared with the remainder of the amount of the bill and not intending to so apply the money obtained from the drawer. (20)

Where A obtained goods from B by a false statement that a bill, — drawn on and accepted by himself, and purporting to be payable at the London and Westminster Bank, which bill he gave to B for the price of the goods — would be paid at the bank the next day, *and that he had made arrangements for it*, this was held to be a sufficient false pretence. (21)

A the secretary of an Odd Fellows' Lodge told B, a member that he owed the lodge 13 s. 6 d., and thereby obtained that sum from him fraudulently,

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(13) R. v. Wellman, Dears., 188, 189; R. v. Hewgill, Dears., 315; R. v. Bulmer, L. & C., 476; R. v. Giles, L. & C., 502.
(14) R. v. Johnson, 2 Moo. C. C., 254.
(15) R. v. Jennison, L. & C., 157.
(16) R. v. Airey, 2 East P. C., 851.
(17) R. v. Witchell, 2 East P. C., 830.
(18) R. v. Thompson, L. & C., 233.
(19) R. v. Archer, Dears., 449.
(20) R. v. Crossley, 2 M. & Rob., 17.
(21) R. v. Hughes, 1 F. & F., 355.

whereas B owed 2 s. 2 d. only. *Held*, rightly convicted of obtaining money by false pretences. (22)

A creditor who wilfully and fraudulently represents to a third person, who holds money of his debtor, that a larger sum is due to him from the debtor than is really the case, and thus obtains from such third person payment of the larger sum, was held guilty of a false pretence within the statute, and that, too, although he had obtained a judgment by default, not set aside, against his debtor for the larger amount. (23)

Where A obtained money from B, a woman, under the threat of an action for breach of promise of marriage, he, A, being, in fact, a married man, already, an indictment, charging that he had falsely pretended that he was entitled to maintain an action against B for the breach of promise was held, by Maule, J., to be good. (24)

An indictment, charging A with obtaining money from B, whose husband had run away, by falsely pretending, to B, that she, A, had power to bring back B's husband was held good. (25)

A pretended to be carrying on an extensive business as a surveyor and house agent, and thereby induced B to deposit with him £25 as a security for his, B's fidelity as a clerk, whereas A was not carrying on any business as a surveyor or house agent. *Held*, to be a false pretence. (26)

A municipality having provided some wheat for the poor, A obtained an order for fifteen bushels, described as "three of Golden Drop, three of Fife, nine of milling wheat." Some days afterwards he went back, and represented that the order had been accidentally destroyed, when another was given to him. He then struck out of the first order "three of Golden Drop, three of Fife," and, presenting both orders, obtained, in all, twenty-four bushels. The indictment charged that A unlawfully, fraudulently, and knowingly, by false pretences, did obtain an order from B one of the municipality of C requiring the delivery of certain wheat, by and from one D, and, by presenting the said order to D, did fraudulently, knowingly, and by false pretences, procure a certain quantity of wheat, etc., from the said D of the goods and chattels of the said municipality, with intent to defraud. *Held*, that the indictment was sufficient, and not uncertain or double, but in effect charged that A obtained the order, and, by presenting it, obtained the wheat, by false pretences. (27)

An indictment containing several counts charged A with obtaining money under false pretences, and the evidence went to show that he had, by fraudulent misrepresentations of the business he was doing in a trade, induced B to enter into a parnership agreement, and to advance £500 to the concern; but it did not appear that the trade was altogether a fiction, or that B had repudiated the partnership. The question being whether, upon such evidence, the jury were bound to convict, it was held that A was entitled to an acquittal, as it was consistent with the evidence that B, as a partner, was interested in the money obtained. (28)

A, who had been discharged from B's service, went to the store of C and D, and, representing himself as still in the employ of B, who was a customer of C and D, asked for goods in B's name, which were sent to B's

(22) R. v. Woolley, 1 Den. C. C., 539; 3 C. & K., 98. And see R. v. Cadden, 28 C. L. T., 185.
(23) R. v. Taylor, 15 Cox C. C., 265, 268.
(24) R. v. Copeland, C. & Mar., 516.
(25) R. v. Giles, L. & C., 502; 34 L. J., M. C., 50.
(26) R. v. Crabb, 11 Cox C. C., 85.
(27) R. v. Campbell, 18 U. C., Q. B., 413.
(28) R. v. Watson, Dears. & B., 348; 27 L. J. (M. C.), 18.

house, where the prisoner preceded the goods, and, as soon as the clerk delivered the parcel, snatched it from him, saying, "This is for me; I am going in to see B;" but, instead of doing so, walked out of the house with the parcel. *Held*, that A was rightly convicted of obtaining the goods from C and D, by false pretences. (29)

A obtained a coat, by falsely pretending that a bill of a coat of the value of 14s. 6d., of which 4s. 6d. had been paid on account, was a bill of another coat of the value of 22s., which he had made to measure, and that 10s. only were due; it was proved that A's wife had selected the 14s. 6d. coat for him, at B's shop, subject to its fitting, on his calling to try it on, and had paid 4s. 6d. on account, for which she received a bill, in which credit was given for the 4s. 6d., so paid on account. On A calling at B's shop, afterwards, to try on the coat, it was found to be too small, and he was then measured for one, which he ordered to be made, to cost 22s. On the day named for trying on this second coat, A called, and the coat was fitted on by B, who had not been present on the former occasion; and the case stated that A, on the coat being given to him, handed 10s. and the bill of parcels for the 14s. 6d. coat, saying, "There is 10s. to pay," which bill B handed to his daughter, to examine, and, upon that, A put the coat under his arm, and, after the bill of parcels referred to had been handed to him with a receipt, went away. B stated that, believing the bill of parcels to be a genuine bill, and that it referred to the second coat which was taken away by A, he parted with that coat on payment of the 10s., which otherwise he should not have done. *Held*, that there was evidence to go to the jury, and that the conviction was right. (30)

A sold to B, a railway pass, representing it to be valid in the hands of B, who believed it to be transferrable but as a matter of fact it was not transferrable but only good to carry a particular person, and could not be used by B, except by committing a fraud upon the railway company, and at the risk of being, at any moment, expelled from the train. A was held guilty of obtaining by false pretences the money paid to him, by B, for such pass. (31)

A was convicted of obtaining money from B, by falsely pretending that there was a person named A. Brient living at Holt, Trowbridge, who was a minister of religion, and had instituted a "*bonâ fide* competition for the production of the greatest number of words from the word *Bernardo*, and had made arrangements to present prizes, of the respective amounts of £2, £1, and 10s., to the successful competitors, and had further arranged to give the proceeds derived from the entrance fees of competition, (after deducting the prizes) to Dr. Bernardo's Home for Destitute Children; and the evidence that A had so pretended was that he had inserted, in a newspaper, the following advertisement: — "Bernardo, £2, £1, 10s., for the most words from Bernardo. Proceeds to go to Dr. Bernardo's Home for Destitute Children. Alphabetical lists with 1s. 3d., to Revd. A. Brient, Holt, Trowbridge, Wilts." *Held*, affirming the conviction, that the words in the advertisement were reasonably capable of the construction put upon them in the indictment, and that it was a question for the jury whether A intended B to put that construction upon them. (32)

The false representation by a person that he is in a large way of business, whereby he induces another to give him goods, is a false pretence. (33) So also is the obtaining a loan upon the security of a piece of land, by

(29) R. v. Robinson, 9 L. C. R., 278.
(30) R. v. Steels, 16 W. R., 341; 11 Cox C. C., 5.
(31) R. v. Abrahams, 24 L. C. J., 325.
(32) R. v. Randall, 16 Cox C. C., 335.
(33) R. v. Cooper, 2 Q. B. D., 510.

falsely and fraudulently representing that a house is built upon it. (34) And threatening to sue on a note made in favor of the prisoner, and which he had negotiated but pretended he was still the holder of, thereby inducing the prosecutor to pay him is a false pretence. (35)

A prisoner who had obtained money and goods by pretending that a paper which he produced was the bank note of an existing solvent bank, which he knew had stopped payment forty years before, was held guilty of obtaining by false pretences. (36)

Where A fraudulently misrepresented an Irish bank note of £1 to be one of £5, and thereby obtained from B, in change, a larger sum than its value, he was held guilty of obtaining money by false pretences, although B had the means of detection at hand, on the face of the note, but relied on A's representations, and although the note was a genuine one. (37)

Where A induced B to buy and pay for a cheese of inferior description by making the wilfully false statement that a tester of a different and superior cheese, which he produced as a sample, formed part of and had been taken out of the cheese which he so induced B to buy, it was held that he might be convicted of obtaining money by false pretences. (38)

A person who sold spurious blacking which he represented to be "Everetts Blacking" was held to be indictable for false pretences. (39)

On the 17th of June 1895, H wrote to C in reference to a coal charter for the schooner "Chlorus," signing himself "J. B. H., owner." In the following October, after some intervening voyages, H obtained goods and supplies for the vessel, from C, and, at his request, C paid cash to third parties who supplied apples to the vessel as cargo, on receipts signed by H, as *owner*. On the 17th of June 1895 and at the times when the goods in question were supplied, the vessel was registered under the *Merchants Shipping Act*, in the name of H's wife, it having been transferred to her by a third party to whom it was previously transferred by H. *Held*, that the evidence was not sufficient to convict H of obtaining the goods or the moneys by means of false pretences, and that the word "owner," as used, did not necessarily mean "registered owner." (40)

A clause of a deed by which the borrower of a sum of money falsely declares property well and truly to belong to him may constitute a false pretence. (41)

Section 359 expressly provides that the offence consists in obtaining by false pretences something capable of being stolen.

It has been held that obtaining credit on an account is not obtaining money by false pretences, (42) and that obtaining credit in account from the party's own banker, by drawing a bill of exchange on a person on whom the party has no right to draw, and which has no chance of being paid, is not a false pretence, though the banker pays money for him in consequence to an extent that he would not otherwise have done. (43)

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(34) R. v. Burgon, Dears. & B., 11; 25 L. J. (M. C.), 105; R. v. Huppel, 21 U. C., Q. B., 281.
(35) R. v. Lee, 23 U. C., Q. B., 340.
(36) R. v. Dowey, 11 Cox C. C., 115; 16 W. R., 344; 37 L. J., M. C., 52. See R. v. Brady, 26 U. C., Q. B., 13.
(37) R. v. Jessop, Dears. & B., 442; 37 L. J., M. C., 70.
(38) R. v. Goss, Bell C. C., 208; 29 L. J., M. C., 90.
(39) R. v. Dundas, 6 Cox C. C., 380.
(40) R. v. Harty, 2 Can. Cr. Cas., 103; 31 N. S. R., 272.
(41) R. v. Judah, 8 L. N., 124.
(42) R. v. Eagleton, 1 Jur. N. S., 944.
(43) R. v. Wavell, 1 Moo. C. C., 224.

Upon an indictment for having obtained, by false pretences, something capable of being stolen, it was held that the prisoner could not be convicted on proof of his having obtained *credit* at a bank by means of a false statement of his financial affairs. (44)

Where a person, who had an interest in the profits of a ship, had repairs done to the ship, and in the settlement of accounts presented a receipt for a larger amount than he had paid, it was held that this was not obtaining money under false pretences but only a credit in account. (45)

It has been held that a person, who orders and consumes a meal at a restaurant without being possessed of means to pay for it,—he having made no statement and being asked no questions, before consuming the meal, as to whether or not he had means to pay,—does not obtain goods by false pretences. (46)

In England, however, a person would under such circumstances, incur a liability, under the *Debtors' Act, 1869*, by thus fraudulently obtaining credit and would be guilty of an offence under section 13 of that Act.

In some of the United States of America the obtaining of board and lodging in hotels or boarding houses, by false representations or tricks, is an offence. (47)

A pretence to a parish officer, as an excuse for not working, that the party had not clothes, when in reality he had,—although it had the effect of inducing the officer to give him clothes,—was held not to be obtaining goods by false pretences, inasmuch as the pretence was made as an excuse for not working and not for the purpose of obtaining the clothes. (48)

Where the prisoner had obtained money from the keeper of a post office, by assuming to be the person mentioned in a money order, which he presented for payment, though he did not make any false declaration or assertion in words in order to obtain the money, it was held to be a false pretence. (49)

A defendant, in the assumed character of a porter of an inn, delivered a parcel as from the country, with a printed ticket containing writing charging carriage and porterage, and he received the amount of money charged thereon. The parcel turned out to be a mock parcel, worth nothing. Part of the false pretences charged against him, on his being prosecuted, consisted of the contents of the printed ticket. It was objected that the defendant had not uttered these words; but Lord Ellenborough said, "I take the defendant to have uttered every word contained on the ticket which he brought with the parcel." (50)

**False pretence by conduct.**—It is not necessary that the pretence should be in words; the conduct and acts of the party may be sufficient to constitute a false pretence, without any verbal representation; thus, giving, in payment, for goods obtained, a cheque upon a banker with whom the defendant has, in fact, no account is a false pretence. (51) But if the defendant at the time of giving the cheque, believes, although he has no

(44) R. v. Boyd, Que. Jud. Rep., 5 Q. B., 1.
(45) R. v. Crosby, 1 Cox C. C., 10.
(46) R. v. Jones, 67 L. J., Q. B., 41; [1898] 1 Q. B., 119.
(47) See Am. & Eng. Ency. of L., vol. 12, p. 833.
(48) R. v. Wakeling, R. & R., 375.
(49) R. v. Story, R. & R., 60.
(50) R. v. Douglass, 1 Camp., 212. And see note to R. v. Barnard, 7 C. & P., 784, where Douglass' case is referred to.
(51) R. v. Lara, 6 T. R., 565; R. v. Flint, R. & R., 460; R. v. Jackson, 3 Camp., 370.

account at the bankers upon whom he draws the cheque, that the cheque will be paid at that bank at the time agreed upon, — between him and the person to whom he gives it, — for its presentation, he cannot be convicted of obtaining by a false pretence. Thus, where A bought a mare and paid for her on Thursday, by a cheque drawn on B, a banker, with whom he had no account, but told C, from whom he bought the mare, and to whom he gave the cheque, not to present it until Saturday, to which C assented, but C, nevertheless, presented it on the same day, Thursday, when it was dishonored, and it appeared, from the evidence, that A was, on Thursday, in daily expectation of having money paid to him which would have enabled him to place the banker in funds to meet the cheque on the Saturday, it was held that there was no false pretence. (52)

A man who makes and gives a cheque for the amount of goods purchased in a ready-money transaction, makes a representation that the cheque is a good and valid order for the amount inserted in it; and if the man has only a colorable account at the bank on which the cheque is drawn, without available assets to meet it, and has no authority to overdraw, and knows that the cheque will be dishonored on presentation, and intends to defraud, he may be convicted of obtaining the goods by false pretences.(53)

A falsely pretended that a post dated cheque, drawn by himself, was a good order for £25 and worth that amount, whereby he obtained from B. a watch and chain. It was proved that, before the completion of the sale and delivery of the watch to A, the latter represented that he had an account with the bankers on whom the cheque was drawn, that he had a right to draw the cheque, and that it would be paid on or after the day of its date. The jury found that these representations were false and that A had no funds to pay the cheque and had no reasonable grounds to believe that it would be paid. *Held*, rightly convicted. (54)

Fraudulently offering a "flash note" in payment, under the pretence that it is a bank note is a false pretence. (55)

A charge of obtaining money or goods by false pretences may be supported by shewing a false pretence by the conduct of the accused; and such pretence need not be in words or writing. For instance, a debtor, who had made a judicial abandonment or assignment of his property for the benefit of his creditors whereby his property became vested in another, and who, knowing that he no longer had any right to receive the rents of the real property forming part of the assets assigned by him, afterwards presented himself as landlord to one of the tenants and received the rent in the same way as he was formerly accustomed to do, was held guilty of obtaining money under false pretences by his acts and conduct; and it was held by the Court of Appeal, in confirming the conviction, that the question of whether the facts disclosed in a case constitute the offence of obtaining by false pretences is not a question of law but one of fact within the province of the jury and cannot be made the subject of a reserved case. (56)

Where a person at Oxford, not being a member of the University, went, for the purpose of fraud wearing a University commoner's cap and gown, and, in this garb, obtained goods, it was a sufficient false pretence, although no representations passed in words. (57)

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(52) R. v. Walne, 11 Cox C. C., 647.
(53) R. v. Hazelton, L. R., 2 C. C. R., 134.
(54) R. v. Parker, 2 Mood. C. C., 1; 7 C. & P., 825.
(55) R. v. Coulson, 1 Den., 592; 19 L. J., M. C., 182.
(56) R. v. Letang, 2 Can. Cr. Cas., 505.
(57) R. v. Barnard, 7 C. & P., 784.

Where a person obtained goods by sending half bank-notes and requesting goods to the value of the entire notes to be sent to her, and, at the time when she did so she had not the corresponding half notes in her possession, — she having previously sent them to other persons, — it was held that this was obtaining goods by false pretences; Morris, C. J., remarking that the request for the goods along with sending the two half notes was evidence from which the jury might infer that there was a sort of silent representation by the defendant that she had the corresponding half notes ready for the satisfaction of the prosecutor. (58)

**Exaggerated Commendation or Depreciation.** — In defining false pretences, section 358, *ante*, expressly states, in the second paragraph thereof, that exaggerated commendation or depreciation of the quality of a thing is not a false pretence, *unless it goes so far as to amount to a fraudulent misrepresentation of fact.*

Thus, where A induced B to buy from him a chain by fraudulently representing that it was of 15-carat gold, whereas in fact it was of a quality little better than 6-carat gold — knowing at the time that he was falsely representing the quality of the chain, it was held that A could properly be convicted of obtaining money by false pretences — there being here a statement as to a specific fact within the actual knowledge of the prisoner, *viz.*, the proportion of pure gold in the chain. (59)

A person who obtained from a pawnbroker, upon an article which he falsely represented to be silver, a greater advance than would otherwise have been made, was held guilty of a false pretence; although the pawnbroker had the opportunity of testing the article at the time. (60)

A false representation that a stamp on a watch is the hall-mark of the Goldsmiths' Company, and that the number 18, part thereof, indicates that it is made of eighteen carat gold, is a false pretence, and is not the less so, because accompanied by the representation that the watch is a gold one, and some gold is proved to have been contained in its composition. (61)

If the purchaser intends to buy a *particular substance*, and the seller passes off to him a counterfeit, — and money is thus obtained, — that is a false pretence within the statute. (62) And it may also be constituted by a fraudulent representation as to the *quantity* of goods sold. For instance, where A, having contracted to sell and deliver to B a load of coals at 7d. per cwt., delivered to her a load which he knew weighed only 14 cwt., but which he stated to her contained 18 cwt. and produced a ticket, to that effect, which he said he himself had made out, when the coals were weighed, and she thereupon paid him the price as for 18 cwt., which was 2s. 4d. more than was really due, it was held that A was indictable for obtaining the 2s. 4d. by false pretences. (63)

Inducing a person to buy some packages of tea representing the packages to contain good tea, when three fourths of the contents were, to the defendant's knowledge, not tea at all but a mixture of substances unfit to drink, was held a false representation of an existing fact. (64)

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(58) R. v. Murphy, 13 Cox C. C., 298; 10 Ir. C. L. Rep., 508.
(59) R. v. Ardley, L. R., 1 C. C. R., 301.
(60) R. v. Ball, C. & Mar., 249; R. v. Roebuck, Dears. & B., 24; 25 L. J., M. C., 101; R. v. Goss, Bell, C. C., 208; 29 L. J., M. C., 86.
(61) R. v. Suter, 10 Cox C. C., 577.
(62) R. v. Bagg, Bell C. C., 218; 29 L. J., M. C., 85.
(63) R. v. Sherwood, Dears. & B., 251; 21 L. J., M. C., 81; R. v. Lee, L. & C., 418; 33 L. J., M. C., 129.
(64) R. v. Foster, 2 Q. B. D., 301.

It is sometimes difficult to distinguish between a mere breach of warranty and a false representation,— for instance, as to the profits of a business, — and the statutory offence of obtaining or attempting to obtain money by false pretences. It was held in the case of R. v. Bryan that if goods of a certain kind be sold under a misrepresentation knowingly made as to their value, — though not of a definite fact, — the statutable offence of obtaining money by false pretences will *not* have been committed. "The legislature," observed Lord Campbell, C. J., "could not have intended to make it an indictable offence for a seller to exaggerate the quality of the goods he is selling, any more than to make criminal the act of a purchaser who strives during the bargain to depreciate their quality, and so induces the seller to part with the goods at a lower price." (65) And Coleridge, J., expressed himself similarly. "It is," he said, "a safe rule, that where the false representation applies merely to the quality, and is in the nature of exaggeration on the one hand, or depreciation on the other, which may take place between parties even in tolerably honest transactions, the statute does not apply."

Where the defendant sold to the prosecutor a reversionary interest which he had previously sold to another, and the prosecutor took a regular assignment of it, with the usual covenants for title, Littledale, J., ruled that the defendant could not be convicted for obtaining money by false pretences; for if this were within the statute every breach of warranty, or false assertion at the time of a bargain might be treated as such. (66) In R. v. Kenrick the above ruling of Littledale, J., was much questioned; and it was strongly intimated that the execution of a contract between the parties does not secure from punishment the obtaining of money under false pretences, in conformity with that contract. (67) And in R. v. Abbott, it was decided unanimously by the judges upon a case reserved, that the law was so. (68)

The jury may connect together representations made in several distinct conversations, (supposing them to be in their nature connectible), and convict the defendant for obtaining money by means of false pretences made in the several conversations. (69)

**Proof of falsity of pretence.** — With regard to proof of the falsity of the pretences made use of, it does not seem essential that they should all be proved. If so many of them as shew the falsity of the substance of the pretence be proved it would appear to be sufficient. Take, for instance, the following case: A goes and says to B, a jeweller: "I am the clerk of C, who has sent me to pick out and get from you, a gold chain, for about the price of $25, which he says he will call and pay you in a few days;" and by means of this representation A obtains from B a gold chain. Now, suppose, on the trial of A for obtaining the chain by false pretences, it should turn out that A was really the servant of C, and, that, therefore, there was nothing false about that part of his statement, still, if it were also to appear that he had received no instructions from C to get the chain, and, that, after obtaining it, he converted it to his own use, the evidence would be sufficient to warrant his conviction.

It appears, also, that it is not necessary that the falsity of the pretences should be shewn by direct evidence. Thus, where the pretences charged were that A had a carriage and pair, which he expected down in a few days,

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(65) R. v. Bryan, Dears. & B., 265.
(66) R. v. Codrington, 1 C. & P., 661.
(67) R. v. Kenrick, 5 Q. B., 49; Dav. & M., 218.
(68) R. v. Abbott, 1 Den., 173; 2 C. & K., 630; R. v. Burgon, Dears. & B., 11; R. v. Goss, Bell C. C., 208; R. v. Meakin, 11 Cox C. C., 270. See sec. 359, *ante*, and authorities at p. 413, *post*.
(69) R. v. Wellman, Dears., 188; 22 L. J., M. C., 118.

and that he had large property abroad; and there was no direct evidence to shew that he had no carriage and no property abroad, but there was evidence shewing that three days before he made the pretences he was in another place assuming to be a man of position and wealth, although really in a destitute condition, and unable to pay his hotel and other bills, it was held that there was evidence from which the jury might infer that the pretences were false. (70)

Where a person represented that a fraudulent cheque was good and that the drawer was responsible, it appeared that, after the cheque had been protested and returned by the bank on which it was drawn, the party defrauded said to the defendant,—"The bank writes that this party is a myth,—that you have been drawing fraudulently upon the bank,"—to which the defendant replied that he would make it good, but made no denial. This was held to be sufficient proof of the falsity of the pretence. (71)

On a charge of obtaining goods under pretence of sending them to Charleston, South Carolina, the evidence of a person usually employed to cart goods for the defendant to the effect that no goods had been carried by him for the defendant to any ship bound for that port was held admissible. (72)

Where a defendant falsely pretended to be indebted to the prosecutor and one other person only, his itemized account to a person not referred to as his creditor may be proved by such person, as tending to shew that the representation was false and fictitious. (73)

The defendant's knowledge of the falsity of the pretence may be shewn by his declarations or admissions made before or after the offence; (74) and under certain circumstances it will be presumed that the defendant had knowledge of the falsity of the pretence. Thus, where the postmaster at B. transferred, to the postmaster at T., post office orders payable which the defendant presented and got cashed, but the moneys for which had never been received by the postmaster at B., and the defendant was knowingly co-operating with him to carry his frauds into effect, he may be assumed to have known that the money for them had never been paid at B., and, therefore, that there was no honest right to draw it at T., in payment of such orders. (75)

**The parting with the property must be induced by the false pretence.**—

The parting with the money or goods must have been induced by the false pretence; and, therefore, where A made false representations to and thereby induced B, to sell him, A, some horses, but B, afterwards, on learning the falsity of the representations, entered into a new agreement in writing with the prisoner, it was held that the subsequent dealings repelled the idea that the prosecutor had parted with his property in consequence of the false pretence. (76)

A was charged with obtaining, from B, a filly, by falsely pretending to be a gentleman's servant and to have lived at Bream and by also pretending that he had bought horses at Bream fair. It appeared that A bought the filly of B at the price of £11, and that besides making the above false

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(70) R. v. Howarth, 11 Cox C. C., 588.
(71) P. v. Pluckney, 67 Hun. (N. Y.), 428.
(72) C. v. Hershell, Thach. C. Cas., (Mass.), 70.
(73) Smith v. S., 55 Miss., 521.
(74) See 12 Am. & Eng. Ency. of L., pp. 823 and 861, and cases there cited.
(75) R. v. Dessauer, 21 U. C., Q. B., 231.
(76) R. v. Connor, 14 U. C., C. P., 529.

pretences, he told B that he would come down to the "Cross Keys" and pay him. B stated in the evidence that he parted with the filly, *because he expected A would come to the "Cross Keys" and pay him*, and not because he believed that A was a gentleman's servant, etc. *Held*, that A was entitled to an acquittal. (77)

Where A had fraudulently obtained, from B, some goods on approval, and had falsely represented to B that she, A, was the daughter of a Mrs. S. A., of C.; but there was no evidence to shew that B knew Mrs. S. A. of C., or that the goods had not been delivered to A, before she made the false representation, or that the goods were parted with by B, on the faith of the false representation, it was held that the conviction of A for obtaining the goods by false pretences could not be sustained. (78)

Where the defendant offered to pledge with a pawnbroker, a chain which he falsely represented to be silver, but the pawnbroker stated that he advanced money on it, not in consequence of defendant's statement but in reliance on its withstanding a test which he himself applied to it, it was held that the defendant could not be convicted of obtaining the money by means of the false pretence but that he was properly convicted of *attempting* to obtain money by false pretences. (79)

On an indictment for having, by means of false pretences, induced the prosecutor to enter into an agreement to take a field for the purpose of making bricks, in the belief that the soil of the field was fit for brickmaking, whereas it was not,—and the prosecutor himself being a brickmaker and having inspected the field, it was held that, nevertheless, if the prosecutor had been induced to take the field by false and fraudulent representations made by the defendant of specific matters of fact relating to the quality and character of the soil, as, for instance, that he, (defendant), had made good bricks therefrom, the indictment would be sustained. *Held*, also, that it would be sufficient if the prosecutor was partly and materially, though not entirely influenced by the false pretences. (80)

Wherever the prosecutor himself knows the falsehood of the pretence but parts with his money or goods, notwithstanding, the defendant cannot be convicted of obtaining by false pretences; (81) but he may in such a case be convicted of attempting to obtain by false pretences, although the indictment charges him with obtaining. (See section 711, *post*.)

The mere fact of the prosecutor having the means at hand of acquiring knowledge of the falsity of the pretence will not of itself excuse the defendant so as to prevent him from being convicted of obtaining by false pretences. (82)

If the defendant has obtained money by a false pretence, knowing that it was false, it is no answer to shew that the party from whom he obtained it laid a plan to entrap him into the commission of the offence. (83) *Quære*, would not this depend upon whether the party from whom the money was obtained knew of the falsity of the pretence. (See R. v. Mills, *supra*.)

A defendant had agreed to do a certain thing for seventy five cents, and the prosecutor took out a two dollar bill to pay him, saying he would get it changed; whereupon the prisoner said, "I'll change it;" upon which, the money being handed to him, he kept it and gave back no change. There being no proof as to what induced the prosecutor to part with the money,

(77) R. v. Dale, 7 C. & P., 352.
(78) R. v. Jones, 15 Cox C. C., 475.
(79) R. v. Roebuck, Dears. & B., 24; 25 L. J. (M. C.), 101.
(80) R. v. English, 12 Cox C. C., 171.
(81) R. v. Mills, Dears. & B., 205; 26 L. J. (M. C.), 79.
(82) See R. v. Jessop, at p. 403, *ante*.
(83) R. v. Ady, 7 C. & P., 140.

it was held that a conviction for obtaining money by false pretences could not be sustained. (84)

A carrier having ordered a cask of ale, said, after he had possession of it, "This is for W." It was held that an indictment, for obtaining the cask of ale, under the false pretence of having been sent for it by another person, — namely, W., — could not be sustained. (85)

**Remoteness of pretence.** — A person, by means of falsely pretending to be a naval officer induced the prosecutrix to let him a lodging at ten shillings a week; and he thus became a lodger in her house. A few days afterwards he expressed a wish to become a boarder. He was then supplied with board as well as lodging at a guinea a week. He was afterwards indicted for obtaining goods (the board) by means of false pretences, and convicted. *Held*, that the conviction could not be supported, as the goods were supplied too remotely from the false pretence. (86)

Where an hotel keeper procured a guest to board at his hotel, and to pay money in advance for his board, by telling him that a certain person, — an acquaintance of such guest, whose society the latter greatly desired, — boarded at the hotel, it was held that this was not a false pretence for which the hotel keeper was criminally liable, the payment of the money for board being too remote a consequence of the false pretence, which was made to induce the party to become a guest and not directly made for the purpose of having the money advanced; it being considered that to get by a false pretence the custom or patronage of a guest is not to get property by false pretences, but to induce a condition of things or a relation of the parties out of which a contract to pay money for value may arise. (87)

Where goods were obtained by the false statement on the part of the buyer that he owned certain property, upon which property he gave to the seller a mortgage, thereby inducing him to part with the goods, it was held that the false pretense of being the owner of the property was the direct and not the remote means of obtaining the goods, even if they would not have been delivered but for the giving of the mortgage. (88)

A defendant falsely pretended that he had a lot of trucks of coal at a railway station on demurrage, that he required forty coal bags and that he was largely in business in the timber and coal line. He inspected some coal bags, but objected to the price. On the following day, he called again, shewed the prosecutor some correspondence and again said that he had a lot of trucks of coal at the railway station on demurrage, and that he wanted some coal bags, immediately; whereupon a number of coal bags were given to him upon his agreement to pay for them in a week. *Held*, that the false pretences were not too remote. (89)

A prisoner was charged with obtaining, by false pretences, a prize in a swimming handicap. He had obtained his competitor's ticket for the race by falsely representing himself to be a member of a certain club and by producing a forged letter purporting to be from the secretary of that club. In this way the prisoner got 20 yards start, and, being an excellent swimmer, won easily. It was held that, the false pretences were too remote, and that on that charge, at all events, the prisoner could not be convicted. (90) But this decision has been overruled in a later case, in which the prisoner was charged with and convicted of attempting to obtain, by false pretences,

(84) R. v. Gemmell, 26 U. C., Q. B., 312.
(85) R. v. Brooks, 1 F. & F., 502.
(86) R. v. Gardner, Dears. & B. C. C., 40; 7 Cox C. C., 136.
(87) Wagoner v. S., 90 Ind., 507; 12 Am. & Eng. Ency. of L., 814.
(88) C. v. Lee, 149 Mass., 184.
(89) R. v. Willot, 12 Cox C. C., 68.
(90) R. v. Larner, 14 Cox C. C., 497.

certain prizes in two foot races at an athletic meeting. It was proved that entry forms for the races were sent in, in the name of one Sims, — a moderately good runner, — correctly stating that Sims had never won a race. At the meeting, the prisoner ran in the name of Sims, and being a very superior runner who had been a winner, previously, and having, — by the statements in the entries, secured longer starts than he would have been allowed if his true name and performances had been known, — he won both races easily. After the first of the two races was run, he falsely stated, in reply to questions put to him by the handicapper, (whose suspicions were aroused), that he had never won a race previously, that he really was Sims, and that the statements in the entries were true statements as to his (prisoner's) performances. He did not apply to have the prizes handed over to him. At the trial, the jury were directed that if the prisoner ran without intending to obtain the prizes they ought to find him not guilty, but that if he made the false representations wilfully, intentionally and fraudulently, with intent to obtain the prizes, they ought to find him guilty. The jury found him guilty; and, upon a case reserved, it was held, that, the jury were properly directed and that the false pretences were not too remote; and the conviction was upheld. (91)

Where a prisoner had, by false pretences, induced a wheelwright to make him a spring van, — which was afterwards made and delivered to him, — it was held that, although at the time the pretence was made, the van was not yet in existence, the prisoner was rightly convicted of obtaining the van by false pretences, the pretences being held to be continuing pretences until the delivery of the van. (92)

The prisoner, who was foreman at a Works, obtained from his master, by means of a false wage-sheet, a cheque for the amount stated in the sheet to pay mens' wages. On account of the cheque being informally drawn, payment of it was refused by the bank; whereupon the prisoner returned it to the prosecutor and told him of the informality. The prosecutor tore up the informal cheque, and drew another, which he gave to the prisoner; who cashed the second cheque and appropriated to his own use the difference between the actual amount of the wages and the amount falsely stated in the wage-sheet. *Held*, that the false pretence upon which the first cheque was obtained continued in force and was the acting motive which influenced the prosecutor's mind in giving the second cheque. (93)

**Intent to defraud.** — Although it must be shewn that the defendant obtained the money or goods with intent to defraud, it is only necessary to shew a general intent to defraud. It is not necessary to allege, that the intent was to defraud any particular person; (see section 613 (*c*), *post*;) and if the evidence shew that there was, on the part of the defendant, an intent to defraud, it will be sufficient.

The intent to defraud may be implied from the facts of the case.

Where A owed B a debt, of which B could not obtain payment, and C, (B's servant), went to A's wife and obtained, from her, two sacks of malt by telling her that B had bought them of A, — he (C) knowing this to be false, — and he (C) took the two sacks of malt to his master to enable him to thereby pay himself the debt owing to him by B, it was held that C could not be convicted of obtaining the malt by false pretences with intent to defraud. (94)

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(91) R. v. Button, 69 L. J., Q. B., 901; [1900] 2 Q. B., 597; 64 J. P., 600. See, also, R. v. Beharrell, Warb. L. Cas., 2nd Ed., 184.
(92) R. v. Martin, L. R., 1 C. C. R., 56; 10 Cox C. C., 383.
(93) R. v. Greathead, 14 Cox C. C., 108.
(94) R. v. Williams, 7 C. & P., 354.

In a case in which the indictment averred an obtaining of a particular sum of money, with intent to defraud the prosecutor of the same, and it appeared that the intent was to defraud him of a part only of that sum, the rest of the amount being really due, it was held, nevertheless, that the prisoner might be convicted. (95)

It has been held that the fact that, at the time of obtaining goods by false pretences, the defendant intended that he would pay for them, if and when it should be in his power to do so, affords no defence. (96)

Where a prisoner was tried on an indictment charging him with having obtained food and money by false pretences,—the false pretences being that he was a bank clerk receiving his salary fortnightly,—and the jury found him guilty, but added that, with regard to the intent to defraud, they considered there was not sufficient evidence, and, therefore, strongly recommended him to mercy, the verdict was accepted by the trial judge as one of guilty. Upon a case reserved, the prosecution argued in support of the conviction, that the verdict was separable,—the latter portion of it being merely the jury's reason for recommending the prisoner to mercy,—and that, if it was not separable, the only possible meaning to be given to the latter portion of it was that the jury considered that the prisoner, when he obtained the food and money, intended at some future time to pay for the food and return the money; but, it was held, that the verdict was not separable and that, inasmuch as the latter portion of it negatived the intent to defraud,—without proof of which the previous portion of the verdict could not have been found,—the conviction could not be sustained. (97)

**Proof of other false pretences.**—On an indictment for attempting to obtain money by falsely pretending that a ring was composed of diamonds when in fact it was composed of crystals, it was held that, to shew the defendant's guilty knowledge and his intent to defraud, evidence was admissible of a false pretence, by the defendant, on a prior occasion, to another person that a chain was gold, whereas it was plated, and on another distinct occasion, that a ring was of diamonds, which it was not. (98)

In another case, it was held that, where there is evidence that, at dates *subsequent* to the offence charged, the prisoner obtained goods from other persons by false pretences similar to those used on the occasion charged in the indictment on trial, such evidence is admissible, when it points to one and the same system of fraud and a connected scheme of dishonesty. (99)

A prisoner was indicted for obtaining money under false pretences by means of worthless cheques. He had been previously indicted for a similar offence and acquitted.—*Held*, that, notwithstanding such acquittal, evidence of the facts in that case was admissible on the subsequent indictment as tending to shew that the prisoner's conduct was not inadvertent or accidental, but was part of a systematic fraud. (100)

**Further comments.**—It will be noticed that section 359 expressly declares that the obtaining by false pretence shall be punishable whether it is done directly or through the medium of a contract.

H. Page sold, to H. Pagnuelo, for $150, a horse described in a written

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(95) R. v. Leonard, 1 Den., 303; 2 C. & K., 514.
(96) R. v. Naylor, L. R., 1 C. C. R., 4; 10 Cox C. C., 151.
(97) R. v. Gray, 17 Cox C. C., 299.
(98) R. v. Francis, L. R., 2 C. C. R., 128.
(99) R. v. Rhodes, 68 L. J., Q. B., 83; [1899] 1 Q. B., 77. See, also, Makin v. Atty. Gen. N. S. W., 63 L. J., P. C., 41; 17 Cox C. C., 704; R. v. Flannagan & Higgins, 15 Cox C. C., 403; R. v. Heeson, 14 Cox C. C., 40; R. v. Roden, 12 Cox C. C., 630; and R. v. Geering, 18 L. J., M. C., 215.
(100) R. v. Ollis, 64 J. P., 518.

document signed in duplicate by the parties at the completion of the sale, in which document it was stated that the purchase money was paid by Pagnuelo, the purchaser, on the faith of the warranty contained in the document, and not upon any verbal representations, and in which it was stipulated that if the horse should not come up to what it was warranted to be by that document, Page would repurchase it from Pagnuelo if brought back within thirty days in the same condition as when sold. On the day following the delivery of the horse and payment of the price, criminal proceedings were instituted by Pagnuelo, charging Page with having obtained the $150 by false pretences. At the trial in June 1892, before Taschereau, J., in the Court of Queen's Bench, at Montreal, objection was made on behalf of the defendant, Page, to the adduction of any verbal evidence to contradict the writing, and especially that part of it, expressly declaring that the prosecutor, Pagnuelo, paid the money on the faith of the warranty contained in the writing and not upon any verbal representations. The Crown counsel, however, took the ground that the writing was a part of the alleged fraud, and resisted the defendant's counsel's objection, which was overruled; and verbal evidence was admitted to shew (*inter alia*), that the defendant, Page, had, before the completion of the sale, and before the signing of the written document, represented to the prosecutor, Pagnuelo, that the horse was a high bred, fast trotting horse, called "*Prince Wilkes*," well known in the sporting world, and upon this evidence and proof of some other facts of minor importance (including evidence that the horse was worth from $80 to $110, the defendant, Page, was found guilty and sentenced to three years' imprisonment. (101)

Parol evidence has been held admissible to prove the false pretences laid in the indictment, although a deed made between the parties and stating a different consideration for parting with the money was put in evidence for the prosecution; such deed having been made for the purpose of the fraud. (102)

If the false pretence be in writing and it be lost, it may be proved by secondary evidence. (103)

On the trial of an indictment for obtaining goods by false pretences, — if the alleged false representation is in writing, it is permissible to ask the person who is alleged to have been defrauded what opinion he formed on seeing the writing. (104)

A person who has assisted in the fraud practised in obtaining money by false pretences may be convicted as a principal, though not present at the making of the false pretence and obtaining the money. (105)

Where several persons were indicted for obtaining money under false pretences, it was objected that, although the defendants were all present when the representations were made to the prosecutor, yet the words could not be spoken by all and that none of them who did not speak the words could be affected by words spoken by another of them, but, that each was answerable for himself only, the using of the words constituting the pretence being, as in the crime of perjury, a separate act in the person using them. But it was held that, as the defendants were all present, acting a different part in the same transaction, they were jointly guilty. (106)

A count in an indictment for false pretences by means of an advertisement alleged that the prisoner falsely pretended to the subjects of Her

(101) R. v. Page, (Not Reported).
(102) R. v. Adamson, 2 Mood. C. C., 286; 1 C. & K., 192.
(103) R. v. Chadwick, 8 C. & P., 181.
(104) R. v. King, 18 Cox C. C., 447.
(105) R. v. Kerrigan, 33 L. J., M. C., 71; L. & C., 383.
(106) R. v. Young, 3 T. R., 96. See, also, R. v. Cadden, 20 C. L. T., 185.

Majesty the Queen, that he required a housekeeper and that, by means of such false pretence, he obtained, from C, a certain valuable security. *Held*, that the count sufficiently stated that the false pretence was made to a definite person. (107)

It has been held, in England, that an indictment which does not aver to whom the alleged false pretence was made nor from whom the money was attempted to be obtained is bad. (108) But, see section 613, clause (*a*) and (*c*), *post*, by which it is provided that no count shall be deemed objectionable or insufficient, on the ground that it does not contain the name of the person injured or intended or attempted to be injured, or on the ground that it charges an intent to defraud without naming or describing the person whom it was intended to defraud. The Court, however, is empowered, by a proviso at the end of the same section, 613, to order the prosecutor to furnish particulars.

Section 616, (par. 2), *post*, renders it unnecessary to set out, in the indictment, the false pretences; but the Court may order the prosecutor to furnish a particular thereof.

**360. Obtaining execution of valuable security by false pretence.** — Every one is guilty of an indictable offence and liable to three years' imprisonment who, with intent to defraud or injure any person by any false pretence, causes or induces any person to execute, make, accept, endorse or destroy the whole or any part of any *valuable security*, or to write, impress or affix any name or seal on any paper or parchment in order that it may afterwards be made or converted into or used or dealt with as a valuable security. R. S. C., c. 164, s. 78.

See section 3 (*ee*), *ante*, for definition of *valuable security*.

A was convicted on an indictment charging him with falsely pretending to B that he "was prepared to pay him £100," and thereby fraudulently inducing him to "make a certain valuable security, to wit, a promissory note, with intent thereby to defraud B." *Held*, that the indictment was good, as it must be taken by necessary inference to allege a false pretence by A. of an existing fact, viz: that he was prepared to pay £100, and had it ready for him on his signing the note. (109)

**361. Falsely pretending to enclose money in a letter.** — Every one is guilty of an indictable offence and liable to three years' imprisonment who, wrongfully and with wilful falsehood, pretends or alleges that he enclosed and sent, or caused to be enclosed and sent, in any post letter any money, *valuable security* or chattel, which in fact he did not so enclose and send or cause to be inclosed and sent therein. R. S. C., c. 164, s. 79.

It is not necessary to allege in the indictment nor to prove at the trial that the act was done with the intent to defraud. (See section 618, *post*.)

**362. Obtaining passage by false tickets.** — Every one is guilty

(107) R. v. Silverlock, 18 Cox C. C., 104; [1894] 2 Q. B., 766.
(108) R. v. Sowerby, 63 L. J., M. C., 136; [1894] 2 Q. B., 172.
(109) R. v. Gordon, 23 Q. B. D., 354; 58 L. J., M. C., 117.

of an indictable offence and liable to six months' imprisonment who, by means of any false ticket or order, or of any other ticket or order, fraudulently and unlawfully obtains or attempts to obtain any passage on any carriage, tramway or railway, or in any steam or other vessel. R. S. C., c. 164, s. 81.

**363. Criminal breach of trust.** — Every one is guilty of an indictable offence and liable to seven years' imprisonment who, being a trustee of any property for the use or benefit, either in whole or in part, of some other person, or for any public or charitable purpose, with intent to defraud, and in violation of his trust, converts anything of which he is trustee to any use not authorized by the trust.

See section 3 (*bb*), *ante*, for the meaning of the expression "Trustee."

Section 547, *post*, provides that, no prosecution under section 363, shall be commenced without the sanction of the Attorney General.

## PART XXVIII.

## FRAUD.

**364. False accounting by official.** — Every one is guilty of an indictable offence and liable to seven years' imprisonment who, being a director, manager, public officer or member of any body corporate or public company, with intent to defraud —

(*a*.) destroys, alters, mutilates or falsifies any book, paper, writing *or valuable security* belonging to the body corporate or public company; or

(*b*.) makes, or concurs in making, any false entry, or omits or concurs in omitting to enter any material particular, in any book of account or other document. R. S. C., c. 164, s. 68.

A collector of poor rates, whose duties included the keeping of the overseers' account book of receipts and payments, stated the account shewing a balance to be due from the overseers to the inhabitants of the district in which he was the collector for the overseers. This balance, — which was correct as to the difference between receipts and expenditure, — was stated by him as "balance *in hand*." But he was unable to produce the amount: — *Held*, that the words "in hand" did not make the entry a false entry, the account being a correct record of receipts and expenditures, and that, therefore, the collector could not be convicted of falsification of accounts, even if he had misappropriated the amount of such balance in hand. (1)

**365. False Statement by Official.** — Every one is guilty of an indictable offence and liable to five years' imprisonment who, being a promotor, director, public officer, or manager of any body

(1) R. v. Williams, 19 Cox C. C., 239.

corporate or public company, either existing or intended to be formed, makes, circulates or publishes, or concurs in making, circulating or publishing, any prospectus, statement or account which he knows to be false in any material particular, with intent to induce persons (whether ascertained or not) to become shareholders or partners, or with intent to deceive or defraud the members shareholders or creditors, or any of them (whether ascertained or not), of such body corporate or public company, or with intent to induce any person to intrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof. R. S. C., c. 164, s. 69.

It has been held, in England, that when a director, manager, or public officer of a body corporate or public company makes or publishes false statements of account knowing them to be false and intending them to be acted upon by those whom they reach, he is *presumed* in law to have done so with intent to defraud. (2)

In considering a charge made, under the above section, 365, against the "president" of an incorporated company, of publishing a false statement, judicial notice will be taken of the statutes of the province under which the company was incorporated requiring the president to be chosen from the directors; and a warrant of commitment against the president as such is legal and sufficient without alleging that he was a director, proof being made of the manner of incorporation of the company. (3)

A charge against the president of an incorporated trading company of having made and published a statement of its affairs knowing the same to be false and with intent to defraud may be tried either in the province in which the statement was despatched by mail to the party to be defrauded or in the province in which it is received by mail at the address to which the defendant directed it; it being held, that, the offence, in such a case, commenced in the province where the letter containing the statement was mailed and is continued in the province to which it is sent, and under section 553 (*b*), *post*, is to be considered as completed in either jurisdiction; (4) and a magistrate of the district to which the letter is addressed, and in which it is received by the party to whom it is addressed, may take the information in such a case under section 554 (*b*), *post*, and compel the attendance of the accused by a warrant executed in the province from which the letter was despatched. (5)

Where it appeared that the alleged false statements were mailed from a place in the province of Ontario to the parties intended to be deceived, in Montreal, the offence thus commenced in Ontario is completed in the province of Quebec by the delivery in Montreal of the letter containing the statement to the parties to whom it was addressed; and in such a case the Courts of the province of Quebec have jurisdiction to try the accused when duly committed for trial by a magistrate of the district. (6)

**366. False Accounting by Clerk.** — Every one is guilty of an indictable offence and liable to seven years' imprisonment who,

(2) R. v. Birt, 63 J. P., 328.
(3) R. v. Gillespie, 1 Can. Cr. Cas., 551.
(4) Ib.
(5) *Ib.*
(6) R. v. Gillespie, 2 Can. Cr. Cas., 309; Que. Jud. Rep., 8 Q. B., 8.

being or acting in the capacity of an officer, clerk or servant, with intent to defraud —

(*a.*) destroys, alters, mutilates or falsifies any book, paper writing valuable security or document which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or concurs in so doing, or

(*b.*) makes, or concurs in making, any false entry in, or omits or alters, or concurs in omitting or altering, any material particular from, any such book, paper writing, valuable security or document.

**367. False Statement by Public Officer.** — Every one is guilty of an indictable offence and liable to five years' imprisonment, and to a fine not exceeding five hundred dollars, who, being an officer, collector or receiver, intrusted with the receipt, custody or management of any part of the public revenues, knowingly furnishes any false statement or return of any sum of money collected by him or intrusted to his care, or of any balance of money in his hands or under his control.

## THE BANK ACT.

The *Bank Act* is the 53 Vic., c. 31, as amended by the *Bank Act Amendment Act, 1900*, 63-64 Vic., c. 26.

### Returns by Banks. (7)

The provisions of the *Bank Act* relating to returns and statements to be made by Banks are sections 85, 86, 87 and 88 of the 53 Vic., c. 31, and sections 21 and 22 of the 63-64 Vic., c. 26, which sections are as follows: —

**Monthly returns and Penalty for not making same.** — "Monthly returns shall be made by the bank to the Minister of Finance and Receiver General in the form set forth in Schedule D to this Act, and shall be made up and sent in within the first fifteen days of each month, and shall exhibit the condition of the bank on the last juridical day of the month next preceding; and such monthly returns shall be signed by the chief accountant and by the president, or vice-president, or the director or principal partner then acting as president, and by the manager, cashier or other principal officer of the bank at its chief place of business.

2. Every bank which neglects to make up and send in, as aforesaid, any monthly return required by this section within the time hereby limited, shall incur a penalty of fifty dollars for each and every day after the expiration of such time during which the bank neglects so to make up and send in such return; and the

(7) See sections 31-33 of the 53 Vic., c. 32, (as amended by section 5 of the 63-64 Vic., c. 28), as to returns to be made by *Savings Banks* in the province of Quebec.

date upon which it appears by the post office stamp or mark upon the envelope or wrapper enclosing such return for transmission to the Minister of Finance and Receiver General, that the same was deposited in the post office, shall be taken *primâ facie*, for the purposes of this section, to be the date upon which such return was made up and sent in." (Sec. 85 of the Bank Act.)

**Special Returns and Penalty for not making same.** — "The Minister of Finance and Receiver General may also call for special returns from any bank, whenever, in his judment, they are necessary to afford a full and complete knowledge of its condition.

2. Such special returns shall be made and signed in the manner and by the persons specified in the next preceeding section; and every bank which neglects to make and send in any such special return within thirty days from the date of the demand therefor by the Minister of Finance and Receiver General shall incur a penalty of five hundred dollars for each and every day such neglect continues; and the provisions contained in the last preceding section as to the *primâ facie* evidence of the date upon which returns are made up and sent in thereunder, shall apply to returns made under this section: Provided always, that the Minister of Finance and Receiver General may extend the time for sending in such special returns for such further period, not exceeding thirty days, as he thinks expedient." (Sec. 86 of the *Bank Act.*)

**Annual Transmission of list of shareholders, and Penalty for neglect to transmit.** — "The bank shall, within twenty days after the close of each calendar year, transmit or deliver to the Minister of Finance and Receiver General, to be by him laid before Parliament, a certified list showing the names of the shareholders of the bank on the last day of such calendar year, with their additions and residences, the number of shares then held by them respectively, and the value at par of such shares:

"3. Every bank which neglects to transmit such list in manner aforesaid within the time aforesaid shall incur a penalty of fifty dollars for each and every day during which such neglect continues." (Sec. 87 of the *Bank Act*).

**Annual statement of unpaid dividends, and Penalty for not rendering same,** — "The Bank shall within twenty days after the close of each calendar year, transmit or deliver to the Minister of Finance and Receiver General, to be by him laid before Parliament, a return of all dividends which have remained unpaid for more than five years, and also of all amounts or balances in respect to which no transactions have taken place or upon which no interest has been paid during the five years prior to the date of such return: Provided always that in case of moneys deposited for a fixed period, the period of five years above referred to shall be reckoned from the date of the termination of such fixed period:

"2. Such return shall be signed in the manner required for the monthly returns under section eighty-five of this Act, and shall set forth the name of each shareholder or creditor, his last known address, the amount due, the agency of the bank at which the last transaction took place, and the date thereof; and if such shareholder or creditor is known to the bank to be dead, such return shall show the names and addresses of his legal representatives, so far as known to the bank:

"3. Every bank which neglects to transmit or deliver to the Minister of Finance and Receiver General the return above referred to, within the time hereinbefore limited, shall incur a penalty of fifty dollars for each and every day during which such neglect continues." (Sec. 88 of the *Bank Act*).

**Annual Return of unpaid drafts and Penalty for non-return.** "The bank shall, within twenty days after the close of each calendar year, transmit or deliver to the Minister of Finance and Receiver General to be by him laid before Parliament, a return of all drafts or bills of exchange, issued by the bank to any person and remaining unpaid for more than five years prior to the date of such return.

"2. Such return shall be signed in the manner required for the monthly returns under section 85 of *The Bank Act*, and shall set forth, so far as known, the name of the person to whom, or at whose request, such draft or bill of exchange was issued, and his address, the payee thereof, the amount and date thereof, and where the same was payable, and the agency of the bank from which the same was issued.

"3. Every bank which neglects to transmit or deliver to the Minister of Finance and Receiver General the return referred to, within the time above limited, shall incur a penalty of fifty dollars for each and every day during which such neglect continues." (Sec. 21 of the *Amending Act*, 63-64 Vic., c. 26).

Sub-section 2 of section 87 of the *Bank Act*, providing for the mode of transmitting the Annual List of shareholders, — was repealed by section 23 of the *Amending Act*, section 22 of which is as follows: —

**Transmission of list and returns.** — "If the certified list or the return required by section 87 or by section 88 of *The Bank Act*, or by the next preceeding section of this Act, to be transmitted or delivered to the Minister of Finance and Receiver General, is transmitted by mail, then and in such case the date upon which it appears, by the post office stamp or mark upon the envelope or wrapper inclosing the list or return received by the Minister of Finance and Receiver General, that it was deposited in the post office of the place in which the chief office af the bank was situated, shall be taken prima facie for the purpose of the said sections to be the day upon which such list or return was trans-

mitted to the Minister of Finance and Receiver General." (Sec. 22 of the *Amending Act*, 63-64 Vic., c. 26).

## OTHER OFFENCES AGAINST THE BANK ACT.

**Officers giving uudue preference to any creditor.** — "Every one is guilty of a misdemeanor and liable to imprisonment for a term not exceeding two years who, being the president, vice-president, director, principal partner *en commandite*, manager, cashier or other officer of the bank, wilfully gives or concurs in giving any creditor of the bank any fraudulent, undue or unfair preference over other creditors, by giving security to such creditor or by changing the nature of his claim or otherwise howsoever, and shall further be responsible for all damages sustained by any person in consequence of such preference." (Section 97 of the *Bank Act*).

**Making a false statement in any Return, etc.** — "The making of any wilfully false or deceptive statement in any account, statement, return, report or other document respecting the affairs of the bank is, unless it amounts to a higher offence, a misdemeanour punishable by imprisonment for a term not exceeding five years ; and every president, vice-president, director, principal partner *en commandite*, auditor, manager, cashier, or other officer of the bank, who prepares, signs, approves or concurs in such statement, return, report or document, or uses the same with intent to deceive or mislead any person, shall be held to have wilfully made such false statement, and shall further be responsible for all damages sustained by any person in consequence thereof." (Section 99 of the *Bank Act*).

**Using the title of "Bank," etc., without authority.** (8) — "Every person assuming or using the title of 'bank,' 'banking company,' 'banking house,' 'banking association' or 'banking institution,' without being authorized so to do by this Act, or by some other Act in force in that behalf, is guilty of an offence against this Act." (Section 100 of the *Bank Act*).

**Punishment of offences against the Bank Act.** — "Every person, committing an offence declared to be an offence against this Act, shall be liable to a fine not exceeding one thousand dollars, or to imprisonment for a term not exceeding five years, or to both, in the discretion of the Court before which the conviction is had." (Section 101 of the *Bank Act*).

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(8) See sections 9-17 of the *Bank Act*, as to the Organization and Incorporation of Banks.

Where, an indictment, under sections 85 and 99 of the *Bank Act*, for making a wilfully false and deceptive statement in a return, alleged that the defendant unlawfully made and sent to the Minister of Finance and Receiver-General a monthly report of and concerning the affairs of the Bank, and added, by way of paraphrase to characterize the term "monthly report," the words, "a wilful, false and deceptive statement of and concerning the affairs of the said Bank," and finally that such monthly report was made with intent to deceive and mislead, it was held that, the ingredients of the offence were sufficiently set forth and the indictment was maintained, — it being sufficient, in indictments, to charge in substance the offence created by the statute and clerical errors or faulty grammatical construction not having the effect of vitiating the indictment. (9)

**368. Defrauding Creditors.** — Every one is guilty of an indictable offence and liable to a fine of eight hundred dollars and to one year's imprisonment who —

(*a*) with intent to defraud his creditors, or any of them, (10)

(i) makes, or causes to be made, any gift, conveyance, assignment, sale, transfer or delivery of his property ;

(ii) removes, conceals or disposes of any of his property ; or

(*b*) with the intent that any one shall so defraud his creditors, or any one of them, receives any such property. R. S. C., c. 173, s. 28.

**369.** Every one is guilty of an indictable offence and liable to ten years' imprisonment who, with intent to defraud his creditors or any of them, destroys, alters, mutilates or falsifies any of his books, papers, writings or securities, or makes, or is privy to the making of any false or fraudulent entry in any book of account or other document. R. S. C., c. 173, s. 27.

On the trial of an indictment, under the English *Debtors' Act, 1869*, charging two persons, the one, a bankrupt, with disposing of goods with intent to defraud his creditors, and the other, the bankrupt's brother-in-law and manager, with aiding and abetting him therein, — the evidence shewing that, in August 1890, the bankrupt had transferred to the other prisoner his business and stock, (including goods purchased from his creditors and not paid for), and had, then, presented against himself a bankruptcy petition and was adjudged a bankrupt in October 1890, — it was held that, statements made by the bankrupt, at the time of obtaining the goods from his creditors, were admissible as evidence against both prisoners, although such statements were made in the absence of the other prisoner. *Held*, also, that, whether the brother-in-law knew that the bankrupt had bought goods and had not paid for them was a question for the jury, and that the jury might infer from the relationship proved to have existed between the parties that the prisoner, who was charged with aiding and abetting, was, at the time of receiving the goods, aware of the fact that they had not been paid for by the bankrupt. (11)

C and D purchased, from L. & Sons, an engine and boiler at the price of $1840. Of this amount they paid $1000, in cash, and gave notes at 6 and

(9) R. v. Weir, et al, 3 Can. Cr. Cas., 102; Que. Jud. Rep., 8 Q. B., 521.
(10) See R. v. Rowlands, 8 Q. B. D., 530; 51 L. J., M. C., 51.
(11) R. v. Chapple & Bolingbroke, 17 Cox C. C., 455.

12 months for the balance. Before the delivery of the engine and boiler, C and D had agreed with L. & Sons to give the latter a bill of sale or chattel mortgage thereon as security for the payment of the notes; but, they failed to give the security, and, being pressed by their creditors, they made an assignment of their property, including the engine and boiler, to one S. as trustee for the benefit of their creditors. S being prosecuted and convicted under sub-section (*b*) of the above section, 368, it was held that, the reception of the property by him was not an offence under that section in the absence of proof of the original fraud. *Held*, also, that what was contemplated by the section was such an abstraction or doing away with property as would, if carried out, completely rob the creditors or any of them of any benefit whatever. (12)

**370. Concealing Deeds or Encumbrances or Falsifying Pedigrees.** — Every one is guilty of an indictable offence and liable to a fine, or to two years' imprisonment, or to both, who, being a seller or mortgagor of land, or of any chattel, real or personal, or chose in action, or the solicitor or agent of any such seller or mortgagor (and having been served with a written demand of an abstract of title by or on behalf of the purchaser or mortgagee before the completion of the purchase or mortgage) conceals any settlement, deed, will or other instrument material to the title, or any encumbrance, from such purchaser or mortgagee, or falsifies any pedigree upon which the title depends, with intent to defraud and in order to induce such purchaser or mortgagee to accept the title offered or produced to him. R. S. C., c. 164, s. 91.

No prosecution for any offence under this section can be commenced without the leave of the Attorney-General. (See section 548, *post*.)

**371. Frauds in respect to the Registration of titles to land.** — Every one is guilty of an indictable offence and liable to three years' imprisonment who, acting either as principal or agent, in any proceeding to obtain the registration of any title to land or otherwise, or in any transaction relating to land which is, or is proposed to be, put on the register, knowingly and with intent to deceive, makes or assists or joins in, or is privy to the making of any material, false statement or representation, or suppresses, conceals, assists or joins in, or is privy to the suppression, withholding or concealing from any judge or registrar, or any person employed by or assisting the registrar, any material document, fact or matter of information. R. S. C., c. 164, ss. 96 and 97.

**372. Fraudulent sales of real property.** — Every one is guilty of an indictable offence and liable to one year's imprisonment, and to a fine not exceeding two thousand dollars, who knowing the existence of any unregistered prior sale, grant, mortgage, hypothec, privilege or encumbrance of or upon any real property, fraudulently makes any subsequent sale of the same, or of any part thereof. R. S. C., c. 164, ss. 92 and 93.

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(12) R. v. Shaw, 31 N. S. R., 534.

**373. Fraudulent Hypothecation of Real Property.** — Every one who pretends to hypothecate, mortgage, or otherwise charge any real property to which he knows he has no legal or equitable title is guilty of an indictable offence and liable to one year's imprisonment, and to a fine not exceeding one hundred dollars.

2. The proof of the ownership of the real estate rests with the person so pretending to deal with the same. R. S. C., c. 164, ss. 92 and 94.

**374. Fraudulent seizures of land.** — Every one is guilty of an indictable offence and liable to one year's imprisonment who, in the province of Quebec, wilfully causes or procures to be seized and taken in execution any lands and tenements, or other real property, not being, at the time of such seizure, to the knowledge of the person causing the same to be taken in execution, the *bonâ fide* property of the person or persons against whom, or whose estate, the execution is issued. R. S. C., c. 164, ss. 92 and 95.

**375. Unlawful dealings with gold or silver.** — Every one is guilty of an indictable offence and liable to two years' imprisonment, who —

(*a*) being the holder of any lease or licence issued under the provisions of any Act relating to gold or silver mining or by any persons owning land supposed to contain any gold or silver, by fraudulent device or contrivance defrauds or attempts to defraud Her Majesty, or any person, of any gold, silver or money payable or reserved by such lease, or, with such intent as aforesaid, conceals or makes a false statement as to the amount of gold or silver procured by him; or

(*b*.) not being the owner or agent of the owners of mining claims then being worked, and not being thereunto authorized in writing by the proper officer in that behalf named in any Act relating to mines in force in any province of Canada, sells or purchases (except to or from such owner or authorized person) any quartz containing gold, or any smelted gold or silver, at or within three miles of any gold district or mining district, or gold mining division; or

(*c*.) purchases any gold in quartz, or any unsmelted or smelted gold or silver, or otherwise unmanufactured gold or silver, of the value of one dollar or upwards (except from such owner or authorised person), and does not, at the same time, execute in triplicate an instrument in writing, stating the place and time of purchase, and the quantity, quality and value of gold or silver so purchased, and the name or names of the person or persons from whom the same was purchased, and file the same with such proper officer within twenty days next after the date of such purchase. R.S.C., c. 164, ss. 27, 28 and 29.

See sections 312 and 343, *ante*, as to concealment and thefts of gold, etc.

See section 571, *post*, as to search warrants.

The words "His Majesty" should now be substituted for the words "Her Majesty," in this section. (See section 7 of the *Interpretation Act*, at p. 9, *ante*.)

**376. Giving or using false warehouse receipts.** — Every one is guilty of an indictable offence and liable to three years' imprisonment who —

(*a*) being the keeper of any warehouse, or a forwarder, miller, master of a vessel, wharfinger, keeper of a cove, yard, harbour or other place for storing timber, deals, staves, boards, or lumber, curer or packer of pork, or dealer in wool, carrier, factor, agent or other person, or a clerk or other person in his employ, knowingly and wilfully gives to any person a writing purporting to be a receipt for, or an acknowledgment of any goods or other property as having been received into his warehouse, vessel, cove, wharf, or other place, or in any such place about which he is employed, or in any other manner received by him, or by the person in or about whose business he is employed before the goods or other property named in such receipt, acknowledgment or writing have been actually delivered to or received by him as aforesaid, with intent to mislead, deceive, injure or defraud any person, although such person is then unknown to him; or

(*b*) knowingly and wilfully accepts, transmits or uses any such false receipt or acknowledgment or writing. R.S.C., c. 164, s. 73.

**377. Owners of merchandise disposing thereof contrary to agreements with consignees who have made advances thereon.** — Every one is guilty of an indictable offence and liable to three years' imprisonment, who —

(*a*) having in his name, shipped or delivered to the keeper of any warehouse, or to any other factor, agent or carrier, to be shipped or carried, any merchandise upon which the consignee has advanced any money or given any valuable security, afterwards, with intent to deceive, defraud or injure such consignee in violation of good faith, and without the consent of such consignee, makes any disposition of such merchandise different from and inconsistent with the agreement made in that behalf between him and such consignee at the time of or before such money was so advanced or such negotiable security so given; or

(*b*) knowingly and wilfully aids and assists in making such disposition for the purpose of deceiving, defrauding or injuring such consignee.

2. No person commits an offence under this section who, before making such disposition of such merchandise, pays or tenders to the consignee the full amount of any advance made thereon. R. S. C., c. 164, s. 74.

**378. Making false statements in receipts for property that can be used under the Bank Act ; or fraudulently dealing with such property.** — Every person is guilty of an indictable offence and liable to three years' imprisonment who —

(*a*) wilfully makes any false statement in any receipt, certificate or acknowledgment for grain, timber or other goods or property which can be used for any of the purposes mentioned in the *Bank Act;* or

(*b*) having given, or after any clerk or person in his employ has, to his knowledge, given, as having been received by him in any mill, warehouse, vessel, cove or other place, any such receipt, certificate or acknowledgment for any such grain, timber or other goods or property, — or having obtained any such receipt, certificate or acknowledgment, and after having endorsed or assigned it to any bank or person, afterwards, and without the consent of the holder or endorsee in writing, or the production and delivery of the receipt, certificate or acknowledgment, wilfully alienates or parts with, or does not deliver to such holder or owner of such receipt, certificate or acknowledgment, the grain timber, goods or other property therein mentioned. R. S. C., c. 164, s. 75.

**379. Innocent Partners.** — If any offence mentioned in any of the three sections next preceding is committed by the doing of anything in the name of any firm, company or copartnership of persons, the person by whom such thing is actually done, or who connives at the doing thereof, is guilty of the offence, and not any other person. R.S.C., c. 164, s. 76.

**380. Offences Respecting Wrecks.** — Every one is guilty of an indictable offence and liable to seven years' imprisonment who, not having lawful title thereto, sells any vessel or wreck found within the limits of Canada. R.S.C., c. 81, s. 36 (*d*).

**381.** Every one is guilty of an indictable offence and liable, on conviction on indictment to two years' imprisonment, and on summary conviction before two justices of the peace to a penalty of four hundred dollars or six months' imprisonment, with or without hard labour, who —

(*a*) secretes any wreck, or defaces or obliterates the marks thereon, or uses means to disguise the fact that it is wreck, or in any manner conceals the character thereof, or the fact that the same is such wreck, from any person entitled to inquire into the same; or

(*b*) receives any wreck, knowing the same to be wreck, from any person, other than the owner thereof or the receiver of wrecks, and does not within forty-eight hours inform the receiver thereof;

(*c*) offers for sale or otherwise deals with any wreck, knowing

it to be wreck, not having a lawful title to sell or deal with the same; or

(*d*) keeps in his possession any wreck, knowing it to be wreck, without a lawful title so to keep the same, for any time longer than the time reasonably necessary for the delivery of the same to the receiver; or

(*e*) boards any vessel which is wrecked, stranded or in distress against the will of the master, unless the person so boarding is, or acts by command of the receiver. R.S.C., c. 81, s. 37.

See section 3 (*dd*), *ante*, for definition of "wreck."

**382. Offences respecting old marine stores.** — Every person who deals in the purchase of old marine stores of any description, including anchors, cables, sails, junk, iron, copper, brass, lead and other marine stores, and who, by himself or his agent, *purchases* any old marine stores *from any person under the age of sixteen years*, is guilty of an offence and liable, on summary conviction, to a penalty of four dollars for the first offence and of six dollars for every subsequent offence.

2. Every such person who, by himself or his agent, purchases or receives any old marine stores into his shop, premises or places of deposit, except in the day time between sunrise and sunset, is guilty of an offence and liable on summary conviction, to a penalty of five dollars for the first offence and of seven dollars for every subsequent offence.

3. Every person, purporting to be a dealer in old marine stores, on whose premises any such stores which were stolen are found secreted is guilty of an indictable offence and liable to five years' imprisonment. R. S. C., c. 81, s. 35.

## OFFENCES RESPECTING "PUBLIC STORES."

**383. Definitions.** — In the next six sections the following expressions have the meanings assigned to them herein:

(*a*) The expression "public department" includes the Admiralty and the War Department, and also any public department or office of the Government of Canada, or of the public or civil service thereof, or any branch of such department or office;

(*b*) The expression "public stores" includes all stores under the care, superintendence or control of any public department as herein defined, or of any person in the service of such department;

(*c*) The expression "stores" includes all goods and chattels, and any single store or article. 50-51 V., c. 45, s. 2.

**384. Marks to be used on public stores.** — The following marks may be applied in or on any public stores to denote Her Majesty's

property in such stores, and it shall be lawful for any public department, and the contractors officers and workmen of such department to apply such marks, or any of them, in or on any such stores : —

*Marks appropriated for Her Majesty's use in or on Naval, Military, Ordnance, Barrack, Hospital and Victualling Stores.*

| STORES. | MARKS. |
|---|---|
| Hempen cordage and wire rope. | White, black or coloured threads laid up with the yarns and the wire respectively. |
| Canvas, fearnought, hammocks and seamen's bags. | A blue line in a serpentine form. |
| Bunting. | A double tape in the warp. |
| Candles. | Blue or red cotton threads in each wick, or wicks of red cotton. |
| Timber, metal and other stores not before enumerated. | The broad arrow, with or without the letters W. D. |

*Marks appropriated for use on stores, the property of Her Majesty in the right of her Government of Canada.*

| STORES. | MARKS. |
|---|---|
| Public stores. | The name of any public department, or the word "Canada," either alone or in combination with a Crown or the Royal Arms. |

50-51 V., c. 45, s. 3; 53 V., c. 38.

See sections 1 — 4, of 38 and 39 Vic., c. 25, (Imp.).

See section 709, *post*, as to proof in cases relating to public stores.

Section 570, authorizes searches of persons suspected of being in possession of public stores, and searches of vessels, etc., in which stolen or unlawfully obtained stores are suspected to be; such searches to be made by any constable or peace officer deputed by a writing from any public department.

Since the accession of King Edward VII, the words "His Majesty" and "His Majesty's use," etc., will be substituted for "Her Majesty" and "Her Majesty's use," etc., in this and following sections relating to public stores and military and naval necessaries. (See section 7, sub-section 6 of the *Interpretation Act*, at p. 9, *ante*.)

**385. Unlawfully applying marks to public stores.** — Every one is guilty of an indictable offence and liable to two years' imprisonment who, without lawful authority, the proof of which shall lie on him, applies any of the said marks in or on any public stores. 50-51 V., c. 45, s. 4.

See section 4, of 38 and 39 Vic., c. 25, (Imp.).

**386. Taking marks from public stores.** — Every one is guilty of an indictable offence and liable to two years' imprisonment who, with intent to conceal Her Majesty's property in any public stores, takes out, destroys or obliterates, wholly or in part, any of the said marks. 50-51 V., c. 45, s. 5.

See section 5, of 38 and 39 Vic., c. 25, (Imp.).

**387. Unlawful possession, sale, etc., of public stores.** — Every one who, without lawful authority, the proof of which lies on him, receives, possesses, keeps, sells or delivers any public stores bearing any such mark as aforesaid, knowing them to bear such mark, is guilty of an indictable offence and liable on conviction on indictment to one year's imprisonment and, if the value thereof does not exceed twenty-five dollars, on summary conviction, before two justices of the peace, to a fine of one hundred dollars or to six months' imprisonment with or without hard labour. 50-51 V., c. 45, ss. 6 and 8.

For definition of *having in possession*, see section 3 (*k*), *ante*.

See section 390, *post*, as to dealing with regimental necessaries.

**388. Not satisfying justices that possession of public stores is lawful.** — Every one, not being in Her Majesty's service or a dealer in marine stores or a dealer in old metals, in whose possession any public stores bearing any such mark are found who, when taken or summoned before two justices of the peace, does not satisfy such justices that he came lawfully by such stores so found, is guilty of an offence and liable, on summary conviction, to a fine of twenty-five dollars; and

2. If any such person satisfies such justices that he came lawfully by the stores so found, the justices, in their discretion, as the evidence given or the circumstances of the case require, may summon before them every person through whose hands such stores appear to have passed; and

3. Every one who has had possession thereof, who does not satisfy such justices that he came lawfully by the same, is liable, on summary conviction of having had possession thereof, to a fine of twenty-five dollars, and in default of payment to three months' imprisonment with or without hard labour. 50-51 V., c. 45, s. 9.

**389. Searching for stores near Her Majesty's Vessels.** — Every one who, without permission in writing from the Admiralty, or from some person authorized by the Admiralty in that behalf, creeps, sweeps, dredges, or otherwise searches for stores in the sea, or any tidal or inland water, within one hundred yards from any vessel belonging to Her Majesty, or in Her Majesty's service, or from any mooring place or anchoring place appropriated to such vessels, or from any mooring belonging to Her Majesty, or

from any of Her Majesty's wharfs or docks, victualling or steam factory yards, is guilty of an offence and liable, on summary conviction before two justices of the peace, to a fine of twenty-five dollars, or to three months' imprisonment, with or without hard labour. 50-51 V., c. 45, ss. 11 and 12.

**390. Receiving regimental necessaries etc., from soldiers or deserters.**— Every one is guilty of an indictable offence and liable on conviction on indictment to five years' imprisonment and on summary conviction before two justices of the peace to a penalty not exceeding forty dollars, and not less than twenty dollars and costs, and, in default of payment, to six months' imprisonment with or without hard labour who —

(*a*) buys, exchanges or detains, or otherwise receives from any soldier, militiaman or deserter any arms, clothing or furniture belonging to Her Majesty or any such articles belonging to any soldier, militianam or deserter as are generally deemed regimental necessaries according to the custom of the army; or

(*b*) causes the colour of such clothing or articles to be changed; or

(*c*) exchanges, buys or receives from any soldier or militiaman any provisions, *without leave in writing from the officer commanding* the regiment or detachment to which such soldier belongs. R. S. C., c. 169, ss. 2 and 4.

See section 13 of 38 and 39 Vic., c. 25, (Imp.), and note as to regimental necessaries at p. 908, Arch. Cr. Pl. & Ev., 21st Ed.

See 44 and 45 Vic., c. 58, s. 156, (Imp.), and note, at p. 908 of Archbold.

**391. Receiving, etc., necessaries from marines or deserters.** — Every one is guilty of an indictable offence, and liable, on conviction on indictment to five years' imprisonment, and on summary conviction before two justices of the peace to a penalty not exceeding one hundred and twenty dollars, and not less than twenty dollars and costs, and in default of payment to six months' imprisonment, who buys, exchanges or detains, or otherwise receives, from any seaman or marine, upon any account whatsoever, or has in his possession, any arms or clothing, or any such articles, belonging to any seaman, marine or deserter, as are generally deemed necessaries according to the custom of the navy. R. S. C., c. 169, ss. 3 and 4.

**392. Receiving, etc., a seaman's property.**— Every one is guilty of an indictable offence who detains, buys, exchanges, takes on pawn or receives, from any seaman or any person acting for a seaman, any seaman's property, or solicits or entices any seaman, or is employed by any seaman to sell, exchange or pawn any seaman's property, unless he acts in ignorance of the same being seaman's property, or of the person with whom he deals being or act-

ing for a seaman, or unless the same was sold by the order of the Admiralty or Commander-in-Chief.

2. The offender is liable, on conviction on indictment to five years' imprisonment, and on summary conviction to a penalty not exceeding one hundred dollars; and for a second offence, to the same penalty, or, in the discretion of the justice, to six month's imprisonment, with or without hard labour.

3. The expression "seaman" means every person, not being a commissioned, warrant or subordinate officer, who is in or belongs to Her Majesty's Navy, and is borne on the books of any one of Her Majesty's ships in commission, and every person, not being an officer as aforesaid, who, being borne on the books of any hired vessel in Her Majesty's service, is, by virtue of any Act of Parliament of the United Kingdom for the time being in force for the discipline of the Navy, subject to the provisions of such Act.

4. The expression "seaman's property" means any clothes, slops, medals, necessaries or articles usually deemed to be necessaries for sailors on board ship, which belong to any seaman.

5. The expression "Admiralty," means the Lord High Admiral of the United Kingdom, or the Commissioners for executing the office of Lord High Admiral. R. S. C., c. 171, ss. 1 and 2.

**393. Not satisfying justice that possession of seaman's property is lawful.** — Every one in whose possession any seaman's property is found who does not satisfy the justice of the peace before whom he is taken or summoned that he came by such property lawfully is liable, on summary conviction, to a fine of twenty-five dollars. R. S. C., c. 171, s. 3.

**394. Conspiracy to defraud.** — Every one is guilty of an indictable offence and liable to seven years' imprisonment who conspires with any other person, by deceit or falsehood or other fraudulent means, to defraud the public or any person, ascertained or unascertained, or to affect the public market price of stocks, shares, merchandise or anything else publicly sold, whether such deceit or falsehood or other fraudulent means would or would not amount to a false pretense as hereinbefore defined.

According to the general definitions of it, a conspiracy is an agreeing or combining, or confederating together, by two or more persons, to accomplish some unlawful purpose, or, to accomplish a lawful purpose by some unlawful means. (13)

Bishop's definition is as follows: — "Conspiracy is the corrupt agreeing together of two or more persons to do, by concerted action, something un-

(13) R. v. Bunn, 12 Cox C. C., 316-339; R. v. Roy, 11 L. C. J., 93; R. v. Vincent, 9 C. & P., 91.

lawful either as a means or an end; (14) and he remarks, as to the gist of the offence, — namely, the combination, — that, "In many circumstances, if two or more combine to do a wrong, — whether, as the means to something else, or, as the contemplated end, — such mere *combining more endangers or disturbs the community* than would the executed wrong accomplish by a single will. This is the central idea in the law of conspiracy."

A conspiracy consists not merely in the *intention* of two or more but in the *agreement* of two or more to do an unlawful act or to do a lawful act by unlawful means. So long as there is an *intention only*, it is not indictable. (15)

It is doubtless on account of the dangerous nature of the offence as affecting the community at large that the legislature has considered it expedient, in many instances, to deal more severely with a conspiracy to commit an offence than with the offence itself when committed independently of the conspiracy.

An act which may be done innocently, by individuals separately may constitute the offence of conspiracy when done by several in concert. Thus, where the combination alleged was an agreement to incite farmers, — who had agreed to pay certain rents, — not to pay the rents which they had contracted to pay, but to break their contracts with their landlords and refuse to pay rents, it was held to be an indictable conspiracy. (16)

Where one of two partners, during the continuance of the partnership, combined with a third party to enable the one partner to cheat the other, with regard to the division of the partnership property on a contemplated dissolution of the partnership, it was held that the combination was a conspiracy, although for one party to cheat another might be only a civil wrong and not a criminal offence at common law. (17)

Where a woman and her mother were indicted for conspiring together to get a quantity of jewellery and other goods from various traders by false pretences and fraud, — and it appeared that one of them obtained goods on credit in order to sell them to the other below the value, that other aiding as a referee and giving a character, — it was held that, though the acts complained of might not amount to a crime in an individual, yet that an indictment might lie for conspiracy when they were the result of an agreement between two or more persons. (18)

It is an offence, under the above section, 394, to conspire by any fraudulent means to defraud any person. Thus, if there was a conspiracy to permit persons to travel free on a railway, that would be a conspiracy to defraud the railway company. (19)

A conspiracy to defraud is indictable even though the conspirators are unsuccessful in carrying out the fraud; (20) the offence being complete when the agreement to do the wrong thing or to employ the wrong means is made. (21)

A servant who, in order to make a profit for himself, sells his master's goods at less than their proper market value, thereby defrauds his master

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(14) 2 Bish. New Cr. L. Com., 8th Ed., s. 171.
(15) Mulcahy v. R., 3 H. of L., 306, 317.
(16) R. v. Parnell and others, 14 Cox C. C., 508.
(17) R. v. Warburton, L. R., 1 C. C. R., 274; 40 L. J., M. C., 22.
(18) R. v. Orman, et al, 14 Cox C. C., 381.
(19) R. v. Defries and Tamblyn, 14 C. L. T., 513; 25 O. R., 645.
(20) R. v. Frawley, 14 C. L. T., 446; 25 O. R., 431.
(21) R. v. Connolly & McGreevy, 25 O. R., 190.

of the difference between the value of the goods and the price at which he sells them. Where, therefore, a person was indicted for conspiring with a servant to cheat and defraud his master, and it was proved that such person had offered a bribe to the servant as an inducement to him to sell certain goods of his master at less than their value, it was held, that, he might be convicted of such conspiracy. (22)

The following are examples of CONSPIRACIES TO DEFRAUD: —

A conspiracy to impose upon a man pretended wine as and for true and good Portugal wine in exchange for goods; (23)

A conspiracy by traders to dispose of their goods in contemplation of bankruptcy, with intent to defraud their creditors; (24)

A conspiracy by persons to cause themselves to be reputed men of property, in order to defraud tradesmen; (25)

A conspiracy to defraud by means of false representations of the solvency of a bank or other mercantile establishment; (26)

A conspiracy to defraud the public by issuing and negociating bills in the name of a fictitious and pretended banking firm; (27)

A conspiracy to defraud the public by means of a mock auction, that is, an auction with sham bidders, who pretend to be real bidders, for the purpose of selling goods at prices grossly above their worth; (28)

A conspiracy by a female servant and a man whom she got to marry her, to impersonate her master in order to defraud her master's relations of a part of his property after his death; (29)

A conspiracy to injure a man in his trade or profession; (30)

A conspiracy to shew by false and fraudulent representations that a horse bought by one of the defendants from the prosecutor was unsound, in order to induce him to accept less for it than the agreed price; (31)

A conspiracy by the promoters of a joint stock company to cheat and defraud, by means of false pretences, those who might buy shares in the company; (32)

A conspiracy to raise, by false rumors, the price of public funds. (33)

See sections 613 and 616, *post*, as to requisites of indictments.

An indictment charging a conspiracy "by divers false pretences and indirect means to cheat and defraud A of his monies," was held good. (34)

But an indictment charging a conspiracy to defraud the creditor of W. E. (not saying of what), was held too general. (35)

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(22) R. v. De Kromme, 17 Cox C. C., 492.
(23) R. v. Macarty, 2 Ld. Raym., 1179.
(24) R. v. Hall, 1 F. & F., 33.
(25) R. v. Roberts, 1 Camp., 399.
(26) R. v. Esdaile, 1 F. & F., 213.
(27) R. v. Hevey, 2 East, P. C., 858.
(28) R. v. Lewis, 11 Cox C. C., 404.
(29) R. v. Taylor, 1 Leach, 47.
(30) R. v. Eccles, 1 Leach, 274.
(31) R. v. Carlile, Dears., 337; 23 L. J. (M. C.), 109.
(32) R. v. Aspinall, 1 Q. B. D., 730; 45 L. J., M. C., 129; 2 Q. B. D., 48; 46 L. J., M. C., 145.
(33) R. v. Aspinall, 2 Q. B. D., 59; 46 L. J., M. C., 150; R. v. De Berenger, 3 M. & Sel., 67.
(34) R. v. Gompertz, 9 Q. B., 824.
(35) R. v. Fowle, 4 C. & P., 592.

The conspiracy itself is the offence, that is to say, the offence is completed by the combination and agreement; (36) and, therefore, it is not necessary, although it is usual, to set out, in the indictment, the overt acts, that is, those acts which may have been done by any of the conspirators, in order to effect the common purpose of the conspiracy. (37)

If the parties conspire to obtain money by false pretences of existing facts, it seems to be no objection to the indictment for conspiracy that the money was to be obtained through the medium of a contract. (38)

A conspiracy must, from its nature, be by two persons, or more; one man alone cannot be tried and convicted of it, unless he be indicted for conspiring with other persons to the jurors unknown; (39) or unless he be charged with having conspired with others who have not appeared,(40) or who are since dead. (41) And, where two persons are indicted for conspiring together, and they are tried together, both must be convicted or both acquitted. (42)

One conspirator may be indicted and convicted on an indictment charging him with conspiring with another or others to defraud, without joining the others, although living within the same jurisdiction. (43)

Where A, B and C, were charged in an indictment for having conspired together and with divers other persons to the jurors unknown, etc., and the jury found that A had conspired with either B, or C, but they could not say which, and there was no evidence against any other persons than the three defendants, A was held entitled to an acquittal. (44)

A count in an indictment charged eight defendants with one conspiracy to effect certain objects; and a finding that three of them were guilty generally, and that the other five were guilty of conspiracy to effect some of the objects, and not guilty as to the residue, was held bad and repugnant, the principle underlying the decision in that case being this, that where there are two or more persons charged with conspiracy in the same count, the count is a single and complete count, and cannot be separated into parts. (45)

With reference to the proof of a conspiracy, the commission of the offence is generally a matter of inference to be deduced from certain acts of the parties accused done in common between them in pursuance of an apparent criminal purpose. (46) General evidence of the nature of the conspiracy may be gone into before adducing evidence to connect the different defendants with it. (47)

It is not necessary to prove that the parties came together and actually agreed in terms to carry out their common design, but the jury may group the detached acts of the parties, and view them as indicating a concerted purpose on the part of all as proof of the alleged conspiracy; and there is

(36) R. v. Thayer, 5 L. N., 162.
(37) R. v. Gill, 2 B. & Ald., 204; R. v. Seward, 3 L. J. (M. C.), 103; R. v. Richardson, 1 M. & Rob., 402.
(38) R. v. Kernick, 5 Q. B., 49; 12 L. J., M. C., 135.
(39) 1 Hawk, c. 72, s. 8.
(40) R. v. Kinnersley, 1 Str., 193.
(41) R. v. Nicholls, 2 Str., 1227.
(42) R. v. Manning, 12 Q. B. D., 241; 53 L. J. (M. C.), 85.
(43) R. v. Frawley, *supra*. And see R. v. Best, 1 Salk., 174, and R. v. Nicholls, 2 Str., 1227.
(44) R. v. Thompson, 16 Q. B., 832; 20 L. J. (M. C.), 183.
(45) O'Connell v. R., 11 Cl. & F., 155.
(46) R. v. Brisac, 4 East, 171.
(47) R. v. Hammond, 2 Esp., 718.

no unvarying rule that the agreement or conspiracy must first be established before the particular acts of the individuals implicated are admissible in evidence. (48)

The acts and declarations of any of the conspirators in furtherance of the common design may be given in evidence against all of them. But before evidence of the acts of one conspirator can be given against the others, the existence of the conspiracy must be proved, and that the act in question was an act done in furtherance of the common design. (49)

A case of conspiracy may be tried where the agreement was entered into or where any overt act was done in pursuance of the common design. When there has been no act done in the execution of the design forming the subject matter of the conspiracy then the place of trial is single and must be where the offence is complete by the making of the agreement. But if the matter goes beyond agreement and passes into execution in other localities, then the conspiring mind manifests itself wherever an overt act is done and the offence is thereby extended and continued elsewhere. (50)

On the trial of a conspiracy, proof may be made of attempts to defraud other persons than those mentioned in the indictment. The production of a written agreement, although constituting one of the elements of proof of the conspiracy will not prevent supplementary verbal proof of false representations before or after the agreement. (51)

As to treasonable conspiracies, see section 66, as to seditious conspiracies, see sections 123 and 124, as to conspiracies to intimidate a legislature, see section 70, as to conspiracies to bring false accusations, see section 152, as to conspiracies to defile women, see section 188, and as to conspiracies to murder, see section 234; and see, also, section 527, *post*, as to conspiracies to commit indictable offences.

**395. Cheating at play.** — Every one is guilty of an indictable offence and liable to three years' imprisonment who, with intent to defraud any person, cheats in playing at any game, or in holding the stakes, or in betting on any event. R. S. C., c. 164, s. 80.

The Imperial Statute 8 and 9 Vic., c. 109, s. 17, treats and punishes cheating at play as an obtaining by false pretences.

Where the offence is committed by two or more persons, and there is any doubt whether the facts are such as to bring the case within this section, a count should be added charging a conspiracy to cheat or a conspiracy to defraud.

As to Gaming Houses, Betting Houses, etc., see sections 196-199, *ante*; and as to gambling in public conveyances, pool-selling and lotteries, see sections 203-205, *ante*.

**396. Witchcraft, Fortune Telling, &c.** — Every one is guilty of an indictable offence and liable to one year's imprisonment who pretends to exercise or use any kind of witchcraft, sorcery, enchantment or conjuration, or undertakes to tell fortunes, or pre-

(48) R. v. Connolly & McGreevy, 14 C. L. T., 255; 25 O. R., 151; 1 Can. Cr. Cas., 498. See, also, R. v. Murphy, 8 C. & P., 310.

(49) R. v. Shellard, 9 C. & P., 277; R. v. Blake, 6 Q. B., 126.

(50) Rems. of Boyd, C., in R. v. Connolly & McGreevy, at pp. 190 and 191 of 25 O. R.

(51) R. v. Shepherd, Que. Jud. Rep., 4 Q. B., 470.

tends from his skill or knowledge in any occult or crafty science, to discover where or in what manner any goods or chattels supposed to have been stolen or lost may be found.

Opposite to a corresponding section of the English Draft Code, the Royal Commissioners have a marginal note referring to the 9 Geo. 11, c. 5, s. 4, as the basis of it.

## PART XXIX.

## ROBBERY AND EXTORTION.

**397. Robbery.** — Robbery is theft accompanied with violence or threats of violence to any person or property used to extort the property stolen, or to prevent or overcome resistance to its being stolen.

**398.** Every one is guilty of an indictable offence and liable to imprisonment for life and to be whipped who —

(*a*) robs any person and at the time of, or immediately before, or immediately after such robbery wounds, beats, strikes, or uses personal violence to such person; or

(*b*) being together with any other person or persons robs, or assaults with intent to rob, any person; or

(*c*) being armed with an offensive weapon or instrument robs, or assaults with intent to rob, any person. R. S. C., c. 164, s. 34.

**399.** Every one who commits robbery is guilty of an indictable offence and liable to fourteen years' imprisonment. R. S. C., c. 164, s. 32.

**400.** Every one who assaults any person with intent to rob him is guilty of an indictable offence and liable to three years' imprisonment. R. S. C., c. 164, s. 33.

Robbery is a stealing from the person aggravated by circumstances either of actual force and violence or of threats of violence; a threat of violence being looked upon by the law as constructive violence. (1)

When robbery is committed in an open street, road, or square, it is called highway robbery.

If there be any actual wounding or beating of the person robbed, it will be an *aggravated* robbery, punishable under section 398; if not, it will be a robbery, punishable under section 399. If the complete offence be not proved, the jury may, according to the actual facts, find a verdict of guilty of an attempt, (see section 711, *post*), or of an assault with intent to rob, or of stealing from the person, or of a common assault, etc. (See section 713, *post*).

(1) Donelly's case, 1 Leach, 196, 197.

The difference between robbery and stealing from the person is that the former is open and violent, while the latter may be and generally is done clandestinely. In robbery, force is a necessary ingredient; in simple stealing from the person, it is not. For instance, merely snatching property from a person, unawares, and running off with it, is not robbery. The rule appears to be well established that no such sudden taking or snatching is sufficient to constitute robbery, unless at the same time some injury be done to the person, or there be a previous struggle for the possession of the property, or some violence, or threats of violence, used to obtain it. (2)

Thus, where a boy was carrying a bundle along the street in his hand, after dark, and the prisoner ran past him, and snatched it suddenly away, it was holden that the act was not done with the degree of force and terror necessary to constitute robbery. (3) And the same was holden in a case where it appeared that, as two little boys were carrying a parcel of cloth to one of the inns at Bath, for the purpose of its being carried by a stage-coach to London, the prisoner came up suddenly, snatched the cloth from the head of one of them, and ran off with it. (4) The same doctrine has been held in three other cases; in one of which the hat and wig of a gentleman were snatched from his head in the street; (5) in another, an umbrella was snatched suddenly out of the hand of a woman, as she was walking along the street; (6) and in a third, a watch was jerked, with considerable force, out of a watch-pocket. (7)

In this last case, A had caught hold of B's watch chain, and had jerked his watch from his pocket, with considerable force, after which a scuffle ensued, and A was secured. Garrow, B., held that, the force used in jerking and obtaining the watch did not make the offence amount to robbery, — but only stealing from the person, — and that, the subsequent scuffle, and the force then used, did not alter the original offence; for the violence necessary to constitute robbery must be either immediately before or at the time of the stealing, and not after it. The learned judge said: "The mere act of taking being forcible will not make this offence highway robbery; to constitute the crime of highway robbery the force used must be either before or at the time of the taking, and must be of such a nature as to show that it was intended to overpower the party robbed, and prevent his resisting, and not merely to get possession of the property stolen; thus, if a man, walking after a woman in the street, were by violence to pull her shawl from her shoulders, though he might use considerable violence, it would not, in my opinion, be highway robbery, because the violence was not for the purpose of overpowering the party robbed, but only to get possession of the property."

If, however, any injury be done to the person, or, if there be, by the person stolen from, any struggle to keep possession of the property, before it is taken from him, there will be a sufficient actual violence. Thus, in a case, where, while a lady was stepping into her carriage, the prisoner snatched at her diamond ear-ring, and separated it from her ear by tearing her ear entirely through; but there was no proof of the ear-ring ever having been seen in his hand, and, upon the lady's arrival at home, it was found amongst the curls of her hair; the judges, upon a case being submitted for their consideration, were all of opinion that it was robbery, although the prisoner must have only had the ear-ring in his possession for

(2) R. v. Baker, 1 Leach, 290; R. v. Walls, 2 C. & K., 214; R. v. Moore, 1 Leach, C. C., 325; R. v. Walton, L. & C., 288; 4 Bl. Com., 243.
(3) R. v. Macauley, 1 Leach, 287.
(4) R. v. Robins, 1 Leach, 290.
(5) R. v. Steward, 2 East P. C., 702.
(6) R. v. Horner, 5 East, P. C., 703.
(7) R. v. Gnosil, 1 C. & P., 304.

a moment, and could not retain but probably lost it, in the same instant. (8)

So, where the prisoner had torn some hair from a lady's head in snatching a heavy diamond pin from it, the pin having a corkscrew stalk, and being twisted very much in her hair, which was closely frizzed and strongly craped, it was held to be robbery. (9)

Where A laid hold of the seals and chain of B's watch and pulled the watch out of the fob, but the watch being secured by a steel chain which went round B's neck, A could not take it until, by pulling with two or three jerks, he broke the chain and then ran off with the watch, it was held by the judges upon a case reserved that this was robbery, as A did not get the watch at once but had to overcome the resistance made by the steel chain, and used actual force for that purpose. (10)

Where it appeared that the prisoner had snatched at a sword while it was hanging at a gentleman's side, and that the latter perceiving him laid tight hold of the scabbard, upon which there ensued between them a struggle, in which the prisoner got possession of the sword, and took it away, the court held that this was robbery. (11)

A ran against B, for the purpose of diverting his attention while he picked his pocket. *Held*, that the force used, was sufficient to make the stealing robbery, such force having been used with that intent. (12)

Even where the violence is used for a different purpose than that of obtaining the property of the person assaulted; yet, if property be obtained by it, the offence will, under some circumstances at least, amount to robbery; as where money was offered to a party endeavouring to commit a rape, and taken by him. Blackham assaulted a woman with intent to ravish her, and she, without any demand from him, offered him money to desist, which money he took and put into his pocket, but continued to treat the woman with violence, in order to effect his original purpose, until he was interrupted; and this was holden to be a robbery, on the ground that the woman, from the violence and terror occasioned by the prisoner's behaviour, and to redeem her chastity, offered the money, which it was clear she would not have given voluntarily; and that the prisoner, by taking it, derived an advantage to himself from his felonious conduct, though his original intent was to commit a rape. (13)

It is not necessary that the thing when taken should be actually on the owner's person. It will be sufficient if, by means of violence or threats of violence, it be taken in his presence. (14)

Therefore, if A, upon being assaulted by a thief, throws his purse or cloak into a bush, and the thief takes it up and carries it away; or if, while A is flying from the thief, he lets fall his hat, and the thief takes it up and carries it away, such taking being done in the presence of A, will be sufficient. (15) So, it has been said, that if a man's servant be robbed of his master's goods in the sight of his master, this shall be taken for a robbery of the master. (16) So, if the thief having first assaulted A, takes away his horse standing by him; or, having threatened and put him in

(8) R. v. Lapier, 1 Leach, 320.
(9) R. v. Moore, 1 Leach, 335.
(10) R. v. Mason, R. & R., 419.
(11) R. v. Davies, 2 East, P. C., 709.
(12) Anon., 1 Lew., 300.
(13) R. v. Blackham, 2 East, P. C., 711.
(14) 1 Hale, 533; R. v. Francis, 2 Str., 1015.
(15) 3 Inst., 68.
(16) R. v. Wright, Style, 156.

fear, drives his cattle, in his presence, out of his pasture, he may be properly said to take such property from the person of A, for he takes it openly and before his face while under his immediate and personal care and protection. (17)

Where, on an indictment for robbery, it appeared that the prosecutor gave his bundle to his brother to carry for him, and, while they were going along the road, the prisoners assaulted the prosecutor, upon which his brother laid down the bundle in the road, and ran to his assistance, and one of the prisoners then ran away with the bundle; Vaughan, B., intimated an opinion that under these circumstances the indictment was not sustainable, as the bundle was in the possession of another person at the time when the assault was committed. Highway robbery was a felonious taking of the property of another by violence against his will, either from his person or in his presence; the bundle in this case was not in the prosecuor's possession. If these persons intended to take the bundle why did they assault the prosecutor, and not the person who had it? (18) The prisoners were convicted of simple larceny; but if, when the attack was commenced, the bundle had been in the prosecutor's own possession, and he, instead of his brother, had thrown it down, and the prisoners had picked it up, it would surely have been held to be robbery.

It is not necessary that after being taken the property should continue in the possession of the thief. Thus, where a robber took a purse of money from a gentleman, and returned it to him immediately, saying: "If you value your purse, you will please to take it back, and give me the contents of it;" but was apprehended and secured before the gentleman had time to give him the contents of the purse; the court held that, there was *sufficient taking* to complete the offence, although the prisoner's possession continued only for an instant. (19)

If the property be once taken, the offence will not be purged by the robber delivering it back to the owner.

For instance, A requires B to deliver his purse, and he delivers it accordingly, when A, finding only two shillings in it, gives it to him again. This is a *taking* by robbery. (20)

The taking must be against the will of the person robbed, or, rather, he must not be a voluntary party to the transaction; and, therefore, where the person from whom the property was taken concerted and connived at the robbery and got one of his confederates to procure two strangers to commit it, for the purpose of getting a reward upon the apprehension and conviction of the strangers, the judges held that it was not a robbery, because the property was not taken against the party's will. (21)

The taking, in robbery, as in all other cases of theft must be *animo furandi;* and therefore if a person, under a *bonâ fide* impression that the property is his own, obtain it by threats, it is a trespass, and it may be an assault but not a robbery. Therefore, where A owed B money and B violently assaulted A and forced him by that means to then and there pay him the debt, it was held that, there was no felonious intent and no robbery. (22)

Although it is clear that, if a person by force or threats compel another

(17) 1 Hawk., P. C., c. 34, s. 6; 4 Bl. Com., 243.
(18) R. v. Fallows, 5 C. & P., 508.
(19) R. v. Peat, 1 Leach, 228; 2 East, P. C., 557. See, also, R. v. Lapier, *supra.*
(20) 1 Hale, 533; R. v. Peat, 1 Leach, 228; 2 East, P. C., 557.
(21) R. v. McDaniel, Fost., 121, 128.
(22) See R. v. Hemmings, 4 F. & F., 50.

to give him goods and by the pretence of payment oblige him to take less than the value, it is robbery, (23) it is doubtful whether it would be robbery for a man by force or threats, to compel another to give him goods which he has to sell, and in return give him money amounting to the full value of the goods. (24)

So, that, where a traveller met a fisherman with fish, who refused to sell him any, and he by force and putting in fear took away some of his fish, and threw him money much above the value of it, judgment was respited, because of the doubt whether the intent were felonious on account of the money given. (25)

Upon an indictment for robbing A of three wires and a pheasant, it appeared that B had set the wires in one of which the pheasant was caught, and A, a gamekeeper of the manor where the wires were set, took the wires and the pheasant into his possession. B came up soon afterwards and said to A, "Have you got my wires?" A replied that he had, and that he had also a pheasant that was caught in them. B then asked A to give him the pheasant and wires, which A refused to do; whereupon B lifted up a large stick and threatened to beat out A's brains, if he did not give them up. A, fearing personal violence, then gave them up. Vaughan, B., in putting the case to the jury, said, "If the prisoner demanded the wires under the honest impression that he had a right to them, though he might be liable for a trespass in setting them, it would not be a robbery. The game-keeper had a right to take them, and when so taken they never could have been recovered from him by the prisoner; yet, still, if the prisoner acted under the honest belief that the property in them continued in himself, I think it is not a robbery. If, however, he used it merely as a pretence, it would be robbery. The question for the jury is, whether the prisoner did honestly believe he had a property in the snares and pheasant or not. (26)

It seems that, where violence is used and the prosecutor forced to deliver his property under circumstances calculated to excite fear, the offence will not the less amount to robbery on account of the thief having had recourse to some colorable or specious pretence, in order the better to effect his purpose. For instance, if a man, with a sword drawn, asks alms of a person who gives them to him through mistrust and apprehension of violence, it is as much robbery as if he had demanded the money in the ordinary way. (27) And, where the defendant took goods from the prosecutrix of the value of eight shillings and by force and threats compelled her to take one shilling as a pretence of payment for them, it was held that this was robbery. (28)

One Hall, at the head of a riotous mob, stopped on the highway a cart laden with cheeses and insisted upon seizing them, for want of a permit. This was a mere pretence, no permit being necessary. After some altercation, Hall induced the owner, one Merriman, to go with him before a magistrate; and, while they were absent, the mob, by preconcerted arrangement with Hall, pillaged the cart. On an action against the Hundred, upon the statutes of hue and cry, it was objected that this was no robbery, because there was no force; but Hewitt, J., overruled the objection, and left the case to the jury who were of opinion that Hall's conduct in insisting upon seizing the cheeses for want of a permit was a mere pretence, so as to defraud Merriman, and they found that the offence was robbery.

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(23) R. v. Simons, *post*.
(24) 1 Hawk., P. C., c. 34, s. 14; Bl. Com., 224.
(25) The Fisherman's Case, 2 East, P. C., 661, 662.
(26) R. v. Hale, 3 C. & P., 409; 1 Russ. Cr., 3rd Ed., 872.
(27) 4 Bl. Com., 242.
(28) R. v. Simons, 2 East, P. C., 712.

This finding was afterwards confirmed on a motion for new trial; the opinion that the case amounted to a robbery being based upon the consideration that the first seizure of the cart and goods by Hall, being by violence, and while the owner was present, constituted the offence one of robbery. (29)

In another case, the offence was held to be robbery, though the violence made use of was under the colour and pretence of a legal proceeding. The prosecutrix was brought to a police office by the prisoner, into whose custody she had been delivered by a headborough, who had taken her up under a warrant, upon a charge of assault. The magistrate, having examined the complaint, ordered her to find bail; but, advised the parties to make the matter up. The magistrate then left the office, and the prisoner, who was an under-servant to the turnkey of the New Prison, Clerkenwell, but had no regular appointment either as a constable or other peace officer, nor had in particular any order to carry the prosecutrix to prison, took her to a public house, where her husband was waiting. When her husband found that the matter was not settled, he requested the prisoner to wait, while he went to procure bail, and immediately left the house. As soon as he was gone, the prisoner began to treat the prosecutrix very ill, locked her up in a stinking place, and then brought her out and threatened to carry her to prison. She was terrified, and implored him to wait till her husband returned; and offered to give him half-a-crown, if he would comply with her request; but he refused, and handcuffed her to a man whom he had in custody. The prisoner then kicked her, thus handcuffed before him; and shoved her and the man into a coach; and, upon the coach setting off, put a handkerchief to the mouth of the prosecutrix, and forcibly took from her a shilling. He then asked her if she had any more money, said that he was sorry for her children, and that if she had as much money as would pay for the coach, she should not go to prison. She said she had no more money; but the man who was handcuffed to her rattled the handcuff against her pocket, and the prisoner put his hand into her pocket, and took out three shillings. In about ten minutes after taking the three shillings, he stopped the coach at a public house, called for some gin, drank some himself and gave the coachman a glass. He gave in payment for the gin the shilling which he first took from her, and got six pence in change. As the prisoner had promised to carry her back, the prosecutrix made no complaint at the public house, but said, that if the prisoner would carry her back he might keep the other three shillings which he had taken from her. The prisoner, however, proceeded with her to the New Prison. He paid for the coach; but returned no part of the money to the prosecutrix. Nares, J., who tried the prisoner, said, that in order to commit the crime of robbery, a violence, though used under a colourable and specious pretence of law, or of doing justice, was sufficient, if the real intention was to rob; and he left the case to the jury, with a direction that if they thought the prisoner had originally, when he forced the prosecutrix into the coach, a felonious intent of taking her money, and that he made use of the violence of the handcuffs as a means to prevent her making resistance, and that he took the money with a felonious intent, they should find him guilty.

The jury found the prisoner guilty; and, upon the case being referred to twelve judges, they were unanimously of opinion that the offence was a robbery. (30)

When the robbery is effected by means of threats, the threats will be sufficient, if they were such, or if the circumstances proved are such as to be *calculated or likely* to create a fear of some violence to the prosecutor's

(29) Merriman v. The Hundred of Chippenham, 2 East, P. C., 709.
(30) R. v. Gascoigne, 2 East, P. C., 709.

person or property, or an apprehension that it would be dangerous or unsafe for him to refuse to accede to the robber's demands, or useless to attempt to withhold the property which he is thus induced to part with.(31)

Where, therefore, on an indictment for robbery, it appeared that the prisoners and their companions hung around the prosecutor's person in the streets, so as to render all attempt at resistance hazardous, if not vain, and rifled him of his watch and money, but it did not appear that any force or menace was used, it was held that this was a robbery; for if several persons so surround another, as to take away the power of resistance, that is force. (32)

A stage coach having frequently been robbed on a particular road, J. N., on one occasion took a little money and a pistol in his pocket for the purpose of apprehending the highway robber; and went into the coach as a passenger. The highwayman, as usual, met the coach, presented a pistol and demanded money of the passengers: J. N. delivered up his money, but, immediately afterwards, jumped out of the coach, and, with the assistance of others, secured the robber. *Held* to be robbery. (33)

As we have already seen, the violence or threats of violence should be *before* or *at the time* of the thing being taken, and therefore, if a man privately steal money from the person of another, and *afterwards* keep it by threats of violence, it will be no robbery, but stealing from the person. For instance, where a thief clandestinely stole a purse, and, on its being discovered in his possession, threatened vengeance against the party if he should dare to speak of it, and then rode away, it was held to be simple theft only, and not robbery, as the words of menace were used after the taking of the purse. (34)

There may, however, be cases of robbery in which the property is not obtained immediately upon the threat being made; but, in these cases, although there is not an immediate taking, in fact, there may be a taking, in law, sufficient to constitute a robbery. (35) It has been held, for instance, that, if thieves attack a man to rob him, and finding little or nothing about him, force him, by menace of death, to swear to fetch them money, which he does accordingly, and delivers it to them while the fear of the menace still continues upon him, and they receive it, this is a sufficient taking in law. (36) And if, upon A assaulting B, and bidding him to deliver his purse, B refuse to do so, and then A pray B to give or lend him money, and B does so accordingly, under the influence of fear, the taking by robbery will be complete. (37) For, where the thief receives money, etc., by the delivery of the party, either while the party is under the terror of an actual assault, or afterwards while the fear of the menaces made use of by the thief continues upon him, such thief may, in the eye of the law, as correctly be said to take the property from the party, as if he had actually taken it out of his pocket. (38)

To obtain money by a mere threat to take a person before the police court for not taking and paying for goods pretended to be sold to her at a mock auction has been held not to amount to robbery. For instance, where the rpisoners, got the prosecutrix into a house, under pretext of an

(31) Fost., 128; 4 Bl. Com., 243, 244.
(32) Hughes' Case, 1 Lew., 301.
(33) Fost., 129.
(34) Harman's case, 1 Hale, 534.
(35) 3 Inst., 68; 1 Hale, 532.
(36) 2 East, P. C., 714.
(37) 1 Hale, 533.
(38) 2 East, P. C., 711, 714.

auction being carried on there, forced her to bid for a lot of articles which was immediately knocked down to her, and then, upon her not producing the money to pay for it, threatened to have her taken to Bow Street and thence to Newgate to be imprisoned till she should raise the money; and then a pretended policeman was introduced, who said to her "Unless you give me a shilling you must go with me;" upon which she gave him a shilling so as to obtain her liberty and avoid being carried to prison, and not out of fear of any other personal violence; the judges, after discussing the circumstances, were of opinion that they were not sufficient to constitute robbery, — the threat to take the prosecutrix to Bow Street and thence to Newgate being only a threat to put her into the hands of the law, which she ought to have known would have taken her under its protection and set her free, as she had done no wrong; and, therefore, that the terror arising from such a threat was not sufficient to induce a person to part with property so as to amount to robbery. (39)

A similar state of facts would, no doubt, be sufficient to sustain an indictment for conspiracy to defraud, or an indictment under section 404, *post*, for demanding with menaces, with intent to steal.

Where the defendant decoyed the prosecutor into a house and chained him to a seat and there compelled him to write orders for the payment of money and delivery of deeds, the paper on which he wrote remaining in his hands half an hour but he being chained all the time, it was held (before the 24 and 25 Vic., c. 96, sec. 48), that it was not an assault with intent to rob. (40)

Such cases as this are now covered by the Imperial Statute; and they come under our section 402, *post*.

It seems that the fear of violence to the person of a child of the party from whom property is demanded will fall within the same consideration as if the fear were of violence to the party himself; and so, where the case was put of a man taking another's child and threatening to destroy it unless the other would give him money, Hotham, B., said he had no doubt that this would be robbery. (41) And Eyre, C. J., expressed the same opinion in the course of his remarks in Reane's case cited below.

A man named Reane was indicted for highway robbery, and one Watkins was charged with him as an accessory before the fact. Reane met the prosecutor, to whom he was an entire stranger, and asked him for money, and, being refused, he went away muttering angry expressions. Next day, he again met the prosecutor and repeated his request, and, on being again refused, he said, "You shall be the worse for it." Later on, he again accosted the prosecutor and told him he had taken indecent liberties with him in the park, and this could be proved by a third party who had been present. The prosecutor with a violent exclamation, asked him what he meant; to which he made no reply, but walked away. On the next day, the prosecutor received a letter containing similar charges; and, having consulted with a friend, he made an appointment with and met Reane, who said that if the prosecutor did not give him money he could prove his indecencies, as a third person had seen it; upon which the other prisoner, Watkins, said: "Yes, I saw you." The prosecutor exclaimed, that it was a horrid abominable falsity.

On the following morning, Reane met the prosecutor, and told him he must have twenty pounds in cash, and a bond for fifty pounds a year; upon which the prosecutor, in pursuance of a plan previously concerted with his friend, told Reane that if he would wait a few days he would

(39) R. v. Knewland, 2 Leach, 721; R. v. Wood, 2 East, P. C., 732.
(40) R. v. Edwards, 6 C. & P., 521.
(41) R. v. Donelly, 2 East, P. C., 715, 718.

bring him the money and the bond. The prosecutor afterwards gave the bond together with nineteen guineas to Reane, who carried both bond and money away with him, saying he would give the prosecutor no further trouble. It was objected for the prisoners that this proof was defective; as, in order to constitute robbery there must be a violence, or a fear of danger, as to the person or character, existing when the property is parted with; but the case was left to the jury, who found the prisoners guilty; upon which the opinion of the twelve judges was taken, and they held that, the conviction was wrong as there was no violence, — either *actual* or *constructive*, — at the time the prosecutor parted with the money. (42)

Cases of this kind are covered by section 405, *post*.

The cases in which the offence of robbery has been committed by threats or fear of injury to the property of the party are principally those in which the fear excited was of the probable outrages of a mob.

A, the ringleader in some riots amongst the tinners of Cornwall, went with about seventy others to the house of B, and said they would have from him the same as they had got from his neighbors, namely a guinea, or they would tear his mow of corn and level his house. B gave them a crown to appease them, when A swore that he would have five shillings more, which B, being terrified, gave him. They then opened a cask of cider by force, drank part of it, and ate B's bread and cheese; and A carried away a piece. This was held to be robbery. (43)

If a mob go to a person's house, and civilly ask and advise him to give them something, if this be not done *bonâ fide*, but as a mere mode of robbing him, the offence is robbery; and evidence of demands of money, made by the same mob on the same day, at other houses, is admissible, to show that this was not done *bonâ fide*. (44)

In Spencer's case, corn was taken from the prosecutor by the prisoner and a mob who accompanied him, compelling the prosecutor to sell it under its value, by a threat that if he would not sell it at the sum offered, it should be taken away. The prosecutor had corn belonging to other persons in his possession when the prisoner came with a great mob marching in military order. One of the mob said, that if he would not sell they were going to take it away; and the prisoner said that they would give thirty shillings a load, and if he would not take that, they would take the corn away; upon which the prosecutor sold, for thirty shillings, corn which was worth thirty-eight shillings. This was ruled to be robbery, and the prisoner was convicted, and executed. (45)

In a case arising out of the London riots in 1780, the prosecutor swore at the trial that the prisoner had another man entered into his dwelling-house; and, upon being asked by him what they wanted, the prisoner, having a drawn sword in his hand, said with an oath, "Put one shilling into my hat, or I have a party that can destroy your house presently;" upon which he gave him a shilling. It was also sworn by another witness, that the prisoner also said, that if the prosecutor "would keep the blood within his mouth, he must give the shilling." This offence was also holden to be robbery. (46)

In another case against the London rioters of 1780, it appeared that a boy with a cockade in his hat knocked violently at the prosecutor's door, who thereupon opened it, when the boy said to him, "God bless your hon-

(42) R. v. Reane, 2 East, P. C., 735, 736.
(43) R. v. Simons, 2 East, P. C., 731.
(44) R. v. Winkworth, 4 C. & P., 444.
(45) R. v. Spencer, 2 East, P. C., 712, 713.
(46) R. v. Brown, 2 East, P. C., 731.

our, remember the poor mob." The prosecutor told him to go along; on which he said, "Then I will go and fetch my captain." and went away; soon afterwards the mob, armed with sticks and other things, came, headed by the prisoner, who was on horseback, and whose horse was led by the same boy. On their coming up, the boy said, "Now, I have brought my captain;" and some of the mob said, "God bless this gentleman, he is always generous." The prosecutor then said to the prisoner, "How much?" to which the prisoner answered, "Half a crown, sir;" upon which the prosecutor gave the prisoner half-a-crown. The mob then gave three cheers, and went to the next house. This was holden to be robbery. (47)

During some riots in Birmingham, A threatened B, that, unless he would give him a certain sum of money he should return with the mob and destroy his house. B, under the impression of this threat, gave A the money *Held*, by the judges to be robbery. (48)

**401. Stopping the mail.** — Every one is guilty of an indictable offence and liable to imprisonment for life, or for any term not less than five years, who stops a mail with intent to rob or search the same. R. S. C., c. 35, s. 81.

See section 4, *ante*, p. 8, for definition of "mail."

The property in any mailable matter may be laid in the Postmaster General. (See section 624, *post*.)

As to receiving stolen post letters, etc., see section 315, *ante*, and as to stealing post letter bags, post letters and other mailable matter, etc., see sections 326, 327 and 328, *ante*.

**402. Compelling Execution of Documents by force.** — Every one is guilty of an indictable offence and liable to imprisonment for life who, with intent to defraud, or injure, by unlawful violence to, or restraint of the person of another, or by the threat that either the offender or any other person will employ such violence or restraint, unlawfully compels any person to execute, make, accept, endorse, alter or destroy the whole or any part of any valuable security, or to write, impress or affix any name or seal upon any paper or parchment, in order that it may be afterwards made or converted into or used or dealt with as a valuable security. R. S. C., c. 173, s. 5.

The provision contained in this section, 402, meets such cases as R. v. Phipoe, in which it was held that where one person compelled another, by threats, to sign a promissory note it was no robbery, the note being of no value to the party signing it. (49)

Under section 48 of 24 and 25 Vic., c. 96, (which is to the same effect as our section 402), the defendants were indicted for having, by threats of violence and restraint, induced the prosecutor to write and sign the following document: —

(47) R. v. Taplin, 2 East, P. C., 712.
(48) R. v. Astley, 2 East, P. C., 720.
(49) R. v. Phipoe, 2 Leach, 673; 2 East, P. C., 599. See R. v. Edwards, 6 C. & P., 515, 521; R. v. Smith, 2 Den., 449; 21 L. J. (M. C.), 111.

"London, July 19th. 1875.

"I hereby agree to pay you £100 sterling on the 24th inst. to prevent any action against me."

*Held*, that the document was a valuable security. (50)

See sections 405 and 406, *post*.

**403. Threatening Letters.**—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who sends, delivers or utters, or directly or indirectly *causes to be received*, knowing the contents thereof, any letter or writing *demanding* of any person with menaces, and without any reasonable or probable cause, any property, chattel, money, valuable security or other valuable thing. R. S. C., c. 173, s. 1.

See section 3 (*aa*), (*cc*), for definitions of "valuable security" and "writing."

Section 403 is to the same effect as the Imperial Statute, 24-25 Vic., c. 96, section 44.

The expression "menaces" in section 44 of the Imperial Statute above mentioned is not limited to menaces or threats of violence and injury to person and to property and of accusations of the crimes set out in section 46 of the Imperial Act, (see p. 449, *post*), but includes menaces or threats of a danger by an accusation of misconduct though of misconduct not amounting to a crime. (51)

Under this section it will be sufficient evidence of the sending or causing to be received to prove that the defendant placed the letter in a place where he knew the prosecutor would come, and that it thus reached him, or that it was there picked up by another person and by him delivered to the prosecutor; (52) or that the letter is in the defendant's handwriting and came to the prosecutor through the post. (53)

Where the prosecutor, having received such a letter, traced it to a woman who was in the habit of going errands for prisoners in Newgate, and she proved that she received it from the defendant then a prisoner in Newgate with instructions to post it, and the post office employee proved that the letter in question was brought to the office by the woman, and forwarded in the regular course, the evidence was held sufficient not only of the sending by the defendant but also that he knew its contents. (54) Sending a letter to A, in order that he may deliver it to B, is a sending to B, if the letter is delivered by A to B. (55) And the leaving of a letter, directed to A, near A's house, with the intention that it should not only reach A but B also, was held to be a sending of it to B, by whom it was afterwards seen. (56)

Where the letter contained a request only, but intimated that if it were

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(50) R. v. John, 13 Cox C. C., 100, Brett, J.
(51) R. v. Tomlinson, 18 Cox C. C., 75; 64 L. J., M. C., 97; [1895] 1 Q. B., 706.
(52) R. v. Lloyd, 2 East, P. C., 1122; R. v. Wagstaff, R. & R., 308.
(53) R. v. Hemming, 2 East, P. C., 1116; R. v. Jepson, 2 East, P. C., 1115.
(54) R. v. Girdwood, 2 East, P. C., 1120; 1 Leach, 142.
(55) R. v. Paddle, R. & R., 484.
(56) R. v. Grimwade, 1 Den., 30; 1 C. & K., 592.

not complied with, the writer would publish a certain libel then in his possession accusing the prosecutor of murder, it was held to amount to a demand. (57)

The demand must be with menaces and without reasonable or probable cause, and it will be for the jury to consider whether the letter does expressly or impliedly contain a demand of this description. The words "without any reasonable or probable cause" apply to the demand for money, and not to the threatened accusation to be made against the prosecutor; and, therefore, it is immaterial in point of law whether the threatened accusation be true or not. (58)

An anonyomus letter intimating that some persons had conspired to burn or otherwise destroy the prosecutor's property, and offering to make a disclosure, if £30 were placed for the writer in a certain spot, was held not to be within the 7 and 8 Geo. 4, c. 29, s. 8, as it did not contain any menace, although its contents might create some apprehension in the owner's mind. (59)

In a later case, it was, however, decided that a very similar letter was a letter demanding money with menaces, within the same statute of Geo. 4; the letter being one written to a banker, stating that it was intended by a cracksman to burn his books, and cause the bank to stop, and that if £250 were put in a certain place, the writer of the letter would prevent the mischief, but if the money were not put there it would happen. (60)

It is as much incumbent upon the prosecution to prove that the demand was made without reasonable or probable cause as that it was made with menaces; both of which questions are questions of fact; and, if the judge's charge is so ambiguous that the jury may have been misled into thinking that a material issue of fact was withdrawn from their consideration as being a matter of law, then, in case of a conviction, a new trial should be ordered. (61)

As to extortion by threatening to publish a libel, see section 300, *ante*.

**404. Demanding with intent to steal.** — Every one is guilty of an indictable offence and liable to two years' imprisonment who, with menaces, demands from any person, either for himself or for any other person, anything capable of being stolen *with intent to steal it*.

This section is to the same effect as section 45 of 24 and 25 Vic., c. 96.

In order to bring a case within this section, the demand must be such as would, if successful, amount to stealing; and the menace contemplated by the section must be of such a nature as to unsettle the mind of the person upon whom it operates, and to take away from his acts that element of voluntary action which alone constitutes consent. It must, therefore, be left to the jury to say whether the conduct of the prisoner is such as to have had that effect on the prosecutor. (62)

The gist of the offence is the demand itself accompanied by menaces and an intent to steal; and, therefore, if such a demand is successful it amounts to an actual theft.

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(57) R. v. Robinson, 2 Leach, 749; 2 East, P. C., 1110.
(58) R. v. Hamilton, 1 C. & K., 212; R. v. Gardner, 1 C. & P., 479.
(59) R. v. Pickford, 4 C. & P., 227.
(60) R. v. Smith, 1 Den., 510; 2 C. & K., 882.
(61) R. v. Collins, 33 N. B. R., 429; 1 Can. Cr. Cas., 48.
(62) R. v. Walton, L. & C., 288; 32 L. J. (M. C.), 79.

Where a policeman, professing to act under legal authority, threatened, that, unless money were given to him he would imprison a person on a charge not amounting to an offence in law, and the person believing him gave him money, it was held that he might be indicted under the Imperial Statute 24 and 25 Vic., c. 96, s. 45; although he might also have been indicted for stealing the money. (63)

As menaces are of two kinds,—by words or by gestures,—it seems that it is not necessary to prove an *express* demand *in words*, but that if the words or gestures of the defendant at the time were plainly indicative of what he required and tantamount in fact to a demand, though not in actual words, it would seem to be sufficient proof of the allegation, in the indictment, of a demand. (64)

The question whether the demand was made without reasonable or probable cause is one of fact.(65) And where any doubt exists on the point, the prosecution is called upon to give some evidence of the want of reasonable or probable cause. (66)

A prisoner was convicted, under the above section, 404, of having demanded money of the prosecutor with menaces, with intent to steal the same; and a case was reserved on the question of whether the evidence was sufficient to establish the charge. The prisoner had demanded $75 from the prosecutor under threat of having him prosecuted for an infraction of the Liquor License Act. *Held*, that any menace or threat,—coming within the sense of the word "menace" in its ordinary meaning,—proved to have been made with intent to steal the thing demanded would bring the case within this section, and that it need not be of a character to excite alarm, but that it would be sufficient if it were such as would be likely to affect any man in a sound and healthy state of mind, and that the question of whether there was the intention to steal the money demanded is one of fact and not of law. And *held* further, that, a threat of prosecution made to a licensee who, to the knowledge of the prisoner, had been previously convicted of an offence under the Liquor License Laws, and, who was, therefore, liable to a cancellation of his license, etc., is a threat likely to affect a man in a sound and healthy state of mind. (67)

A defendant was convicted by a magistrate of an offence against the above section, 404, upon the following evidence. The defendant, as agent for others, went to the complainant's abode to collect a debt from him. The defendant threatened the complainant that if the latter did not pay the debt he would have him arrested, and he demanded of the complainant certain goods, a portion of which had been sold to the complainant by the defendant's principals and on account of which the debt had accrued, but upon which they had no lien or charge. The complainant,—as he swore,—being frightened by the defendant's threats, acquiesced in the latter's demand for the goods which the defendant took away. The defendant swore that he took the goods as security for the debt he was seeking to collect. *Held*, that there was no evidence of intent to steal; and the conviction was quashed. (68)

A demand, with menaces, of money actually due, is not a demand with intent to steal. A prisoner, who owned a house, having gone away and deserted his family, his wife let the house to the prosecutor. The prisoner afterwards returned and demanded the rent from the prosecutor, who

(63) R. v. Robertson, L. & C., 483; 34 L. J. (M. C.), 35.
(64) R. v. Jackson, 1 Leach, 269.
(65) R. v. Miard, 1 Cox C. C., 22.
(66) Roscoe Cr. Ev., 932.
(67) R. v. Gibbons, 12 Man. L. R., 154; 1 Can. C. Cas., 340.
(68) R. v. Lyon, 18 C. L. T., 289; 29 O. R., 497; 2 Can. Cr. Cas., 242.

refused to pay him, but paid it to the prisoner's wife. The prisoner, having again demanded the rent and being again refused by the prosecutor, he told the latter that, if he did not give him the money, he would blow out his brains and burn up everything in the place. The prisoner was convicted; but, on appeal, the conviction was set aside, Robinson, C. J., saying,—"The prisoner had the law on his side in insisting on the money being paid to him; and, *whether he had or not, if he demanded the money under that impression*, he was not committing the offence charged against him. He used violent threats; but, if he had induced the prosecutor to pay him the rent he claimed, he never could have been held to have stolen that money from him; and, therefore, his demanding it with threats, under such circumstances, cannot be held to have been a demand with intent to steal. (69)

**405. Extortion by threats to accuse of a capital or infamous crime** — Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, with intent to extort or gain anything from any person —

*(a)* accuses or threatens to accuse either that person or any other person, *whether the person accused or threatened* with accusation *is guilty or not, of*

(i) any offence punishable by law with death or imprisonment for seven years or more;

(ii) any assault with intent to commit a rape, or any attempt or endeavour to commit a rape, or any indecent assault;

(iii) carnally knowing or attempting to know any child so as to be punishable under this Act;

(iv) any infamous offence, that is to say buggery, an attempt or assault with intent to commit buggery, or any unnatural practice, or incest;

(v) counselling or procuring any person to commit any such infamous offence; or

(*b*) threatens that any person shall be so accused by any other person; or

(*c*) causes any person to receive a document containing such accusation or threat, knowing the contents thereof;

(*d*) by any of the means aforesaid compels or attempts to compel any person to execute, make, accept, endorse, alter or destroy the whole or any part of any valuable security, or to write, impress or affix any name or seal upon or to any paper or parchment, in order that it may be afterwards made or converted into or used or dealt with as a valuable security. R. S. C., c. 173, ss. 3, 4, 1, and 5.

The provisions of the Imperial Law on these subjects, are contained in sections 46 and 47 of 24 and 25 Vic., c. 96, which are as follows: —

(69) R. v. Johnson, U. C., Q. B., 569.

"Whosoever shall send, deliver or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing, accusing or threatening to accuse any other person of any crime punishable by law with death, or penal servitude for not less than seven years, or of any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any infamous crime as hereinafter defined, with a view or intent, in any of such cases, to extort or gain, by means of such letter or writing, any property, chattel, money, valuable security or other valuable thing from any person, is guilty of felony, and being convicted thereof shall be liable at the discretion of the court, to be kept in penal servitude for life, or to be imprisoned [*etc*] ; and the abominable crime of buggery, committed either with mankind or with beast, and every assault with intent to commit the said abominable crime, and every attempt or endeavour to commit the said abominable crime, and every solicitation, persuasion, promise or threat offered or made to any person whereby to move or induce such person to commit or permit the said abominable crime, shall be deemed to be an infamous crime within the meaning of this Act:" (Section 46)

"Whosoever shall accuse, or threaten to accuse, either the person to whom such accusation or threat shall be made or any other person, of any of the infamous or other crimes lastly hereinbefore mentioned, with the view or intent, in any of the cases last aforesaid, to extort or gain from such person so accused or threatened to be accused, or from any other person, any property, chattel, money, valuable security or other valuable thing, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life; [*etc.*] (Section 47).

It will be seen that, under the provisions of the above section, 405, the accusation or threat to accuse may be either verbal or in the shape of a document; and that under the English sections the accusation or threat may be either verbal or in the shape of a letter or writing; and, as both refer, in effect, to the same offences, there is very little difference between the English sections and our own law as contained in section 405. But section 406, *post*, extends the above provisions so as to cover accusations or threats to accuse of any other offence.

The word "accuses" in this section, 405, includes accusing by the laying of an information and complaint before a magistrate under section 558, *post*. So, that, where the prisoners were convicted of having with intent to extort unlawfully accused the prosecutor of rape by laying an information against him, therefor, and causing him to be arrested and brought before a justice of the peace thereon, and of having, while he was under arrest, taken from him two promissory notes and then called in the justices of the peace, who, on the prisoners (then prosecutors) saying they had no witnesses, dismissed the charge, it was held, on a reserved case, that the conviction was right. (70)

It is not necessary, however, that the threat should be a threat to ac-

(70) R. v. Kempel, 31 O. R., 631.

cuse before a judicial tribunal; but that a threat to make the accusation before a third party is sufficient. (71) So, that, if A, with intent to extort money from B, were to threaten to accuse him, before his wife, of having committed an infamous offence, it seems that this would make A liable under the above section.

The section expressly states that it shall be immaterial whether the accusation be true or not; and, therefore, it would be no defence that the prosecutor was guilty of the offence of which he was accused or threatened to be accused; (72) for the gist of the crime is the accusing or threatening to accuse with intent to extort or gain anything.

The prosecutor's guilt or innocence of the crime imputed to him may, however, be material where the question arises as to whether, under the circumstances, the prisoner had an intention to extort money. (73)

If the prisoner's intent do not appear from the accusation or threat itself, it may be proved by circumstances from which the jury may fairly presume it; as by subsequent expressions of the defendant. (74)

Proof that the prisoner went to the prosecutor, and threatened to accuse his son of an unnatural offence with a mare unless the prosecutor would buy the mare for £3, was held to sustain an indictment for threatening to accuse of an abominable crime, with intent thereby to extort money.(75)

As to threats to murder, see section 233, *ante;* and, as to threats to burn, see section 487, *post.*

**406. Extortion by Threats to Accuse of any other offence.** — Every one is guilty of an indictable offence, and liable to imprisonment for seven years who —

*(a)* with intent to extort or gain anything from any person accuses or threatens to accuse either that person or any other person of any offence other than those specified in the last section, *whether the person accused or threatened* with accusation *is guilty or not* of that offence; or

(*b*) with such intent as aforesaid, threatens that any person shall be so accused by any person; or

(*c*) causes any person to receive a document containing such accusation or threat knowing the contents thereof; or

(*d*) by any of the means aforesaid, compels or attempts to compel any person to execute, make, accept, endorse, alter or destroy the whole or any part of any valuable security, or to write, impress or affix any name or seal upon or to any paper or parchment, in order that it may be afterwards made or converted into, or used or dealt with as a valuable security.

Sections 405 and 406 are to the same effect as sections 295 and 296 of the English Draft Code, except, that under the first of the latter sections

(71) R. v. Robinson, 2 M. & Rob., 14.
(72) R. v. Cracknell, 10 Cox C. C., 408.
(73) R. v. Richards, 11 Cox C. C., 43.
(74) R. v. Cain, 8 C. & P., 187.
(75) R. v. Redman, L. R., 1 C. C. R., 12; 35 L. J. (M. C.), 89.

the punishment is penal servitude for life, (with one whipping in the case of a male offender under sixteen), and seven years penal servitude, under the other section.

Upon section 296 of their Draft the English Commissioners have the following remark: —

"The provisions as to Robbery and Extortion re-enact the existing law, with the exception of section 296, which is new. At present a policeman or game-keeper who levies blackmail under threats of accusing of larceny or poaching, is, — if criminally responsible at all, — only punishable with imprisonment and fine."

The word "offence" in this section, 406, applies to offences against provincial as well as Dominion Acts and is not confined to offences against the Criminal Code. (76)

A obtained five shillings from B by pretending to be a bailiff, and threatening to distrain. It was held that, his guilt depended on the question whether or not he made the threat in such a way as to unsettle B's mind, and take away from his acts that element of free voluntary action which alone constitutes consent. (77)

Where, on the trial of a charge of sending a threatening letter to a person with intent to extort money, it is proved that the accused had stated that he had written a letter to such person and that he had stated its purport in language to the like effect as the threatening letter, it is not error for the Court to admit the threatening letter in evidence without further proof of the hand writing and to submit it to the jury for comparison with an exhibit already in evidence admittedly written by the accused. (78)

## PART XXX.

## BURGLARY AND HOUSEBREAKING.

According to some of the more ancient authorities, burglary was the felonious breaking and entering of houses, or churches, or the walls or gates of a town.

But it is generally considered as having reference to the breaking and entering of private houses, and, in that sense, it is described, as — *A breaking and entering the mansion-house of another in the night, with intent to commit some felony within the same, whether such felonious intent be executed or not.* (1)

The word *burglar* is supposed to have been introduced from Germany by the Saxons; and to be derived from the German, *burg*, a house, and *laron*, a thief; the latter word being from the Latin, *latro*. (2) But, Sir H. Spelman, thinks that the word *burglaria* was brought into England by the Normans, as he does not find it amongst the Saxons; and he says that *burglatores*, or *burgatores*, were so called, *quod dum alii per campos latrocinantur eminus, hi burgos pertinacius effringunt, et depraedantur.* The crime, however, appears to have been noticed in our earliest laws, in the

(76) R. v. Dixon, 28 N. S. R., 82; 2 Can. Cr. Cas., 589. See, also, R. v. Shepherd, 20 N. S. R., 476.
(77) R. v. Ogden, L. & C., 288.
(78) R. v. Dixon, 29 N. S. R., 462; 3 Can. Cr. Cas., 220.
(1) 4 Bl. Com., 224; 1 Hawk., P. C., c. 38, s. 1; 2 East, P. C., 484.
(2) Burns Just. Tit. *Burglary*, section 1.

common genus of offences denominated *Hamsecken*, and, by the ancient laws of Canute and of Henry I, to have been punished with death. (3)

Originally the circumstance of *time* does not seem to have been material; and the malignity of the offence was supposed to consist entirely in the invasion on the right of habitation, to which the laws of England have always shewn special regard.

The learned editor of Bacon's Abridgement says that his researches had not enabled him to discover at what particular period *time* was first deemed essential to the offence, but that it must have been so settled before the reign of Edward VI. (4)

There is no material difference between the above description or definition of burglary and that contained in section 410, *post*. A verbal change, however, is necessary, on account of the abolition of the distinction between felony and misdemeanor. The general definition of burglary, therefore, will now stand thus,—*A breaking and entering of a dwelling-house, by night with intent to commit an indictable offence therein.* Clause (*b*), of section 410, however, makes it burglary, also, to *break out* of a dwelling-house, by night, after having committed an indictable offence therein or after having entered it with intent to commit an indictable offence therein.

**407. Meanings of terms.** — In this part, the following words are used in the following senses:

(*a*) "Dwelling-house" means a permanent building the whole or any part of which is kept by the owner or occupied for the residence therein of himself, his family or servants, or any of them, although it may at intervals be unoccupied;

(i.) A building occupied with, and within the same curtilage with any dwelling-house shall be deemed to be part of the said dwellinghouse, if there is, between such building and dwelling house a communication, either immediate or by means of a covered and inclosed passage, leading from the one to the other, but not otherwise:

(*b.*) To "break" means to break any part, internal or external, of a building, or to open by any means whatever (including lifting, in the case of things kept in their places by their own weight), any door, window, shutter, cellar-flap or other thing intended to cover openings to the building, or to give passage from one part of it to another;

(i.) An entrance into a building is made as soon as any part of the body of the person making the entrance, or any part of any instrument used by him, is within the building;

(ii.) Every one who obtains entrance into any building by any threat or artifice used for that purpose, or by collusion with any person in the building, or who enters any chimney or other aperture of the building permanently left open for any neces-

(3) 1 Hale, 547, citing Spelm. Gloss. Tit. *Hamsecken* and *Burglaria*.
(4) 1 Bac. Ab. Tit. *Burglary*, 551; 3 Inst., 65.

sary purpose, shall be deemed to have broken and entered that building. R.S.C., c. 164, s. 2.

**408. Breaking place of worship.** — Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who *breaks and enters* any place of public worship *and commits* any indictable offence therein, or who, having committed any indictable offence therein, *breaks out* of such place. R.S.C., c. 164, s. 35.

**409.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who *breaks and enters* any place of public worship *with intent* to commit any indictable offence therein. R.S.C., c. 164, s. 42.

Upon an indictment for breaking into a parish church, and stealing two surplices and a scarf, it appeared that the surplices and scarf were stolen from a box kept in the church tower; this tower was built higher than the church, and had a separate roof, but it had no outer door, the only way of going into it being through the body of the church, from which the tower was not separated by a door or a partition of any kind. It was objected that the stealing of these articles deposited in the tower was not sacrilege. *Held*, that a tower, circumstanced as this tower was, must be taken to be part of the church, and that the stealing of these articles in the tower was a stealing in the church. (5)

Where, in another case, it appeared that the offence had been committed by breaking into the vestry and stealing the sacramental plate out of a chest in the vestry; and the vestry had in old times been the porch of the church, and when the church was altered the porch was turned into the vestry room, and it had never been used for vestry purposes, but only for the robing of the clergyman, and the custody of the sacramental plate; and the vestry had a door opening into the body of the church, and another into the churchyard, which was always kept locked inside, Coleridge, J., held, that this vestry was as much a part of the church, for the purpose of this indictment, as the altar or the nave. (6)

**410. Burglary.** — Every one is guilty of the indictable offence called burglary, and liable to imprisonment for life, who —

(*a.*) breaks and enters a dwelling-house *by night* with intent to commit any indictable offence therein; or

(*b.*) breaks out of any dwelling-house *by night*, either after committing an indictable offence therein, or after having entered such dwelling-house, either by day or by night, with intent to commit an indictable offence therein. R.S.C., c. 164, s. 37. (24-25 Vict., c. 96, ss. 51, 52, 54, *Imp.*)

2. Every one convicted of an offence under this section who when arrested, or when he committed such offence, had upon his person any offensive weapon, shall, in addition to the imprisonment above prescribed, be liable to be whipped. (Added by the *Criminal Code Amendment Act 1900.*)

(5) R. v. Wheeler, 3 C. & P., 585.
(6) R. v. Evans, 1 C. & M., 288.

"*Night*" is the interval between nine P. M. and six A. M. of the following day. (See section 3 (*q*), *ante*, p. 5.)

The ownership of the goods need not be stated in the indictment. (7)

The intent to commit an indictable offence ought to be charged; (8) or it will be necessary to prove the commission of some indictable offence in the house after the breaking and entering. Thus, where an indictment was for burglariously breaking and entering a dwelling-house and then and there stealing goods therein and it omitted to state the intent, it was held that the defendant might be convicted of the burglary, if the alleged stealing were proved, but not otherwise. (9)

Before the statute 7 Will., and 1 Vic., c. 86, sec. 4 (re-enacted in 24 and 25 Vic., c. 96, sec. 1), which first declared that for the purposes of a burglary the night should be from 9 P. M. to 6 A. M., many nice questions arose as to what fell within the meaning of "*night*." If the breaking and entering were in the night it was burglary; if in the day time it was not; if it were committed during twilight then if there were not day-light or *crepusculum* enough left to discern a man's face, it was burglary; otherwise it was not. (10) But this did not extend to moonlight nights. (11)

Both a breaking and an entering are necessary to constitute burglary; and the breaking and entering must both be in the night. If the breaking be in the day and the entering in the night, or the breaking in the night and the entering in the day, it will not be burglary; but the breaking may be on one night and the entering on another; (12) provided the breaking be with intent to enter, and the entering with intent to commit an indictable offence. (13)

Every entrance into a house, in the nature of a mere trespass is not sufficient. Thus, if a man steals in a house which he enters by a door or window which he finds open, or through a hole or opening which was made there before, (unless it be such a permanent opening as a chimney, etc., as is mentioned in paragraph (*ii*) of section 407 (*b*), *ante*), he will not be guilty of burglary. (14) But see section 415, *post*, as to being found in a dwelling-house, at night. There must be either an actual breaking of some part of the house or a breaking by construction of law, as where the entrance is obtained by some threat or artifice, or by collusion with some one in the building, as provided by the second sub-clause of section 407 (*b*), *ante*.

**Actual breaking.** — Where a cellar window, which was boarded up, had in it a round aperture of considerable size, to admit light into the cellar, and through this aperture one of the prisoners thrust his head, and, by the assistance of the other prisoner, he thus entered the house, but the prisoners did not enlarge the aperture at all; it was held that this was not a sufficient breaking. (15) So, where a hole had been left in the roof of a brewhouse, part of a dwelling-house, for the purpose of light, and it was contended that an entry through this hole was like an entry by a chimney, it was held that this was not a sufficient breaking. Bosanquet, J., "The entry by the chimney stands upon a very different footing; it is a neces-

(7) See section 613 (*b*), *post*. See, also, R. v. Clarke, 1 C. & K., 421.
(8) 1 Hawk. P. C., 559.
(9) R. v. Furnival, R. & R., 445.
(10) 3 Inst., 63; 1 Hale, 550; 4 Bl. Com., 224.
(11) 4 Bl. Com., 224; 1 Hale, 551.
(12) 1 Hale, 551.
(13) R. v. Smith, R. & R., 417; R. v. Jordan, 7 C. & P., 432.
(14) 4 Bl. Com., 225.
(15) R. v. Lewis, 2 C. & P., 628.

sary opening in every house, which needs protection; but if a man choose to leave an opening in the wall or roof of his house, instead of a fastened window, he must take the consequences. The entry through such an opening is not a breaking." (16)

The following are some examples of burglarious breakings:—

Making a hole in the wall; forcing open the door; putting back, picking or opening the lock with a false key; breaking the window; taking a pane of glass out of the window, either by taking out the nails or other fastening, or by drawing or bending them back; putting back the leaf of a window with an instrument; drawing or lifting a latch; turning the key where the door is locked on the inside; or unloosing any other fastening which the owner has provided. (17)

Where a pane of glass had been cut for a month, but there was no opening whatever, as every portion of the glass remained exactly in its place, and the prisoner was both seen and heard to put his hand through the glass, this was held a sufficient breaking. (18)

So, where a window opening upon hinges is fastened by a wedge, and pushing against it will open it, if such window be forced open by pushing against it, there will be a sufficient breaking. (19) So, pulling down the sash of a window is a breaking, though it has no fastening, and it is only kept in its place by the pulley weight, although there was an outer shutter, which was not closed. (20)

Any raising a window which is shut down close, but not fastened, is a breaking, although there be a hasp, by which it could have been fastened and kept down. (21)

Cutting and tearing down a netting of twine which is nailed to the top, bottom, and sides of a glass window, so as to cover it, and entering the house through such window, though it was not shut, constitute a sufficient breach and entry. (22)

Where a window was partly open, but not sufficiently to admit a person's body, and the prisoner raised it higher and entered by the larger aperture thus made, it was held, on a case reserved, that this was not a breaking. (23)

Where, however, a square of glass in a kitchen window, through which the prisoners entered, had been previously broken by accident, and half of it was out at the time when the prosecutor left the house, and the aperture was sufficient to admit a hand, but not to enable a person to put his arm in, so as to undo the fastening of the casement, and one of the prisoners thrust his arm through the aperture, thereby breaking out the residue of the square, and having so done, he removed the fastening of the casement, it was held that this was a sufficient breaking, — not by breaking the residue of the window pane, — but by unfastening and thus opening the window itself. (24)

On one occasion, it was doubted whether getting into a house through the chimney was a sufficient breaking and entering to constitute burglary;

(16) R. v. Spriggs, 1 M. & Rob., 357.
(17) 1 Hale, 552; 3 Inst., 64; 1 Hawk., P. C., c. 38, s. 6.
(18) R. v. Bird, 9 C. & P., 44.
(19) R. v. Hall, R. & R., 355.
(20) R. v. Haines & Harrison, R. & R., 451.
(21) R. v. Hyams, 7 C. & P., 441.
(22) Commonwealth v. Stephenson, 8 Pick, 354.
(23) R. v. Smith, R. & M., C. C. R., 178.
(24) R. v. Robinson, R. & M., C. C. R., 327.

but it was afterwards agreed that it was sufficient, on the ground that a house, with no opening, except through the chimney, is as much closed as the nature of things will permit. (25) And, it has been held, that, getting into the chimney of a house is a sufficient breaking and entering to constitute burglary, even if the party does not enter any room of the house. The prisoner got in at the top of a chimney and went down to just above the mantle-piece of a room on the ground floor; and upon a case reserved, two judges thought it was not a breaking and entering, as the prisoner could not be considered as being in the dwelling-house when he had not got below the mantle-piece; but the ten other judges, held otherwise, on the ground that the chimney was part of the dwelling-house, that the getting in at the top was a breaking of the dwelling-house, and that the prisoner's lowering himself down was an entry within the dwelling-house.(26)

A case is reported, in which the breaking was held to be sufficient, though there was no interior fastening to the doors which were opened. The place which the prisoner entered was a mill, under the same roof, and within the same curtilage, as the dwelling-house; through the mill there was an open entrance, or gateway, capable of admitting wagons, and intended for the purpose of loading them more easily with flour by means of a large aperture or hatch, over the gateway, communicating with the door above; and this aperture was closed by folding doors, with hinges, which fell over it, and remained closed by their own weight, but without any interior fastening; so that persons on the outside, under the gateway, could push them open at pleasure, by a moderate exertion of strength. The prisoner entered the mill in the night, by so pushing open the folding doors, with the intention of stealing flour; and this was held to be a sufficient breaking, and the prisoner was accordingly convicted of burglary. (27)

But doubts were entertained whether lifting up the trap-door or flap of a cellar, which was kept down solely by its own weight, was a sufficient breaking; such trap-door or flap being used for the purpose only of taking in liquors to the cellar, and not as a common entrance for persons. The prisoner was indicted for stealing some bottles of wine in a dwelling-house, and afterwards burglariously breaking out of the house. The wine was taken from a bin, in a cellar of the house, which was a public house, and removed by the prisoner from the bin to the trap-door, or flap of the cellar, in getting out of which he was apprehended. The cellar was closed on the outside, next the street only by the flap, which had bolts for bolting it on the inside, and was of considerable size, being made to cover the opening through which the liquors were usually let down into the cellar. The flap was not bolted on the night in question, but was down; in which situation it would remain unless raised by considerable force. When the prisoner was first discovered, his head and shoulders were out of the flap; and, upon an attempt being made to lay hold of him, he got quite out, and ran away, when the flap fell down, and closed by its own weight. Upon this evidence, it was doubted whether there was a sufficient breaking to constitute burglary; and, the prisoner having been convicted, the question was reserved, for the opinion of the twelve judges, who were divided in opinion as to this being a sufficient breaking. (28)

It has, however, since been held, that lifting up the flap of a cellar, which was kept down by its own weight, is a sufficient breaking, although such flap may have been occasionally fastened by nails, and was not so fastened at the time the entry was made. (29)

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(25) 1 Hawk., P. C., c. 38, s. 6; 2 East, P. C., 485.
(26) R. v. Brice, R. & R., 450.
(27) Brown's Case, 2 East, P. C., c. 15, s. 3, p. 487.
(28) R. v. Callan, R. & R., 157.
(29) R. v. Russell, R. & M., C. C. R., 377.

A door or wall forming part of the outward fence of the curtilage and opening into no building, but into the yard only, was held to be no such part of the dwelling-house as would render it burglary to break and enter by such door or wall; and it was held to make no difference that the door broken was the entrance to a covered gateway, and that some of the buildings belonging to the dwelling-house and within the curtilage were over the gateway, and that there was a hole in the ceiling of the gateway for taking up goods into the buildings above. The prosecutor had a dwelling-house, warehouses and other buildings and a yard; the entrance into the yard being through a pair of gates, which opened into a covered way. Over this covered way were some of the warehouses, and over the gates there was a loop-hole and crane to admit of goods being hauled up. There was also a trap-door in the roof of the covered way; and there was free communication from the warehouse to the dwelling-house. The prisoners broke open the gates in the night, with intent to steal. They then entered the yard, but they did not enter any of the buildings. *Held*, that the outward fence of the curtilage, not opening into any of the buildings, was no part of the dwelling-house. (30)

An area gate, opening into the area only, is not such a part of the dwelling-house that the breaking of the gate will be burglary, if there be any door or fastening to prevent persons in the area from entering the house, although such latter door or other fastening may not be secured at the time. (31)

It has been held, and it is expressly declared by section 407 (*b*), *ante*, that the breaking requisite to constitute a burglary is not confined to the external part of the house, but may be of an inner door after the offender has entered by means of a part of the house which was open. Thus, if A enter the house of B, in the night time through the outward door which is open, or by an open window, and, when within the house, turn the key of a chamber door, or unlatch it, with intent to steal, this will be burglary. (32) So, where the prisoners went into the house of the cook at Sergeant's Inn, in Fleet street, to eat, and taking their opportunity, slipped up stairs, picked open the lock of a chamber door, broke open a chest, and stole plate, it was held that the picking open of the lock of the chamber door, constituted burglary, though the breaking open the chest would not have done so. (33) And it will also amount to burglary if a servant in the night time open the chamber door of his master or mistress, whether latched or otherwise fastened, and enter for the purpose of committing murder or rape, or with any other felonious design; or if any other person, lodging in the same house, or in a public inn, open and enter another's room door, with such evil intent. (34) But it has been questioned whether, if a lodger in an inn should, in the night time, open the door of the chamber occupied by him, steal goods, and go away, the offence would be burglary; on the ground of his having a kind of special property and interest in his chamber, and the opening of his own chamber door being therefore no breaking in the inn-keeper's house. (35)

But he would be guilty of burglary, by breaking out, if, after stealing he not only opened his own chamber door but lifted a latch or turned a handle of the outward door so as to get completely out of the house. (36)

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(30) R. v. Bennett, R. & R., 289.
(31) R. v. Davis, R. & R., 322.
(32) 1 Hale, 553; 1 Hawk., P. C., c. 38, s. 6.
(33) Anon., 1 Hale, 524.
(34) 1 Hale, 553, 554; 4 Bl. Com., 227.
(35) 2 East, P. C., c. 15, s. 4, p. 488.
(36) R. v. Wheeldon, 8 C. & P., 747.

It is clear that the breaking open of a chest, or box, by a thief who has entered a house by means of an open door or window, is not a kind of breaking which will constitute burglary, because such articles are no part of the house. (37) But the question with respect to the breaking of cupboards, and other things of a like kind, when affixed to the free-hold, has been considered as more doubtful. Thus, at a meeting of the judges, upon a special verdict, to consider the point, whether breaking open the door of a cupboard let into the wall of the house were burglary or not, it appears that they were divided upon the question. (38) Lord Hale says that such breaking is not burglary at common law. (39)

**Constructive breaking.**—Where, in consequence of violence commenced or threatened in order to obtain entrance to a house, the owner, either from apprehension of the violence, or in order to repel it, opens the door, and the thief enters, such entry will amount to breaking in law; (40) for which some have given as a reason that the opening of the door by the owner, being occasioned by the felonious attempt of the thief, is as much imputable to him as if it had been actually done by his own hands. (41) But if, upon a bare assault upon a house, the owner fling out his money to the thieves, it will not be a burglary; (42) though if the money were taken up in the owner's presence, it is admitted that it would be robbery. (43) And though the assault were so considerable as to break a hole in the house; yet if there were no entry by the thief, but only a carrying away of the money thrown out to him by the owner, the offence could not, it should seem, be burglary, though certainly robbery. (44)

Where an act is done, *in fraudem legis*, the law gives no benefit thereof to the party. Thus if thieves, having an intent to rob, raise hue and cry, and bring the constable, to whom the owner opens the door, and they, when they come in, bind the constable, and rob the owner, it is burglary. (45) And, upon the same principle, the getting possession of a dwelling-house by a judgment of ejectment obtained by false affidavits, without any colour of title, and then rifling the house, was ruled to be within the statute against breaking the house, and stealing the goods therein. (46) So, if a man go to a house under pretence of having a search warrant, or of being authorized to make a distress, and by these means obtain admittance, it is, if done in the night-time, a sufficient breaking and entering to constitute burglary, or, if done in the day-time, house-breaking. (47)

If admission to a house be gained by fraud, though not carried on under the cloak of legal process, but merely by a pretence of business, it will also amount to a breaking by the construction of law. Accordingly, it was adjudged, that where thieves came to a house in the night-time, with intent to commit a robbery, and knocked at the door, pretending to have business with the owner, and, being by such means let in, robbed him, they were guilty of burglary. (48) And so where some persons took lodgings in a house, and afterwards, at night, while the people were at prayers, robbed them; it was considered that, the entrance into the house

(37) 1 Hale, 523, 524, 525; 1 East, P. C., 489.
(38) Fost, 108.
(39) 1 Hale, 527.
(40) 1 Hale, 553; 2 East, P. C., 486.
(41) 1 Hawk., P. C., c. 38, s. 7.
(42) 1 Hawk., P. C., c. 38, s. 3.
(43) 2 East, P. C., 486.
(44) 1 Hale, 555.
(45) 3 Inst., 64, 1 Hale, 552, 553; Kel., 44, 82; 4 Bl. Com., 226.
(46) Farre's Case, Kel., 43.
(47) Gascoigne's Case, 1 Leach, 284.
(48) Le Mott's Case, Kel., 42; 1 Hawk., P. C., c. 38, s. 8.

being gained by fraud, with an intent to rob, the offence was burglary. (49)

In another case, the entrance was gained by deluding a boy who had the care of it. The prisoner, who was acquainted with the house and knew that the family were in the country, asked the boy, who kept the key, to go with her to the house, promising him, by way of inducement, a pot of ale. The boy went with her, opened the door, and let her in; upon which she sent him for the pot of ale, and, while he was gone, she robbed the house and went away. This being in the night-time, it was held that the prisoner was clearly guilty of burglary. (50)

Where a servant conspired with a thief to let him into his master's house to commit a robbery, and, in pursuance of this arrangement, opened the door or window in the night-time and let him in, it was considered burglary both in the servant and the thief. (51)

Two men were indicted for burglary. One of them was a servant in the house where the offence was committed. In the night-time he opened the street door, let in the other prisoner, and shewed him the sideboard, from which the other prisoner took the plate. The servant then opened the door, and let his confederate out. The judges were all of opinion that both prisoners were guilty of burglary; and they were accordingly executed. (52)

**Entrance.** — Any, even the least entry with any part of the offender's body or with any part of any instrument or weapon used by him is sufficient. (53)

So, that, where A, in the night-time, cut a hole in the window shutters of B's shop, which was part of his dwelling-house, and, putting his hand through the hole, took out some watches which hung in the shop, it was held to be burglary. (54) And, if a thief breaks the window of a house in the night-time, with intent to steal, and puts in a hook to reach out goods, or puts a pistol in at the window with intent to kill, it is burglary, in either case, although his hand be not in the window. (55)

In a case where thieves came in the night to rob A, who, perceiving their intent, opened his door, issued out, and struck one of the thieves with a staff, when another of them, having a pistol in his hand, and perceiving persons in the entry ready to interrupt them, put his pistol within the door, over the threshold, and shot, in such manner that his hand was over the threshold, but neither his foot nor any other part of his body, it was adjudged to be burglary. (56)

It has even been held that to discharge a loaded gun into a house is a sufficient entry, although neither the person discharging it nor any part of the gun be within the house. (57)

It seems, therefore, that no distinction is to be made between the implied entry effected by discharging a pistol or other fire-arm into a house, and that effected by means of an instrument introduced within the window or threshold, for the purpose of committing an indictable offence.

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(49) 1 Hawk., P. C., c. 38, s. 9; 4 Bl. Com., 227; 2 East, P. C., 485.
(50) R. v. Hawkins, 1 East, P. C., 485.
(51) 1 Hale, 553; 4 Bl. Com., 227.
(52) Cornwall's Case, 2 Str., 881.
(53) See first sub-clause of section 407 (*b*). See, also, R. v. Davis, R. & R., 499; R. v. Bailey, R. & R., 341.
(54) Gibbon's Case, Fost., 107, 108.
(55) 3 Inst., 64; 1 Hale, 555.
(56) 1 Hale, 553; 2 East, P. C., 490.
(57) 1 Hawk., P. C., c. 38, s. 11. See Pickering v. Rudd., 4 Camp., 220.

Where it appeared that the prisoner had bored a hole with an instrument called a *centre-bit* through the panel of a house door, near to one of the bolts by which it was fastened, and that some pieces of the broken panel were found within the threshold of the door; but it did not appear, that any instrument, except the point of the *centre-bit*, or that any part of the bodies of the prisoners had been within the house, or that the aperture was made large enough to admit a man's hand; the Court held this not to be a sufficient entry. (58)

Introducing the hand between the glass of an outer window, and an inner shutter, is a sufficient entry to constitute burglary, on the ground that, as the glass of the window is the outer fence, whatever is within the glass is within the house. (59)

Where, in breaking a window in order to steal something in the house, the prisoner's finger went within the house, it was held that there was a sufficient entry to constitute burglary. (60)

**Dwelling-house.**—Every house for the dwelling and habitation of man is taken to be a dwelling-house in which burglary may be committed; (61) and under the above section, 407, clause (*a*), it means any permanent building the whole or any part of which the owner or occupier keeps for the residence therein of himself, his family, or servants, although, at intervals, unoccupied, and it includes also any building occupied with and within the same curtilage with it, provided there be between them a communication either direct or by means of a covered and enclosed passage; and evidence of the breaking and entering of a building so attached will sustain an indictment charging a breaking and entering of the dwelling-house. (62)

A dwelling-house, therefore, in relation to the offence of burglary, is any place kept for the purpose of living in; and it will be sufficient if any part of the family of the owner or tenant live there.

Sets of chambers in an inn of court or a college are deemed distinct dwelling-houses, they being, in their nature and manner of occupation, as unconnected with each other as if they were under separate roofs. (63)

A burglary cannot be committed in a tent or booth in a market or fair, even although the owner lodge in it; because it is a temporary, not a permanent edifice; (64) but, if it be a permanent building, although used for the purpose of a fair, it may be a dwelling-house if a part of it be used as such during the fair. (65)

A loft situated over a coach-house and stables, in a public mews, and converted into lodging rooms, has also been holden to be a dwelling-house. The prosecutor, who was coachman to a lady, rented the rooms at a yearly rent; but he had never paid any rent; and the rooms were not rated in the parish books as dwelling-houses, but as appurtenances to the coach-house and stables; the way to the coach-house and stables was down a passage out of the public mews, to a staircase which led to these rooms, and the entrance to which staircase was through a door, which was never

(58) R. v. Hughes, 1 Leach, 606; 1 Hawk., P. C., c. 38, s. 12; 2 East, P. C., 491.
(59) R. v. Bailey, R. & R., 341.
(60) R. v. Davis, R. & R., 499.
(61) 3 Inst., 64.
(62) R. v. Garland, 1 Leach, 144.
(63) 1 Hale, 522, 556; 3 Inst., 65. See Monks v. Dykes, 4 M. & W., 365; Fenn v. Grafton, 2 Bing. N. C., 617; 2 Scott, 56.
(64) 1 Hawk., c. 38, s. 35; 1 Hale, 557.
(65) R. v. Smith, 1 M. & R., 256.

fastened, but there was a door at the top of the staircase to the rooms, which was locked at night, and was broken by the prisoner. It was contended, on behalf of the prisoner, that these rooms did not form such mansions or dwelling-houses as to become the subject of burglary; but, the objection was overruled, and the rooms were held to be the habitation of the prosecutor and his family. (66)

Where the prosecutors' house consisted of two living rooms, of another room used as a cellar, downstairs, and of three bedrooms, upstairs, — one of such bedrooms being over the wash house, and the bedrooms over the house place communicating with the bedroom over the wash house, but there being no internal communication between the wash house and any of the rooms of the house, though the whole were under the same roof, and it appeared that the defendant broke into the wash house and was breaking through the partition wall between the wash house and the house place, it was held that the defendant was properly convicted of burglary in breaking the house. (67)

But where adjoining to the house was a kiln, one end of which was supported by the wall of the house, and adjoining the other end of the kiln there was a dairy, one end of which was supported by the wall of the kiln, at that end, the roofs of all three being of different heights, and there being no internal communication from the house to the dairy, it was held that burglary was not committed by breaking into the dairy, the kiln being between it and the house. (68)

A Mr. Smith, having purchased a house with an intention to reside in it, had moved into it some of his furniture and effects; the house was put under the care of a carpenter for the purpose of being repaired; but Mr. Smith had not himself entered into the occupation of any part of it, nor did any part of his family, nor any person whatever sleep therein. While the house was in this situation, it was broken open in the night time; and, upon a case reserved, the judges were of opinion that it could not be considered a dwelling-house, being entirely uninhabited; and that, therefore, there could be no burglary. (69)

Where a house (which a former tenant had quitted), was taken by a new tenant, who put all his furniture into it, and frequently went thither in the day time, but neither himself, nor any of his family had ever slept there, it was ruled that burglary could not be committed therein. (70)

And, though persons sleep in a house thus situated, yet, if they are not of the family of the owner, it will still not be a dwelling-house in which burglary can be committed. (71)

So, in a case where the prosecutor had lately taken the house which was broken open; he himself never having slept there nor any of his family; but on the night on which it was so broken, and for six nights before, he had procured two hairdressers, who were not in any situation of servitude to him, to sleep there for the purpose of taking care of his goods therein; the Court was of opinion, that the house could not, in contemplation of law, be considered as the dwelling-house of the prosecutor. (72)

Where the owner of the house has no intention of going to reside in it

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(66) R. v. Turner, 1 Leach, 305; 2 East, P. C., 492.
(67) R. v. Burrowes, 1 Mood., C. C., 274.
(68) R. v. Higgs, 2 C. & K., 322.
(69) R. v. Lyons and Miller, 1 Leach, 185.
(70) R. v. Hallard, 2 East, P. C., 498; 2 Leach, 701; R. v. Thompson, 2 Leach, 771.
(71) R. v. Fuller, 2 East, P. C., 448; 1 Leach, 186, note *b*.
(72) R. v. Harris, 2 Leach, 701.

himself, and merely puts some person to sleep there at nights till he can get a tenant, the same rule applies, and the house, under such circumstances, cannot be considered as the dwelling-house of the owner. (73)

Where the owner of the house has never, by himself or by any of his family slept in it, though he has used it for his meals, and all the purposes of his business, it is not his dwelling-house, so as to make the breaking thereof burglary. (74)

When the owner or occupier has once entered into possession and begun to use the house, as a dwelling, either by himself, or by some of his family, it will not cease to be his dwelling-house by reason of any occasional or temporary absence, even though no person be left in it. (75) Thus if A have a dwelling-house, and upon occasion he and his family be absent for a night or more, burglary may be committed in their absence; and so, if A have two residences and be sometimes with his family at one and sometimes at the other, the breach of one of them in the night time in the absence of his family will be burglary. (76)

Also, if A, have a chamber in a college or inn of court, where he usually lodges in term time; and, in his absence in the vacation, his chamber be broken open in the night, the same rule will apply. (77)

A, having a residence in Westminster, took a journey into Cornwall with the intention of returning; and, he sent his wife and family out of town, leaving the key with a friend who was to look after the house. After A had been gone a month, the house,—there being no one in it,—was broken into, in the night, and robbed. A month afterwards, A returned to the house to live there. *Held*, that the breaking was a burglary. (78)

In another case, it was held that the prosecutor's residence was still his dwelling-house, although he and his family had left six months before, he having left his furniture in it, and having the intention to go back to it. (79)

In these cases, there must be an intention on the part of the owner or occupier to return to his house, *animus revertendi*. If he has quitted without any intention of returning, the breaking of a house so left will not be burglary. (80)

So, that, if a man leaves his house without any intention of living in it again, and means to use it as a warehouse only, and has persons, not of his family, to sleep in it to guard the property, the house cannot be described as his dwelling-house. (81)

But, though a man leave his house, and never mean to live in it again, yet, if he uses part of it as a shop, and lets a servant and his family live and sleep in another part of it for fear the place should be robbed, and lets the rest to lodgers, the habitation by the servant and his family is a habitation by the owner, and the shop will still be considered part of his dwelling-house; the putting in of a servant and family to *lire* there being considered different from putting them there merely to sleep. (82)

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(73) R. v. Davies, 2 Leach, 876.
(74) R. v. Martin, R. & R., 108.
(75) Fost., 77; 3 Inst., 64.
(76) 1 Hale, 556.
(77) 1 Hale, 556.
(78) R. v. Murry, 2 East, P. C., 496.
(79) R. v. Kirkham, 2 Stark, Ev., 279.
(80) Fost, 77; 4 Bl. Com., 225.
(81) R. v. Flannagan, R. & R., 187.
(82) R. v. Gibbons, R. & R., 442.

The mere casual use of a place, or the using it upon some particular occasions for particular purposes it not considered sufficient to constitute it a habitation where burglary can be committed. (83) Thus, it was held that, the fact of a servant having slept in a barn, on the night in which it was broken open, and for several nights before, he being put there, *for the purpose of watching thieves*, did not make the offence burglary. (84) And the circumstance of a porter lying in a warehouse *to watch goods*, — this being only for a particular purpose, — was held not to make it a dwelling-house. (85)

It was formerly necessary to correctly state the ownership in the indictment, and, therefore, the question of the ownership of the house at the time of being broken and entered, was, then, a matter of great importance.

Although the allegation of ownership is no longer absolutely necessary, and although its omission will not render the indictment objectionable or insufficient, — (see section 613 (*b*), *post*), — it is better to state to whom the dwelling-house belongs; and it may not be out of place, here, to notice some of the cases on the subject of ownership and its exercise either by the owner's own occupation and that of his family and servants or by others who hold from him some interest which constitutes in them an ownership as to the whole or some part or parts of the dwelling-house.

With regard to the exercise of ownership by the occupation of the owner's servants, it has been held that, where apartments in a house belonging to a corporation were appropriated as lodgings for servants of the corporation, a burglary, committed in them should be laid as committed in the corporation's dwelling-house. (86)

Where a servant lived rent free in a house belonging to his master, the master paying the taxes, and having his business carried on in the house, but the servant and his family being the only persons who slept there, and that part of the house in which his master's business was carried on being at all times open to those parts in which the servant lived, it was held, upon an indictment for breaking and entering that part of the house in which the master's business was carried on, that it was properly described as the servant's house; but, the judges would not say that it might not, also, have been described as the house of the employer. (87)

Where a servant lived in a cottage quite distinct from his master's house, and had entire control over the cottage, it was held that it might be described as his dwelling-house, although he paid no rent for it, and might be liable to give it up whenever his service was terminated. (88)

The governor of a workhouse was appointed under contract for seven years, and was to have the chief part of the dwelling-house for his own and his family's occupation, the guardians and overseers who appointed him reserving the use of one room for an office, and three others for store-rooms. The governor was assessed for the dwelling-house, excepting the reserved rooms. The office having been broken into, the indictment described it as the governor's dwelling-house; but, after conviction, upon a case reserved, the judges held that the description was wrong. (89)

Where a policeman was allowed to live in a house, in order to take care

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(83) 2 East, P. C., 497.
(84) R. v. Brown, 2 East, P. C., 501.
(85) R. v. Smith, 2 East, P. C., 497.
(86) R. v. Pickett, 2 East, P. C., 501. See R. v. Maynard, 2 East, P. C., 501. See, also, R. v. Hawkins, Fost, 38.
(87) R. v. Witt, 1 Moo. C. C., 248.
(88) R. v. Rees, 7 C. & P., 568.
(89) R. v. Wilson, R. & R., 115.

of it and a wharf adjoining, it was held that the house was properly described as the dwelling-house of the policeman, on the ground that he must live somewhere; and he was not otherwise the servant of the owner than in the particular matter. (90) But, where upon an indictment for burglary in the dwelling-house of Bird, it appeared that Bird worked for one Woodcock, who did business as a carpenter for the New River Company, and put him in to take care of the house and flock mill adjoining, which belonged to the Company, and he received no more wages than he did before he lived there, nor had any agreement for any, it was doubted whether the house was properly laid, and it was thought that there might be some difference between this and the preceding case, as here the man was put in by a person who did the work for the Company, and it was thought the safest course to consider the indictment as not properly laying it to be the dwelling-house of Bird. (91)

Where a company in the country rented, for their agent, a house in London, in the upper part of which house the agent lived, with his family, it is reported to have been held by Graham, B., and Grose, J., that a burglary committed in the house was well laid to have been committed in the dwelling-house of the agent; the use of the house being given by the company to the agent as part of the remuneration for his services. (92)

Where, with certain wages, a laborer had a cottage to live in, rent free, it was held that as he occupied it for his own benefit, and not for the benefit of his master, it was properly described as the dwelling-house of the laborer. (93)

Where a person was employed by the lessee of tolls to collect such tolls, at a weekly salary, besides the privilege of living in the toll-gate house, erected by the trustees of the road, and the toll-gate house was broken and entered in the night time, it was held that the house was well described as the dwelling-house of the toll-gate keeper. (94)

With regard to the exercise of the ownership of a house by persons other than the proper owner thereof, it seems that where they have no fixed or certain interest in any part of the house, the proper owner retains the ownership in himself; as for instance, where persons are abiding in a house as guests, and a burglary is committed in any of their apartments, the indictment should lay the offence as committed in the dwelling-house of the proprietor of the house. (95)

So, that, where the chamber occupied by a guest in an inn was broken and entered at night, the indictment for the burglary should lay it as having been committed in the dwelling-house of the innkeeper. (96)

A, the lessee of a house, suffered B, his son-in-law, to live in it. B failed, and left the house, but one of B's servants, C continued in it. A, the lessee died, and the house was given up to the landlord, who through his steward suffered C to continue in the house, and the only goods in the house belonged to C. In an indictment for breaking the house, it was laid to be the house of C, and upon the point being saved, the judges held that it was rightly laid, as C was there not as a servant, but as tenant at will. (97)

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(90) R. v. Smith, 1 Russ. Cr., 3rd Ed., 815.
(91) R. v. Rawlins, 7 C. & P., 150.
(92) R. v. Margetts, 2 Leach, 930.
(93) R. v. Jobling, R. & R., 526.
(94) R. v. Canfield, 1 Mood. C. C., 42.
(95) 1 Hawk. P. C., c. 38, s. 26.
(96) 1 Hale, 557.
(97) R. v. Collett, R. & R., 498.

Where the owner, who let out apartments in his house to other persons, slept under the same roof, and had but one outer door at which he and his lodgers entered, it was considered that all the apartments of such lodgers were parcel of the one dwelling-house of the owner; but, that if the owner did not himself dwell in the same house, or if he and his lodgers entered by different outer doors, the apartments so let out were the mansion, for the time being, of each lodger respectively; (98) and it was held, accordingly, that where a house was let out to several lodgers, a burglary committed therein must be alleged to have been committed in the dwelling-house of the lodger whose apartments were broken and entered. (99)

Where a lodger occupied one room in a house, the landlady keeping the key of the outer door, it was held that this could not be described as the lodger's dwelling-house; (100) but, it was otherwise where the house was divided into several chambers with separate outer doors. (101)

A burglary was committed in a house belonging to one Nash who, however, did not live in any part of it himself, but let the whole of it out in separate lodgings from week to week; and an inmate named Jordan had two apartments in the house, namely, a sleeping-room up one pair of stairs, and a workshop in the garret; which he rented by the week as tenant at will to Nash. The workshop was the room broken open by the prisoner. And upon a case referred to the judges for their consideration, whether the indictment had properly charged the burglary in the dwelling-house of Jordan, ten of them were of opinion, that as Nash, the owner of the house, did not inhabit any part of it, the indictment was good. (102)

In a case in which it appeared that the house was situated in a mews, and the whole of it let out in lodgings to three families, with only one outer door, which was common to all the inmates, one of whom rented the parlour on the ground floor and a single room up one pair of stairs and that the parlor on the ground floor was the part of the house broken open: all the judges held that the offence was well laid in the indictment, as having been committed in the dwelling-house of the particular inmate. (103)

It was held that, where a house was let to A and a warehouse under the same roof, and with no inner communication, to A and B, the warehouse could not be described as the dwelling-house of A. (104)

A building may be divided so as to form several separate dwelling-houses by letting off parts, and leaving no internal communication between the parts so let and the remainder of the building. An indictment charged that a burglary was committed in a house forming the centre of a building with two wings, one of which wings was the dwelling-house of A, and the other consisted of the dwelling-houses of B and C respectively. The centre consisted of three manufactories in one of which A, B, D and other persons were jointly concerned, and of the other two, D was the sole proprietor. C was merely in D's employ. There was no internal communication between the centre building and the houses of A and B nor between it and the house of C, except a window in the house of C which looked into a passage that ran the whole length of the centre building. One count in the indictment alleged the centre building to be the house of C; but the

(98) R. v. Gibson, 1 Leach, 357; Lee v. Gansel, Cowp., 8.
(99) R. v. Rodgers, 1 Leach, 89.
(100) Monks v. Dykes, 4 M. & W., 567.
(101) Fenn v. Grafton, 2 Bing. N. C., 617; 2 Scott, 56.
(102) R. v. Carrell, 1 Leach, 237; 2 East, P. C., 506.
(103) R. v. Trapshaw, 1 Leach, 427; 2 East, P. C., 506.
(104) R. v. Jenkins, R. & R., 244. See R. v. Hancock, R. & R., 171.

judges held that, the window merely was not such an internal communication that the centre building could be deemed a portion of C's house.(105)

**The Intent.**—There must be an intent, to commit some indictable offence; and if the intention of the entry be alleged or be proved by the evidence to have been only for the purpose of committing a trespass the offence will not be burglary. An indictment charged the prisoners with a burglary in the dwelling-house of A with intent to steal the goods of B. It appeared that B who was an excise officer had seized uncustomed bags of tea entered in the name of C, and being in C's possession without a legal permit, and after seizing them, B had removed them to his lodgings at A's house. The prisoners and many other persons broke open A's house in the night, with intent to take this tea. It was not proved that C was in company with them; but the witnesses said, that they supposed the tea to belong to C; and supposed that the fact was committed either in company with him, or by his procurement. The jury, being directed to find as a fact with what intent the prisoners broke and entered the house, found that they intended to take the goods on behalf of C, and, upon the point being reserved, all the judges were of opinion that the indictment was not supported; as, however outrageous the conduct of the prisoners was, in so endeavouring to get back C's goods, still there was no intention to steal. (106)

Where the intent laid was to kill a horse, and the intent proved was merely to lame him, in order to prevent him from running a race, the variance was held fatal. (107)

Where the intent laid was to steal, and the intent proved was to carry away the defendant's trunk containing money which he had *previously* embezzled from his master, it was held that the offence proved did not amount to a burglary, for it was no felony in the defendant to remove the money. (108)

If there be evidence of a theft but none of burglary and none showing the theft to have been committed in the dwelling-house, the defendant may be convicted of the simple theft, and if two or more are indicted, one may be found guilty of the burglary and the other of the theft only.(109) And a verdict may be rendered finding the defendant guilty of an attempt, if the evidence warrant it. (110)

Where a room-door was latched, and a person lifted the latch and entered the room, and concealed himself for the purpose of committing a theft there, which he afterwards effected; and two other persons were present with him when he lifted the latch, for the purpose of assisting him to enter, and screened him from observation, by opening an umbrella, it was held that those two were, in law, parties to the breaking and entering, and were answerable for the stealing which afterwards took place, though they were not near the spot when it was perpetrated. (111)

Where the intent laid was to steal the goods of J. W. and it appeared in evidence that no goods of any person of the name of J. W. were in the house, but that the name of J. W. had been inserted in the indictment by mistake, the judges held the variance to be fatal, and the defendant was acquitted. (112)

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(105) R. v. Egginton, 2 B. & P., 508.
(106) R. v. Knight and Roffey, 2 East, P. C., 510.
(107) R. v. Dobbs, 2 East, P. C., 513.
(108) R. v. Dingley, 2 Leach, 840, c.
(109) R. v. Butterworth, R. & R., 520.
(110) See section 711, *post*.
(111) R. v. Jordan, 7 C. & P., 432.
(112) R. v. Jenks, 2 East, P. C., 514.

But, where the indictment alleged the intent to be generally "the goods and chattels in the said dwelling-house then and there being" to steal, and charged the defendant with stealing the goods of A therein, it was held to be satisfied by proof of a breaking into the house, with intent to steal the goods there generally, though the goods actually stolen did not belong to A alone. (113)

The best evidence of the intent is, that the defendant actually committed the offence alleged to have been intended by him; (114) but, any other facts may be given in evidence from which the intent may be presumed. It may be inferred from the nature of the weapon or instrument, with which the defendant is found armed, the place in which he is found, his own declarations, or from any other circumstances.

Where an indictment charges a breaking and entering, at night, with intent to commit an indictable offence, proof of the actual commission of an indictable offence will be sufficient and in fact the best evidence to establish the intent; but, it is best to allege both the intent to commit and the actual commission of an indictable offence. (115)

It should be observed, also, that different intents may be stated in the indictment. Thus, where the first count of an indictment for burglary laid the fact to have been done with intent to steal the goods of a person, and the second count laid it with intent to murder him; it was objected, upon a general verdict of guilty, that there were two several capital charges in the same indictment, tending to deprive the prisoner of the challenges to which he would have been entitled if there had been distinct indictments, and also tending to perplex him in his defence; but, the indictment was holden good, on the ground that they were the same facts and evidence, only laid in different ways. (116)

Although an indictment charging a breaking and entering, *with intent* to commit an indictable offence, will be supported by evidence that, on breaking and entering the defendant *actually* committed the indictable offence charged, it seems that where the indictment charges a breaking and entering and the *actual* commission of an indictable offence, but does not charge the intent, it will not be supported, if the evidence merely shew a breaking and entering with intent to commit and no actual commission of the offence. (117)

It will be seen that the essentials of the crime of burglary, as defined and punished under section 410, are: —

1. A BREAKING and ENTERING a dwelling-house, by night, with intent to commit an indictable offence therein;

2. A BREAKING OUT of a dwelling-house, by night, after committing an indictable offence therein; and,

3. A BREAKING OUT of a dwelling-house, by night, after having entered it, by day or by night, with intent to commit an indictable offence therein.

But section 410, does not expressly declare that it is burglary to break and enter a dwelling-house, by night, and *commit* an indictable offence therein, *Quære*, would it, therefore, be sufficient in an indictment for burglary, under that section to allege a breaking and entering of a dwelling-house by night and the *commission* therein of an indictable offence, without also alleging an intent to commit it? And, if in a trial for burglary

(113) R. v. Clarke, 1 C. & K., 421.
(114) See R. v. Locost, Kel., 30.
(115) 1 Hale, 549, 560; 2 East, P. C., 514; R. v. Furnival, R. & R., 445.
(116) R. v. Thompson, 2 East, P. C., 515.
(117) R. v. Vandercomb & Abbott, 2 Leach, 708; 2 East, P. C., 159.

the evidence shewed that when the defendant broke and entered the house he had no intention whatever to commit any indictable offence therein, would he, by afterwards committing an indictable offence therein, become guilty of burglary under section 410?

Sections 411 and 412, relating to house-breaking, expressly state that the offence is committed: — 1, by breaking and entering a dwelling-house, by day, and *committing* an indictable offence therein; 2, by breaking out of a dwelling-house, by day, after having committed an indictable offence therein; and 3, by breaking and entering a dwelling-house, by day, *with intent* to commit an indictable offence therein.

If, upon an indictment for burglary, it be proved that the breaking and entering were in the day time and not in the night time the prisoner may be convicted of house breaking under section 412; (118) and, if the breaking and entering be not proved, the defendant may be convicted (under section 345, *ante*), of stealing in a dwelling-house, if the property stolen amount to $25, or, if, though less than that amount, he was by threats put any one in the house in bodily fear; and, if the stealing do not come within the terms of section 345, the defendant may be convicted of simple theft. (See section 713, *post*.)

**411. House-breaking.** — Every one is guilty of the indictable offence called house-breaking, and liable to fourteen years' imprisonment, who —

(*a*.) breaks and enters any dwelling-house by day and commits any indictable offence therein; or

(*b*.) breaks out of any dwelling-house by day after having committed any indictable offence therein. R. S. C., c. 164, s. 40.

**412.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who, by day, breaks and enters any dwelling-house with intent to commit any indictable offence therein. R. S. C., c. 164, s. 42.

See comments under section 410.

The breaking and entering must be proved in the same manner as in burglary, (119) except that it need not be proved to have been done in the night-time; but, if it be proved to have been done in the night-time, so as to amount to burglary, it seems that the defendant may, notwithstanding, be convicted upon an indictment for burglary. (120)

The proof of the stealing will be the same as in any other case of theft; and the least removal, as we have seen already, will be sufficient. For instance, where it appeared that the prisoner after breaking and entering the house, took two half sovereigns from a bureau, in one of the rooms, but, being immediately detected, threw them into the grate in that room, Parke, J., held, that this was a sufficient asportation to constitute the offence of house-breaking and stealing therein. (121)

If the prosecutor succeed in proving the theft, but fail in proving any of the other facts necessary to constitute the offence of house-breaking, the

(118) R. v. Compton, 3 C. & P., 418.
(119) 1 Hale, 526; Fost, 108.
(120) See R. v. Pearce, R. & R., 174; R. v. Robinson, R. & R., 321.
(121) R. v. Amier, 1 C. & P., 344.

defendant may be convicted of simple theft; or, if the prosecutor fail in proving the breaking and entry, and the goods be laid and proved to be of the value of twenty-five dollars, the defendant may be convicted of stealing in the dwelling-house.

Where a defendant was tried upon a charge of house-breaking accompanied by theft, and the evidence did not prove that offence, but the prosecution contended that a case of receiving stolen goods had been made out, it was held, upon a reserved case, that the power, under section 713, *post*, of convicting of an offence other than that charged can only be exercised when all the essential elements or ingredients of the offence proved are included in the offence charged, and that, according to that rule, the offence of receiving stolen goods is not comprised in the offence of house-breaking accompanied by theft, the crime of theft being the taking and carrying away of the goods of another, while the crime of receiving stolen goods is that of receiving goods stolen by a person other than the receiver. (122)

A defendant may, if the evidence warrants it, be convicted of an attempt to commit the offence if the prosecutor fails to prove its actual commission. (See section 711, *post*.)

**413. Breaking shop.** — Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, either by day or night, breaks and enters and commits any indictable offence in a school-house, shop, warehouse or counting-house, or any building within the curtilage of a dwelling-house, but not so connected therewith as to form part of it under the provisions hereinbefore contained. R. S. C., c. 164, s. 41.

**414.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who, either by day or night, breaks and enters any of the buildings mentioned in the last preceding section with intent to commit any indictable offence therein. R. S. C., c. 164, s. 42.

See comments under sections 410, 411 and 412, *ante*.

The breaking and entering must be proved in the same way as upon an indictment for burglary, except that it is immaterial whether the breaking and entry be by night or by day. If the proof of the breaking and entry fail the defendant may be convicted of simple theft.

A warehouse was, at one time, held to be such as factors or traders keep their goods in, for sale, and where customers go to view them, and not such as is used for the safe keeping of goods merely; (123) but this distinction is now exploded. (124) There is a *dictum* of Alderson, B., upon the repealed statute 7 and 8 Geo. 4, c. 29, s. 15, that a *shop*, to be within it, must be a shop for the sale of goods, and that a mere workshop (such as a carpenter's or blacksmith's shop, would not be sufficient. (125) But, Lord Denman, C. J., dissented from that *dictum*, and held that a blacksmith's shop, when used as a workshop only, was within the statute.(126)

(122) R. v. Lamoureux, 4 Can. Cr. Cas., 101.
(123) R. v. Howard, Fost, 77, 78. See R. v. Godfrey, 1 Leach, 278.
(124) See R. v. Hill, 2 M. & Rob., 458.
(125) R. v. Sanders, 9 C. & P., 79.
(126) R. v. Carter, 1 C. & K., 173.

Where A had in connection with his chemical works a building commonly called the machine house in which goods sent out were weighed, and in which a book was kept by A's servant for entering the goods weighed and sent out, and it also appeared that the time of the men employed in the works was also taken and their wages paid in that same building, the books in which their time was entered being brought there for the purpose of being entered up and for paying their wages, it was held upon an indictment for breaking and entering this building that it was a counting house. (127)

Section 407 (*a*) includes, as part of a dwelling-house, any building occupied with and being within the same curtilage with it, provided there be, between such building and the dwelling-house, "a communication either immediate or by means of a covered or enclosed passage leading from one to the other;" and the breaking and entering of any such building is punishable as burglary or house-breaking,—according to the facts,—under sections 410, 411 and 412, *ante*; but sections 413 and 414 also cover and punish the breaking and entering of any building which is within the curtilage of a dwelling-house, though not so connected with it,—either immediately or by means of a covered or enclosed passage,—as to form part of it. The word "*curtilage*" (which is derived from the Saxon word *curt*, signifying *court*), means a court, a yard, a garden, a field, or any piece of land, (with or without buildings on it), surrounding, or near and belonging to a messuage or dwelling-house; and so in olden times, the mansion or dwelling-house, in which burglary might be committed, included the out houses,—such as warehouses, barns, stables, cow-houses, dairy-houses, offices,—and all other buildings and erections, which were within the *curtilage*, or same common fence as the mansion house itself, though not under the same roof and not joined to the dwelling-house, upon the ground that the main house protected and privileged all its out-buildings, branches and appurtenances, if within the curtilage or common homestall. (128)

Sections 413 and 414, therefore, make it an indictable offence to break and enter any building occupied with, belonging to, and within the curtilage of a dwelling-house.

**415. Entering or being found in a dwelling-house, at night.** — Every one is guilty of an indictable offence and liable to seven years' imprisonment who unlawfully enters, or is in, any dwelling-house by night with intent to commit any indictable offence therein. R.S.C., c. 164, s. 39.

This section will meet cases in which the prisoner has entered (either by an open door or window or otherwise) a dwelling-house or is found therein, by night, and where, though there is no proof of any breaking or of the commission of any indictable offence, the circumstances shew an intent to commit one, and that the prisoner was there with that intent.

**416. Being found armed with intent to break a dwelling house, etc.** — Every one is guilty of an indictable offence and liable to seven years' imprisonment who is found —

(*a.*) armed with any dangerous or offensive weapon or instru-

(127) R. v. Potter, 2 Den., 235; 3 C. & K., 179; 20 L. J. (M. C.), 170.
(128) 3 Inst., 64; 1 Hale, 558; 4 Bl. Com., 225; 2 East, P. C., 493; 1 Hawk. P. C., c. 38, s. 21.

ment, *by day*, with intent to break or enter into any *dwelling-house*, and to commit any indictable offence therein; or

(*b.*) armed as aforesaid, *by night*, with intent to break into any *building* and to commit any indictable offence therein. R.S.C., c. 164, *s.* 43.

For the definition of "offensive weapon," see section 3 (*r*), *ante*.

**417. Having possession of burglars' tools, or being disguised.**—Every one is guilty of an indictable offence and liable to five years' imprisonment who is found —

(*a.*) having in his possession, *by night*, without lawful excuse (the proof of which shall lie upon him), any instrument of housebreaking; or

(*b.*) having in his possession, *by day*, any such instrument with intent to commit any indictable offence; or

(*c.*) having his face masked or blackened, or being otherwise disguised, *by night*, without lawful excuse (the proof whereof shall lie on him); or

(*d.*) having his face masked or blackened, or being otherwise disguised, *by day*, with intent to commit any indictable offence. R. S. C., c. 164, *s.* 43.

For definition of "Having in possession," see section 3 (*k*), *ante*.

In reference to section 417, the English Commissioners say: "These are extensions of the existing law. It is thought that being disguised by night affords sufficient *primâ facie* evidence of a criminal intent."

**418.** Every one who, after a previous conviction for any indictable offence, is convicted of an indictable offence specified in this part for which the punishment on a first conviction is less than fourteen years' imprisonment is liable to fourteen years' imprisonment. R.S.C., c. 164, *s.* 44.

See sections 628 and 676, *post*, as to the indictment and procedure when a previous conviction is charged.

## PART XXXI.

## FORGERY.

"It is not possible to say precisely what are the documents the false making of which is forgery, at common law. But, by a great many different enactments, passed at different times, a great many forgeries have been made felonies, and as such, punishable with great severity.

"The statute law was, for the most part, consolidated by the 24-25 Vict. c. 98.

"Like the other consolidation Acts, the Forgery Act assumes that the common law definition of forgery is known. This definition however, is a somewhat intricate matter involving various questions as to the extent of falsification implied in forgery; the character of the intent to defraud essential to it, and the circumstances essential to the completion of the crime. These matters are dealt with in sections 313 to 317 both inclusive (1).

"The part relating to Forgery, contains an enumeration of the various classes of documents, the forgery of which is punishable. They include all those which are mentioned in 24 and 25 Vict. c. 98, though not always in the same order or under the same names. They also include a considerable number of documents, (contracts, for instance, documents intended to be produced in evidence, and false telegrams), which are not included in that Act.

"This part makes provisions for the forgery of some documents as to which it is doubtful whether to forge them is or is not a common law offence.

"Finally, it contains a general clause, (section 336), (2) punishing the forgery of any document, whatever, with intent to defraud the public or any person, or to pervert the course of justice, or to injure any person, or to deprive any person of or prevent his obtaining any office, etc.

"We believe that few, if any, cases would be punishable under this section which would not be forgeries at common law. There is a considerable difference between this part and the corresponding chapter of the Bill. The general section (section 336), corresponds very nearly to a similar provision in the Bill, which proposed to subject offenders against its provisions to a maximum punishment of seven years penal servitude instead of two years imprisonment with hard labor. Such an enactment would have rendered unnecessary a considerable part of the enumeration of documents contained in the Draft Code. The provision was regarded as objectionable on the ground that it authorised a sentence of penal servitude for the forgery of various documents which were not defined, and the forgery of which could be at present punished by fine and imprisonment only. The difference in length between the Draft Code and the Bill is to a great extent due to the manner in which, perhaps *ex abundanti cautelâ* the former deals with each particular forgery. In the result, there will, we believe, be but little practical difference. The Draft Code adheres more closely than the Bill to the existing law, and is in these matters more explicit and detailed.

(1) Sections 313-317 of the English Draft Code correspond with sections 419-422 of the present Code.

(2) See clause (C) (*n*) of section 423, *post*.

"The provisions as to preparations for forgery are chiefly re-enactments of existing statutes.

"In section 356, (3) we have re-enacted 25-26 Vict., c. 88, as to Trade Marks, omitting some clauses which seem not practical." (Eng. Commrs'. Rep., pp. 29 and 30.)

**419. Meanings of "Document," "Bank note," "Exchequer bill," "false document."** — A *document* means, *in this part*, any paper, parchment, or other material used for writing or printing, marked with matter capable of being read, but does not include trade marks on articles of commerce, or inscriptions on stone or metal or other like material.

**420.** "*Bank note*" includes all negotiable instruments issued by or on behalf of any person, body corporate, or company carrying on the business of banking in any part of the world, or issued by the authority of the Parliament of Canada or of any foreign prince, or government, or any governor or other authority lawfully authorised thereto in any of Her Majesty's dominions, and intended to be used as equivalent to money, either immediately upon their issue or at some time subsequent thereto, and all bank bills and bank post bills;

*(a)* "*Exchequer bill*" includes exchequer bonds, notes, debentures and other securities issued under the authority of the Parliament of Canada, or under the authority of any legislature of any province forming part of Canada, whether before or after such province so became a part of Canada.

For the words, "Her Majesty's," in this section, substitute "His Majesty's." (See section 7 of the *Interpretation Act*, p. 9, *ante*.)

**421.** The expression "*false document*" means —

*(a.)* a document the whole or some material part of which purports to be made by or on behalf of any person who did not make or authorize the making thereof, or which, though made by, or by the authority of, the person who purports to make it is falsely dated as to time or place of making, where either is material; or

*(b.)* a document the whole or some material part of which purports to be made by or on behalf of some person who did not in fact exist; or

*(c.)* a document which is made in the name of an existing person either by that person or by his authority, with the fraudulent intention that the document should pass as being made by some person, real or fictitious, other than the person who makes or authorizes it.

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(3) See sections 445-447, *post*, of the present Code, as to the forgery, etc., of Trade Marks.

2. It is not necessary that the fraudulent intention should appear on the face of the document, but it may be proved by external evidence.

It will be readily seen that the expression "*false document*" as used in connection with forgery has a meaning entirely different from what is meant by a document which is false in the sense of being simply an untrue statement of facts. Where a letter purports to be signed by A B, but is, as a matter of fact, signed by C D, in A B's name, without A B's authority, a third party to whom it is shewn is deceived and led to believe that it is A B's letter, which, in fact, it is not; and, in that sense, it is a false document, whether its contents be true or false. It may be a true document as to the facts set forth in it; but, whether true or false as a statement of facts, it is a false document in regard to the signature. If the letter, instead of being signed by C D, in A B's name, were really signed by A B himself, or by his authority, and if its contents were false, then, although a false document in the sense of being an untrue statement of facts, it would be a true and genuine document in regard to the signature, and no forgery. A document whose contents are true may thus be a forged false document; and a document which contains false statements of fact may, nevertheless, be a genuine document, in the sense of being no forgery; although it may amount to and be punishable as a false pretence. For instance, if in a letter, written and signed in his own name, A. make a false statement, whereby B is induced to part with his money or goods, the letter would not be a false document in the sense of being a forgery, but it would be a written false pretence.

**422. Forgery defined.** — Forgery is the making of a *false* document *knowing* it to be false, with the intention that it shall in any way be used or acted upon as genuine, to the prejudice of any one whether within Canada or not, or that some person should be induced, by the belief that it is genuine, to do or refrain from doing anything, whether within Canada or not.

2. Making a false document includes altering a genuine document in any material part, and making any material addition to it or adding to it any false date, attestation, seal or other thing which is material, or by making any material alteration in it, either by erasure, obliteration, removal or otherwise.

3. Forgery is complete as soon as the document is made with such knowledge and intent as aforesaid, though the offender may not have intended that any *particular* person should use or act upon it as genuine, or be induced, by the belief that it is genuine, to do or refrain from doing anything.

4. Forgery is complete although the false document may be incomplete, or may not purport to be such a document as would be binding in law, if it be so made as, and is such as to indicate that it was intended, to be acted on as genuine.

Forgery at common law is defined, by Blackstone, as "the fraudulent making or alteration of a writing to the prejudice of another man's right." (4) It has also been defined as "a false making, a making *malo animo*, of

(4) 4 Bl. Com., 247.

any written instrument, for the purpose of fraud or deceit;" (5) the word "*making*," in the latter definition, being considered as including every alteration in or addition to a true instrument.

As to the word *forge*, Lord Coke says, "To forge is metaphorically taken from the smith who beateth upon the anvil and *forgeth* what fashion or shape he will. The offence is called *crimen falsi*, and the offender *falsarius;* and the Latin word *to forge* is *falsare* or *fabricare*." (6)

Besides the offence of forgery at common law, which was of the degree only of misdemeanor, a great many kinds of forgery were specially subjected to severe punishments by various statutes, which, as stated by the English Commissioners, (7) were, for the most part, consolidated by the Imperial Act, 24-25 Vic., c. 98.

When documents filed as exhibits in a civil suit form, the subject matter of indictment for forgery and uttering, they may be impounded on the application of the Attorney-General acting for the Crown. (8)

The gist of the offence of forgery, as defined by the present Code, is the *knowingly making of any false document*, (defined by section 421), either, 1, *with intent*, that such false document shall be used or acted upon as genuine, to the prejudice of any one, or, 2, *with intent* that any one shall, by belief in its genuineness, be induced to do or refrain from doing anything; and it is expressly declared by section 422, that *making* shall include any material alteration in or addition to a genuine document; and that the forgery shall be complete as soon as the false document is made, "with such knowledge and intent as aforesaid."

It is unnecessary that the forgery should reach the point of being actually used or acted upon as genuine, or that it should have actually prejudiced any one. As soon as the false document is made with *intent* that it shall be acted upon or used as genuine, it is sufficient; and the forgery is complete without any further step being taken, and therefore without any uttering of it. For, although the publication or uttering of the instrument is the usual medium by which the intent is made manifest, the intent may be proved as plainly by other evidence.

Thus, in a case where the note which the prisoner was charged with having forged, was never published, but was found in his possession at the time he was apprehended, no objection was taken to the conviction on the ground of the note never having been published, there being in the case circumstances sufficient to warrant the jury in finding a fraudulent intention. (9) In another case, it was held by LeBlanc, J., that, though the note there in question had been kept in the prisoner's possession, and never attempted to be uttered by him, yet it was a question for the jury, under all the circumstances of the case, whether the note had been made innocently or with an intent to defraud. (10)

It is forgery to execute a deed in the name of, and as representing another person, with intent to defraud, even though the prisoner has a power of attorney from such person, but fraudulently conceals the fact of his being only such attorney, and assumes to be the principal. (11)

See section 431, *post*.

(5) 2 East, P. C., 852, 965.
(6) Inst., 169; 2 Russ. Cr., 3rd Ed., 318.
(7) See p. 471, *ante*.
(8) Couture v. Fortier; Que. Jud. Rep., 7 S. C., 197.
(9) R. v. Elliott, 1 Leach, 175; 2 East, P. C., 951.
(10) R. v. Crocker, R. & R., 97; 2 Leach, 987.
(11) R. v. Gould, 20 U. C., C. P., 159.

Where a party committing forgery uses a name different from his own, it is immaterial whether the name used be that of a person actually existing or that of a merely fictitious person who never existed. (See section 421 *b*). It is as much a forgery in the one case as in the other. (12)

Where the forgery is committed by using the name of an existing person, it makes no difference whether the offender passes himself off for such person or not. (13)

If three persons, A, B and C, have authority jointly to draw out money from a bank, and A, one of them, draw out the money by a cheque signed by himself and D and E, two strangers who personate B, and C, it is forgery. (14)

Where there is no false making, it will be no forgery although a person falsely assume to be the real endorser and the one who has really endorsed the bill, and thus obtain money or goods upon it, and although all this be done in concert with the real endorser, and for the purpose of fraud. The prisoner, John Hevey, was indicted for having, with intent to defraud, forged an endorsement in the name of Bernard McCarty on the back of a bill of exchange for £30 drawn in favor of McCarty, upon and purporting to be accepted by Beatty & Co., and for uttering such forged endorsement. The evidence shewed that the prisoner Hevey went to the pawnshop of the prosecutors, to buy a watch and offered them the bill in question, with the endorsement then upon it, saying that it was a good bill, that his name was Bernard McCarty, that he had endorsed the bill, and that Beatty & Co., were agents to the Bath Bank. The pawnbrokers sent their servant to enquire about the acceptance, and, on the latter returning and saying that the acceptance was good, they let the prisoner have the watch, and gave him the difference of the bill. It was proved that the prisoner had always been known as John Hevey, but it also appeared that there was such a man as Bernard McCarty, and that the endorsement was in the latter's hand writing. The jury found the prisoner guilty; but, the case being afterwards submitted to the consideration of the judges they were all of opinion that it did not amount to forgery, the jury having found that there was no false endorsement but that the endorsement was truly made by a real person whose name it purported to be. (15)

An instrument may be a forgery by being falsely dated as to the time of making it; (section 421); and, so, it has been held that, a man may be guilty of forgery by making a false deed in his own name; as, where A, having made a conveyance in fee of his land to B, afterwards fraudulently executed a deed of lease, for 999 years, of the same land, to C, which lease, by being ante-dated, purported to be prior to the conveyance in fee to B. (16)

A prisoner was indicted, under the English *Forgery Act*, for having feloniously caused and procured to be delivered and paid to Henry Dorber the sum of £9, the money of George Crompton and Samuel Radcliffe, upon a certain forged message purporting to have been handed in at a certain post-office, — "the Royal Exchange, Manchester,"— for transmission by telegraph and purporting to have been transmitted by telegraph to the General post-office in Manchester, with intent to defraud, the prisoner knowing it to be forged. The prisoner, who was a clerk in the Manchester

(12) R. v. Parkes, 2 Leach, 773; 2 East, P. C., 963; R. v. Froud, 1 B. & B., 300; R. & R., 389; R. v. Wilks, 2 East, P. C., 957; R. v. Webb, 3 B. & B., 228; R. & R., 405.

(13) R. v. Dunn, 1 Leach, 57; 2 East, P. C., 962.

(14) R. v. Dixon, 2 Lew., 178.

(15) R. v. Hevey, 1 Leach, 229; 2 East, P. C., 855.

(16) R. v. Ritson, L. R., 1 C. C. R., 200; 39 L. J., M. C., 10.

General Post-Office, — (post-offices in England having a telegraphic department), — had obtained permission from Dorber, to make bets, in the latter's name, with Crompton & Radcliffe, who were bookmakers. On the 27th June 1895, the "Newcastle Handicap" was to be run at 2.45 p. m.; and the prisoner, on that day, sent the telegram in question, in Dorber's name offering to bet £3 on "Lord of Dale." The telegram purported to have been handed in at the Royal Exchange post-office at 2.40 p. m., and to have been received at the General Post-Office at 2.51 p. m., whence it was transmitted to Crompton & Radcliffe, who, — acting on their usual practice and believing that the telegram offering the bet had been handed in before the race was run, — accepted the bet at current odds, and, in due course, paid the amount won. As a matter of fact, the telegram was not handed in at the Royal Exchange post-office, at all, but was despatched by the prisoner direct from the General post-office after the prisoner had received news of the fact that "Lord of Dale" had won the race. *Held*, that the telegram, — being written so as to make it appear that it was sent in for despatch before the race was run, when it was not, — was a forged instrument, and that the indictment was good. (17)

**Forgery by alteration.** — The general principle upon which *making* a false document includes altering or adding to a genuine one, (as provided by the second paragraph of section 422), is that an alteration of any material part of a true instrument changes and falsifies the whole.

Upon an indictment for "making, forging and counterfeiting" a bill of exchange, and for uttering it knowing it to be forged, the prisoners were convicted upon evidence of an alteration of the bill, from £10 to £50.(18)

The fraudulent alteration of a material part of a deed is forgery, however slight the alteration may appear in itself; as, for instance, the making a lease of the manor of Dale to appear to be a lease of the manor of Sale, by changing the letter D into an S; or by making a bond for £500, expressed in figures, seem to have been made for £5,000. (19)

Where a party made a copy of a receipt, added to such copy material words, not in the original, and, then, offered it in evidence on a suggestion of the original being lost, it was considered that he might be prosecuted for forgery. The words inserted were "in full of all demands."(20)

Altering the date of a bill of exchange after acceptance, and thereby accelerating the time of payment is forgery; (21) and so is altering a bill payable at three months into a bill payable at twelve months. (22)

Where a note of a country banker was made payable at their house in the country or at their bankers in London, and the London bankers had failed, it was forgery to alter the name of such London bankers to the name of another London banker, with whom the country bankers had made their notes payable subsequent to the failure; the judges deciding that the act done by the prisoner was a false making in a circumstance material to the value of the note, and its facility of transfer, by making it payable at a solvent instead of an insolvent house. The alteration was effected by pasting a slip of paper bearing the words *Ramsbottom & Co.*, over the words *Bloxam & Co.*, in the same manner as the prosecutors had themselves altered their re-issuable notes, after the failure of their first London bankers, Bloxam & Co. (23)

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(17) R. v. Riley, [1896] 2 Q. B., 309.
(18) R. v. Teague, 2 East, P. C., 979; R. & R., 33. See R. v. Dawson, 1 Str., 19.
(19) 1 Hawk. P. C., c. 70, s. 2. See R. v. Elsworth, 2 East, P. C., 986.
(20) Upfoln v. Leit, 5 Esp., 100.
(21) Master v. Miller, 4 T. R., 320; 2 East, P. C., 852.
(22) R. v. Atkinson, 7 C. & P., 669.
(23) R. v. Treble, 2 Taunt, 328; 2 Leach, 1040; R. & R., 164.

Altering a banker's one pound note by substituting the word *ten* for the word *one* was held to be forgery. (24)

Discharging one endorsement and inserting another, or making it thereby a *general* instead of a *special* endorsement has been held to be an altering of an endorsement, and to be a forgery. (25)

A person, having an order for delivery of wheat for the support of the poor persons in a municipality, is guilty of forgery, if he materially alters the order, so as to increase the quantity of wheat which is obtainable thereunder, with intent to defraud. (26)

The prisoner, a railway station master, had the paying of B, who was employed to collect and deliver parcels; and the company provided a form in which the charges due to B were entered by the prisoner under the heads of "Delivery" and "Collecting" respectively. The prisoner having falsely told B, that the company would no longer pay for delivering, but only for collecting, continued to charge the company for the collecting as well as the delivering; and, in order to furnish a voucher, after paying B the sum entered in the form for collecting, and obtaining a written receipt for it, the prisoner, without B's knowledge, put on such written receipt, a receipt stamp, and put in the receipt, in figures, (as the aggregate for collecting and delivering), a larger sum than he had actually paid. This was held a forgery. (27)

On an indictment for forgery, it appeared that a promissory note had been drawn by the prisoner, payable two months after date, to the order of one J. S., and afterwards endorsed by said J. S. and that the prisoner then altered the note, by making it payable three months after date, and discounted it at the Bank of British North America, in London, Ontario. The jury convicted him of forgery, and on motion for a new trial, on the ground that the forgery, or uttering, if any, was a forgery of or uttering of a forged endorsement, the note having been made by the prisoner himself, and that there was no legal evidence of an intent to defraud, it was held that the altering of the note while in his own possession, after endorsement, was a forgery of a note, and not of an endorsement, and that the passing of the note to a third party, who was thereby defrauded, was sufficient evidence of an intent to defraud. (28)

It is forgery for a person, having authority to fill up a blank acceptance or a cheque, for a certain sum, to fill it up for a larger amount. Therefore, if a person gives another a blank acceptance, and at the time limits the amount either by writing upon it, or otherwise, and, if in the filling up of the acceptance that amount be exceeded with intent to defraud the acceptor, or any other person, it is forgery under clause (*a*) of section 421. (29)

**Filling in blank cheques without authority.**—Filling in (without authority) the body of a blank cheque, to which a signature is attached, is a forgery.

The prisoners were indicted for uttering a forged cheque, and it appeared that one Townsend was in the habit of signing blank checks, and leaving them with his clerk when business called him away from home; one of these checks fell into the hands of the prisoners, who filled up the blank with the words "one hundred pounds," and dated it; it was objected that

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(24) R. v. Post, R. & R., 101.
(25) R. v. Birket & Brady, R. & R., 251.
(26) R. v. Campbell, 18 U. C. Q. B., 416.
(27) R. v. Griffiths, Dears. & B., 548; 27 L. J. (M. C.), 205.
(28) R. v. Craig, 7 U. C. C. P., 239; R. v. McNevin, 2 Rev. Leg., 711.
(29) See R. v. Minter Hart, Moo. C. C., 486; 7 C. & P., 652; R. v. Wilson, 2 C. & K., 527. See R. v. Richardson, 2 F. & F., 343.

the signature being genuine, it could not be said that the prisoner had uttered a forged instrument; but, Bailey, J., held, that it was a forgery of the check. By filling in the body and dating it, it was made a perfect instrument, which it previously was not, and, although it was not in point of fact made entirely by the prisoners, yet it had been held that the doing that, which is necessary to make an imperfect instrument a perfect one, is a forgery of the whole. (30)

**Forgery by signing forger's own name as that of another person.**—If a bill of exchange, payable to A B or order, get into the hands of *another person* of the same name with the payee, and such other person knowing that he is not the real payee, in whose favour it was drawn, endorse it, for the purpose of fraudulently possessing himself of the money, he is guilty of forgery. (31)

Coal, consigned to G. P. of New York, arrived, and was claimed by *another person* of the name of G. P., who resided there, and who, knowing this, obtained an advance of money, on endorsing the permit for the delivery of the coal, with his own proper name. This was held to be forgery. (32)

**Forgery by using a fictitious name.**—The use of a fictitious name may be sufficient to constitute forgery.

Thus, a person who endorsed a fictitious name on a bill of exchange to give it currency was held to be guilty of forgery; and, where a bill of exchange was drawn in fictitious names, there being no such persons existing as the bill imported, it was held to be a forged bill. (33)

It has been held that an order on a banker, for the payment of money, falsely purporting to be made by one who kept cash with such banker, was a forgery, though made in a fictitious name, or in the name of one who had no authority to draw on the banker; (34) and that a receipt, in a fictitious name, endorsed on a bill of exchange was also a forgery, although it did not purport to be the name of any particular person. (35)

In a case where the prisoner was indicted for uttering a forged deed, purporting to be a power of attorney, from Elizabeth Tingle, administratrix of her, (Elizabeth Tingle's), father Richard Tingle, deceased, late a marine belonging to His Majesty's ship the Hector, to F. Predham, of Bernard's-Inn, etc., empowering the said Predham to receive all prize-money due to her, etc., the facts were clearly proved, and the prisoner was convicted. But a doubt was entertained whether, as Richard Tingle had died childless, and as there was no such person as Elizabeth Tingle, the case amounted to forgery; and the point was referred to the consideration of the twelve judges. Eleven of them were very clearly of opinion, that it was forgery. (36)

Forging, in a false name assumed for concealment, with a view to a fraud, of which the forgery is part, is sufficient to constitute the offence. And if there be proof of the prisoner's real name, it is for him to prove that he used the assumed name before the time he had the fraud in view, even in the absence of proof as to what name he had used for several years before the fraud in question. (37)

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(30) R. v. Wright, 1 Lew., 135.
(31) Mead v. Young, 4 T. R., 28.
(32) P. v. Peacock, 6 Cowen, 72.
(33) R. v. Wilks, 2 East, P. C., 957. See, also, the cases of R. v. Blenkinsop & R. v. Epps., cited *infra*.
(34) R. v. Lockett, 1 Leach, 94; R. v. Abraham, 2 East, P. C., 941.
(35) R. v. Taylor, 1 Leach, 214; R. v. Francis, R. & R., 209.
(36) R. v. Lewis, Fost., 116.
(37) R. v. Peacock, R. & R., 278.

Where the prisoner obtained money from B, for a cheque on Jones, Lloyd & Co., purporting to be drawn by G. Andrews in favour of,—Newman, Esq. on bearer, telling him that it was for Mr. Newman, of Soho Square, in whose service he was for three months, and that Mr. Newman had put his name on the back; and it appeared, upon an indictment for forging and uttering the cheque, that no person of the name of G. Andrews kept an account with Jones, Lloyd & Co., that Mr. Newman of Soho Square did not write his name on the back of the cheque, and that the prisoner was never in that gentleman's service; Parke, J., held this to be sufficient *primâ facie* evidence that G. Andrews was a fictitious person, and told the jury that if G. Andrews really drew the cheque, the prisoner might produce him or give some evidence upon the subject. The prisoner was convicted. (38)

Where the prisoner was indicted for forging and uttering a cheque on Greenwood & Co., army agents and bankers, purporting to be drawn by J. Weston; and a clerk in the army department was called to prove that J. Weston kept no account with his employers; he admitting that he did not know the names of all the customers, but adding that he knew of no customer named J. Weston, and that, upon inquiry of the other clerks, he found that there was no such person: Parke, J., with the concurrence of Patteson, J., and Gurney, B., held this to be *primâ facie* evidence sufficient to call upon the prisoner to show who J. Weston really was. (39)

If a person write an acceptance in his own name to represent a fictitious *firm*, with intent to defraud, it is a forged acceptance; for, if an acceptance represent a fictitious *firm*, it is the same as if it represented a fictitious *person*. (40)

Two men named *Parkes* and *Brown* were indicted for forging and uttering a promissory note purporting to be signed by "Thomas Brown" and being for £5-5-0, payable to bearer. The prisoner *Brown* uttered the note to one Hulls, a shoemaker, in paying for some boots, he pretending that he was a *Captain Brown*, and, that he had a brother who had just married a lady with £15,000 which his brother had deposited in the hands of Down and Thornton, bankers, London, and, in handing Hulls the note, he said "I am sorry I cannot pay you in gold; but I can give you what is just as good, one of my brother's drafts." Hulls asked him if it was on the money lodged with Down, Thornton & Co's, and *Brown* said it was. The note was soon discovered to be a forgery; and it appeared that *Brown* and *Parkes* were connected together, that the note was in *Parkes'* handwriting, including the signature "Thomas Brown," and that Dunn & Co. had no such customer as Thomas Brown. Both prisoners were found guilty, the jury saying they thought *Parkes* signed the note with *Brown's* assent and that *Brown* uttered it under a representation that it was his brother's, knowing that it was not so, with intent to defraud Hulls. The following objections to the conviction were taken by the counsel for the prisoners: first, that *Thomas Brown* was the real name of one of the prisoners; secondly, that it was no forgery in *Parkes* to sign the name of Thomas Brown, with his, *Brown's*, consent; thirdly, that if *Parkes* were not guilty of forgery, *Brown* could not be guilty of uttering the note knowing it to be forged; and fourthly, that the subsequent misrepresentation of *Brown* ought not to affect *Parkes*, as there was no evidence that he was aware of the fraudulent circumstances under which *Brown* was going to utter the note; the principle being, that mis-representations do not amount to forgery, or make that a forgery which was not so at the time of the original making.

(38) R. v. Backler, 5 C. & P., 118.
(39) R. v. Brannan, 6 C. & P., 326.
(40) R. v. Rogers, 8 C. & P., 629.

The judges held the conviction wrong as to *Parkes*, but right as to *Brown*, for the following reasons: — that forgery is "the false making of a note, or other instrument, with intent to defraud; which might be done either by using the name of one who did not exist, or of one who did exist, without his consent; that this was of the former description, being uttered by the prisoner as the note of his brother, no such person as his brother of that name appearing to exist; and that the circumstance of its being made in the same name as his own could not make any difference; the note being uttered as the note of another, and not as his own. The same answer applied to the second objection. As no such person existed to whom the name of Thomas Brown, *as the signer of the note*, could apply, there could be no consent given to sign the name. It was signed by the authority of *a* Thomas Brown, but not of *the* Thomas Brown, for whose note it purported to be given; for the person in whose name the note was made, was, according to the description of him in the note, then a resident at Ringhton, in Salop; and it imported that he was a correspondent of Down, Thornton and Co. and had money in their hands; and he was also represented to be the brother of the prisoner; but no such person of that name and description appeared to exist. And all this was proved and found to be done for the purpose of fraud. Thirdly, that the indictment did not charge that, *Brown* uttered the note knowing it to have been forged *by Parkes*, but only knowing it to have been *forged*; and, therefore, let it have been forged by whomsoever it might, it was equally an offence in Brown to utter it." (41)

It is immaterial whether any additional credit be gained by using the false or fictitious name. (42)

Where the fictitious name used by the prisoner in the forged instrument was found by the jury to have been assumed by him with the intention of defrauding the prosecutor, although the prisoner's real name would, as admitted by the prosecutor, have carried with it as much credit as the assumed name, a conviction for forgery was held to be right. (43)

It has, however, been held that where a man, *who had been long known by a fictitious name*, drew a bill in that name, it was not a forgery. (44)

**Intent.** — The intent necessary is an intent that the false document shall be used or acted upon as genuine to some one's prejudice, or that some one shall be led by belief in its genuineness to do or refrain from doing something.

So, that, a man, who makes a false note, and issues and gets money or anything on it, will have led some one to act on it as genuine, and will be guilty of forgery, although he may mean to take it up, and even if he actually does take it up, at maturity. In a case in point, the prisoner was tried for uttering a forged bill of exchange with intent to defraud S. Minor. it appeared that the parties to the bill were all fictitious persons, that circumstance being fully known to the prisoner at the time he uttered it, and that there was no doubt that the names were forged, and the bill uttered by the prisoner with full knowledge of that fact. There was, however, reason to contend that the prisoner, who had filled a respectable station in life as a farmer, and who had endorsed the bill to Minor, intended at the time he so uttered it to take up and pay the bill when it arrived at maturity. For the prisoner it was urged to the jury, that the existence of

(41) R. v. Parkes & Brown, 2 Leach, 775; 2 East, P. C., 963.
(42) R. v. Taft, 1 Leach, 172. See R. v. Marshall, R. & R., 75, and R. v. Sheppard, 1 Leach, 226.
(43) R. v. Whiley, R. & R., 99.
(44) R. v. Aickles, 2 East, P. C., 968; R. v. Bontein, R. & R., 269. See R. v. Peacock, cited at p. 479, *ante*.

such an intention, if they believed it, was ground upon which they might properly negative the intention to defraud Minor, as charged in the indictment; and a case was cited in which Lord Abinger, at the previous assizes for Shrewsbury, had so decided. In summing up the case, Alderson, B., told the jury, (after consulting Gurney, B.), that if they were satisfied that the prisoner uttered the bill in payment of a debt due to Minor, knowing at the time he so uttered it that it was a forgery, and meaning that Minor should believe it to be genuine, they were bound to infer that he intended to defraud Minor. The prisoner was found guilty; but, Alderson, B., thought it proper, from respect to the opinion of Lord Abinger, to state a case for the opinion of the judges, in order to know if the rule laid down by him in his summing up to the jury was correct; and the judges, having considered the case, were unanimously of opinion that the conviction was right. (45)

Upon an indictment for forging and uttering an order for the payment of money, signed John Phillips, with intent to defraud F. Rufford and others, it appeared that the order was presented at Messrs Rufford's bank; but they would not pay the amount; and no person named John Phillips kept cash with them; it was objected that there could be no intent to defraud Messrs. Rufford, as there was not the most remote chance of their paying the money; but it was held that the prisoner's going to Messrs. Rufford's and presenting the paper for payment, was quite sufficient evidence of an intent to defraud them. (46)

Where it appeared that the forged bill had since it was uttered, been paid before proceedings were taken against the prisoner, Parke, B., in addressing the jury said this made no difference and that they were bound to infer an intent to defraud from the act of the forgery and the uttering. (47)

If a person put the name of another on a bill of exchange, as acceptor, without the other's authority, expecting to be able to meet it when due, or expecting that such other person will overlook it, it is forgery. But, if the person either had authority from such other person, or from the course of their dealings *bonâ fide* considered that he had such authority, it is not forgery. (48)

Nothing short of *bonâ fide* belief that the defendant had authority and a fair ground for that belief, from the acts of the party whose name is used, is sufficient. Thus, where A was indicted for forging and uttering an acceptance on a bill of exchange in the name of B, and B admitted that he had had money transactions with A and had been connected with him as a partner in a hat manufactory and that they had had many bill transactions and had trusted each other largely, and that a mutual accomodation existed between them, Coleridge, J., in his summing up, said, "We now come to B's statement that he has been for the last eight years in habits of great intimacy with the prisoner and in partnership with him. Now, I put the question whether, though he had not authorized the signing of his name on that particular bill, he had ever given the prisoner a general authority. If he had said to the prisoner, 'You may use my name whenever you like,' it would be idle to say that the acceptance was a forgery. It is not merely writing another man's name, but writing it, without

(45) R. v. Hill, 2 Moo. C. C. R., 30. See, also, R. v. Cooke, 8 C. & P., 582; R. v. Beard, 8 C. & P., 143; R. v. Boardman, 2 M. & Rob., 147; 2 Lew. 187; R. v. James, 7 C. & P., 553.

(46) R. v. Crowther, 8 C. & P., 316.

(47) R. v. Geach, 9 C. & P., 499. See R. v. Mazagora, R. & R., 291, and R. v. Carter, 7 C. & P., 134.

(48) R. v. Forbes, 7 C. & P., 224. See R. v. Hill, 8 C. & P., 274; R. v. Cooke, 8 C. & P., 582.

authority and with intend to defraud. But I go further: I think that if a person had reasonable ground for believing, from the acts of the party, that he had authority to accept and did in point of fact act on that, it would not be forgery. Let me suppose one or two cases: — Suppose the prisoner to have meant to raise £200 for two or three months, and trusted that, at the end of that time he should be able to repay it, if he used another person's name, without authority and not believing that he had authority, that would be a distinct forgery. No man has a right to use another's name, trusting that he may be able to take up the bill. So, if a person having no authority were to say, 'I want to raise a sum of money, and I am sure my father is so fond of me that he will not proceed against me criminally,' and were to write his father's name to an acceptance, that would be forgery. No man has a right to trust to the kindness of another man. If you are of opinion that the prisoner acted in either of those ways, knowing that he had no authority but meaning to repay the bill or trusting that the prosecutor would not prosecute, in either of those cases, this would be forgery. There can be nothing short of the person believing that he had authority and having a fair ground for that belief from the other party. The authority need not be express; it may implied from acts. I put the question to see whether the prisoner had any reason for thinking that he had authority to use Mr. Woodman's name. Now, you are to judge whether you have any reason to believe, looking at the circumstances fairly between the Crown and the prisoner, not stretching on one side or on the other, that the prisoner believed that he had authority, and from the circumstances had reasonable grounds for so believing. There was great intimacy between these parties; and, there had been a great many dealings between them. All which is to be taken into account. You certainly find that, the moment Mr. Woodman is called upon, he does not pay the bill, and he does not in the least adopt the act that was done by the prisoner; that is really the only point in the case. (49)

Where an indictment was for forgery at common law of a surrender of the lands of J. S., and it was not shown in the indictment that J. S. had any lands, it was holden upon motion in arrest of judgment that the indictment was good, upon the principle that it was not necessary to show that the party was prejudiced, the *intent* to prejudice being sufficient.(50)

See section 431, *post*, and comments thereunder.

**Forged documents which are legally imperfect.** — It was at one time considered that where the document was imperfect or such as would if genuine have no legal effect it would be no forgery; as, for instance, where a document was imperfect as a bill, — writing a name across it to be used as an acceptance, was held not to be a forgery of an acceptance; (51) and, where a defendant was indicted for forging a will of lands, and the will was not one which purported to be attested by the legal number of witnesses, it was held that the defendant could not be convicted. (52) The same ruling was upheld in regard to a country bank note or bill of exchange, which, for want of a signature, was incomplete, and also in regard to a navy-bill payable in blank.=(53) But there are decisions which seem to be in a different sense from the foregoing. For instance, it was held that a forgery might be committed of an instrument made on unstamped paper, notwithstanding that the particular instrument was subject to some

(49) R. v. Beard, 8 C. & P., 143.
(50) Goate's Case, 1 Ld. Raym., 737.
(51) R. v. Cooke, 8 C. & P., 582; R. v. Butterwick, 2 M. & R., 196.
(52) R. v. Wall, 2 East, P. C., 953. See, also, R. v. Moffatt, 1 Leach, 431.
(53) R. v. Richards, R. & R., 193; R. v. Randall, R. & R., 195; R. v. Fateman, R. & R., 455; R. v. Burke, R. & R., 496; R. v. Turpin, 2 C. & K., 820; R. v. Harper, 7 Q. B. D., 78; 50 L. J. (M. C.), 90.

law requiring it to be stamped; it being held in reference, for example to a bill of exchange, which under the English Stamp Acts required to be stamped, that such Acts declaring that a bill without a stamp should not be pleaded or given in evidence or be available in law or in equity, signified only that it should not be made use of to recover the debt. (54) And it was held that a man might be convicted of forging and uttering a bill of exchange although the name of the payee was not endorsed on it. (55) A man was also held indictable for forging a deed, though not made in pursuance of the provisions of particular statutes requiring it to be in a particular form. (56) And where a man forged an instrument which if genuine could not have been made available by reason of some circumstance not appearing upon the face of the instrument, but to be made out by some extrinsic evidence, he was held indictable for the forgery. (57)

In a case where the defendant was convicted upon an indictment which stated that one Garbut and his wife were seized in fee of certain messuages, lands, and tenements, called Jawick, in the parish of Clacton, in Essex, and that the defendant intending to molest them, and their interest in the premises, forged a lease and release as from Garbut and his wife, whereby they were supposed for a valuable consideration to convey to him "all that park called Jawick, in the parish of Clacton, in Essex, containing eight acres in circumference, with all the deer, wood, etc., thereto belonging," it was moved in arrest of judgment, that the premises supposed to be conveyed were so materially different from those really belonging to Garbut and his wife, that it was impossible this conveyance could ever molest or disturb them. But the Court held that it was not necessary that there should be a charge, or a possibility of a charge, and that it was sufficient if it were done with such intent, and that the jury had found that it was done with intent to molest Garbut and his wife in the possession of their land. (58)

It was held, in several cases, that forgery might be committed by the false making of an instrument, purporting to be the will of a person still living; notwithstanding the objection, that during the life of a party his will is ambulatory, and can have no validity as a will until his death. Thus, a prisoner was convicted for forging the will of a seaman, who it appeared was still alive, and had returned to England two years after the prize money had been received by the prisoner, under the forged will. (59) In a subsequent case, where the prisoner was indicted and convicted for forging the last will and testament of a woman who was still living, and was a witness on the trial, the judgment was respited upon a doubt, whether, as the supposed testatrix was living, the prisoner was legally convicted of having forged her *last will* and testament; there being no such instrument as a last will and testament in contemplation of law, until after the death of the person making it; but the judges were unanimously of opinion, that an instrument may be the subject of forgery, although in fact it should appear impossible for such an instrument as the instrument forged to exist, provided it purports on the face of it to be good and valid as to the purposes for which it was intended to be made. (60) The point

(54) R. v. Hawkeswood, 2 T. R., 606; 1 Leach, 257; 2 East, P. C., 955. See R. v. Lee, 1 Leach, 258, and R. v. Lyons, R. & R., 255; R. v. Froud, R. & R. 389; R. v. Morton, 2 East, P. C., 955; R. v. Pike, 2 Moo. C. C. R., 70; R. v. Reculist, 2 Leach, 703.

(55) R. v. Wickes, R. & R., 149. See the cases of R. v. Hawkes, R. v. Curry, R. v. Mopsey, cited at p. 491, *post*.

(56) R. v. Lyon, R. & R., 255.

(57) R. v. McIntosh, 2 Leach, 833; 2 East, P. C., 942.

(58) R. v. Crooke, 2 Str., 991; 2 East, P. C., 921.

(59) R. v. Murphy, 10 Hargr. St. Tr., 183; 2 East, P. C., 949.

(60) R. v. Sterling, 1 Leach, 99.

was again referred to the consideration of the judges, in a case where the prisoner was indicted and convicted for knowingly uttering and publishing as true, a certain false and forged will of one J. G., late a seaman belonging to a merchant vessel, and it appeared, that the said J. G. was living. All the judges held the conviction right. It was observed by the learned judge, who delivered their opinion, that every will must be made in the life time of the party, whose will it was; that it existed as a will in his lifetime, though not to take effect till his death; that the making a false instrument importing on the face of it to be a will was equally forgery, whether the person whose will it purported to be were dead or alive, at the time of making it; that a contrary doctrine would operate as a repeal of the law; for if the act of making the will were not forgery at the time, a publication afterwards would not make it so. Buller, J., thought the very definition of forgery decided the doubt, for it was the making a false instrument with intent to deceive; and that here the intention to deceive had been established by the jury, and the instrument purporting to be a will was clearly false. (61)

On an indictment for forging a will, the probate of that will unrevoked is not conclusive evidence of its validity so as to be a bar to the prosecution. (62)

A prisoner was convicted of forging a will of a non-existing person. He was indicted for forging the will of Jane Warner, and it appeared that there was no such person; on which it was objected that the forgery of the will of a non-existing person was no forgery. Patterson, J., "There is nothing to limit the offence to the forgery only of the wills of persons that have existed." (63)

There can, no longer, be any doubt that imperfections and defects in a forged document will not enable the forger to escape punishment; for clause 4 of the above section 422 expressly declares that the forgery is complete, although the false document may be incomplete or may not purport to be such a document as would be binding in law, if it be so made as to be acted on as genuine, and is such as to indicate that it was intended to be acted on as genuine.

**423. Punishment of forgery.** — Every one who commits forgery of the documents hereinafter mentioned is guilty of an indictable offence and liable to the following punishment: —

(*A*) **To imprisonment for life,** — if the document forged purports to be, or was intended by the offender to be understood to be or to be used as —

(*a.*) any document having impressed thereon or affixed thereto any public seal of the United Kingdom or any part thereof, or of Canada or any part thereof, or of any dominion, possession or colony of Her Majesty; (63 *a*) R.S.C., c. 165, s. 4; or

(*b.*) any document bearing the signature of the Governor General, or of any administrator, or of any deputy of the Governor,

(61) R. v. Coogan, 1 Leach, 499.
(62) R. v. Buttery and Macnamara, R. & R., 342.
(63) R. v. Avery, 6 C. & P., 596.
(63*a*) The words "His Majesty" must be substituted for "Her Majesty" in this section. (See section 7 of the *Interpretation Act*, at p. 9, *ante*.)

or of any Lieutenant-Governor or any one at any time administering the government of any province of Canada; R.S.C., c. 165, s. 5; or

(*c.*) any document containing evidence of, or forming the title or any part of the title to, any land or hereditament, or to any interest in or to any charge upon any land or hereditament, or evidence of the creation, transfer or extinction of any such interest or charge; or

(*d.*) any entry in any register or book, or any memorial or other document made, issued, kept or lodged under any Act for or relating to the registering of deeds or other instruments respecting or concerning the title to or any claim upon any land or the recording or declaring of titles to land; R.S.C., c. 165, s. 38; or

(*e.*) any document required for the purpose of procuring the registering of any such deed or instrument or the recording or declaring of any such title; R.S.C., c. 165, s. 38; or

(*f.*) any document which is made, under any Act, evidence of the registering or recording or declaring of any such deed, instrument or title; R.S.C., c. 165, s. 38; or

(*g.*) any document which is made by any Act evidence affecting the title to land; or

(*h.*) any notarial act or document or authenticated copy or any *procès-verbal* of a surveyor or authenticated copy thereof; R.S.C., c. 165, s. 38; or

(*i.*) any register of births, baptisms, marriages, deaths or burials authorized or required by law to be kept, or any certified copy of any entry in or extract from any such register; R.S.C., c. 165, s. 43; or

(*j.*) any copy of any such register required by law to be transmitted by or to any registrar or other officer; R.S.C., c. 165, s. 44; or

(*k.*) any will, codicil or other testamentary document, either of a dead or living person, or any probate or letters of administration, whether with or without the will annexed; R.S.C., c. 165, s. 27; or

(*l.*) any transfer or assignment of any share or interest in any stock, annuity or public fund of the United Kingdom or any part thereof, or of Canada or any part thereof, or of any dominion, possession or colony of Her Majesty, or of any foreign state or country, or receipt or certificate for interest accruing thereon; R.S.C., c. 165, ss. 8 and 25; or

(*m.*) any transfer or assignment of any share or interest in the debt of any public body, company or society, British, Canadian or foreign, or of any share or interest in the capital stock of any such

company or society, or receipt or certificate for interest accruing theron; R.S.C., c. 165, s. 8; or

(*n*) any transfer or assignment of any share or interest in any claim to a grant of land from the Crown, or to any scrip or other payment or allowance in lieu of any such grant of land; R.S.C., c. 165, s. 8; or

(*o*.) any power of attorney or other authority to transfer any interest or share hereinbefore mentioned, or to receive any dividend or money payable in respect of any such share or interest; R.S.C., c. 165, s. 8; or

(*p*.) any entry in any book or register, or any certificate, coupon, share, warrant or other document which by any law or any recognized practice is evidence of the title of any person to any such stock, interest or share, or to any dividend or interest payable in respect thereof; R.S.C., c. 165, s. 11; or

(*q*.) any exchequer bill or endorsement thereof, or receipt or certificate for interest accruing thereon; R.S.C., c. 165, s. 13; or

(*r*.) any bank note or bill of exchange, promissory note or cheque or any acceptance, endorsement or assignment thereof; R.S.C., c. 165, ss. 18, 25 and 28; or

(*s*.) any scrip in lieu of land; R.S.C., c. 165, s. 13; or

(*t*.) any document which is evidence of title to any portion of the debt of any dominion, colony, or possession of Her Majesty, or of any foreign state, or any transfer or assignment thereof; or

(*u*.) any deed, bond, debenture, or writing obligatory, or any warrant, order, or other security for money or payment of money, whether negotiable or not, or endorsement or assignment thereof; R.S.C., c. 165, ss. 26 and 32; or

(*v*) any accountable receipt or acknowledgment of the deposit, receipt, or delivery of money or goods, or endorsement or assignment thereof; R.S.C., c. 165, s. 29; or

(*w*) any bill of lading, charter-party, policy of insurance, or any shipping document accompanying a bill of lading, or any endorsement or assignment thereof; or

(*x*) any warehouse receipt, dock warrant, dock-keeper's certificate, delivery order, or warrant for the delivery of goods, or of any valuable thing, or any endorsement or assignment thereof; or

(*y*) any other document used in the ordinary course of business as proof of the possession or control of goods, or as authorizing, either on endorsement or delivery, the possessor of such document to transfer or receive any goods.

(*B*) **To fourteen years' imprisonment,**—if the document forged

purports to be, or was intended by the offender to be understood to be, or to be used as —

(*a*) any entry or document made, issued, kept or lodged under any Act for or relating to the registry of any instrument respecting or concerning the title to or any claim upon, any personal property; R.S.C., c. 165, s. 38.

(*b*) any public register or book not hereinbefore mentioned appointed by law to be made or kept, or any entry therein. R.S.C., c. 165, s. 7.

(*C*) **To seven years' imprisonment**, — if the document forged purports to be, or was intended by the offender to be understood to be, or to be used as —

(*a*) any record of any court of justice, or any document whatever belonging to or issuing from any court of justice or being or forming part of any proceeding therein; or

(*b*) any certificate, office copy, or certified copy or other document which, by any statute in force for the time being, is admissible in evidence; or

(*c*) any document made or issued by any judge, officer or clerk of any court of justice, or any document upon which, by the law or usage at the time in force, any court of justice or any officer might act; or

(*d*) any document which any magistrate is authorized or required by law to make or issue; or

(*e*) any entry in any register or book kept, under the provisions of any law, in or under the authority of any court of justice or magistrate acting as such; or

(*f*) any copy of any letters patent, or of the enrolment or enregistration of letters patent, or of any certificates thereof; R.S.C., c. 165, s. 6; or

(*g*) any license or certificate for or of marriage; R.S.C., c. 165, s. 42; or

(*h*) any contract or document which, either by itself or with others, amounts to a contract, or is evidence of a contract; or

(*i*) any power or letter of attorney or mandate; or

(*j*) any authority or request for the payment of money, or for the delivery of goods, or of any note, bill, or valuable security; R.S.C., c. 165, s. 29; or

(*k*) any acquittance or discharge, or any voucher of having received any goods, money, note, bill or valuable security, or any instrument which is evidence of any such receipt; R.S.C., c. 165, s. 29; or

(*l*) any document to be given in evidence as a genuine document in any judicial proceeding; or

(*m*) any ticket or order for a free or paid passage on any carriage, tramway or railway, or on any steam or other vessel; R.S.C., c. 165, s. 33; or

(*n*) any document other than those above mentioned; R.S.C., c. 165, s. 76.

It is not necessary to set out in the indictment a copy or fac-simile of the forged document; (see section 613, *post*); but the indictment should state what the instrument is in respect of which the forgery was committed; (64) and the instrument should be correctly described. For instance, if a bill of exchange is described as a promissory note, the indictment will be defective, unless amended. (65)

If the document be set out in the indictment, it should, when given in evidence, correspond exactly with that set out in the indictment, or the variance, if not amended, may be fatal. (66)

A mere literal variance, however, (that is, where the omission or addition of a letter does not alter or change a word, so as to make it another word), will not be material; (67) as, for instance, "receivd" for "received;" (68) "undertood" for "understood;" (69) "Messes" for "Messrs" (70) or the like.

Attaching to the paper or parchment, on which the indictment is written, impressions of forged notes taken from engraved plates, is not a legal mode of setting out the notes in the indictment. (71)

If the instrument forged be in a foreign language, it should, (if it be set out at all), be set out in that language, and a complete and accurate translation should also be set out. (72)

Counts under the repealed statute 2 and 3 W. 4, c. 123, s. 3, stating the plates to have engraved on them, in the Polish language, a promissory note for the payment of money, to wit, for the payment of five florins, purporting to be a promissory note for the payment of money of a certain foreign prince, without stating the English value, were held good after verdict, by virtue of 7 Geo. 4, c. 64, s. 21. (73)

PROOF. — That the signature or other part of the instrument alleged to be forged is not of the handwriting of the party may be proved by any person acquainted with his handwriting, either from having seen him write, or from being in the habit of corresponding with him. (74) It is sufficient,

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(64) R. v. Wilcox, R. & R., 50.
(65) R. v. Hunter, R. & R., 511; R. v. Birkett, R. & R., 251.
(66) R. v. Powell, 2 East, P. C., 976.
(67) R. v. Drake, 2 Stalk, 661.
(68) R. v. Hart, 1 Leach, 145; 2 East, P. C., 977.
(69) R. v. Beach, Cowp., 229.
(70) R. v. Oldfield, 1 Russ., 376.
(71) R. v. Harris, R. v. Moses, R. v. Balls, 7 C. & P., 429; R. v. Warshaner, 1 Mood. C. C., 466.
(72) See R. v. Szudurskie, 1 Mood. C. C., 419; R. v. Warshaner, Id., 466; R. v. Harris, 7 C. & P., 410, 429.
(73) R. v. Warshaner, R. v. Harris, *supra*.
(74) Garrells v. Alexander, 4 Esp., 37; Gould v. Jones, 1 W. Bl., 384; Harrington v. Fry, R. & M., 99; R. v. Horn Tooke, 25 How. St. Tr., 71, 72.

*prima facie*, to disprove his handwriting, and he need not be called to disprove an authority to others to use his name. (75)

The party himself whose name is forged may be a witness to prove the forgery. But the forgery may equally be proved by other witnesses who are acquainted with his handwriting, without calling him as a witness. (76)

By section 698, *post*, "Comparison of a disputed writing with any writing proved to the satisfaction of the Court to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute."

It seems that the disputed writing and the writing whose genuineness is proved should not be left to the jury direct, in order that by their own comparison of the two writings they may draw their own *unaided* conclusions, but that they must be assisted by the evidence of an expert.(77)

A person skilled in the detection of forgeries may be examined to prove that the writing is in a feigned hand, though he never saw the party write. (78)

On an indictment for uttering a forged will, which, it was alleged had been written over pencil marks, that had been rubbed out, it was held that the evidence of engravers, who had examined the paper with a mirror, and traced the pencil marks, was admissible for the prosecution. (79)

Evidence must also be given of the identity of the party whose handwriting is alleged to be forged; that is, it must be proved, expressly, or from circumstances, that the alleged forgery was intended to represent the handwriting of the person whose handwriting it is proved not to be; or that it was intended as the handwriting of a person who never existed.(80)

Where the defendant uttered a forged note, and said that it was drawn by W. H. of the Bull's Head, it was held to be sufficient to prove, that it was not of the handwriting of *that* W. H., although it appeared that there was another W. H. living in the neighborhood. (81)

It was at one time doubted whether the forgery, in England, of an instrument payable abroad, or the uttering, in England, of an instrument forged and payable abroad, was an offence within some of the repealed statutes; (82) although it was afterwards decided that it was. (83)

This doubt was removed by the Imperial Statute, 11 Geo. 4, and 1 Will. 4, c. 66, s. 30, which was re-enacted in section 40 of 24 and 25 Vic., c. 98; and our section 422, *ante*, expressly declares that the making of a false document is forgery, whether the person intended to be affected is within Canada or not; and section 424, *post*, which deals with uttering, says that it is immaterial where the document was forged.

No person accused of forgery, under section 423, can be convicted upon

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(75) R. v. Harley, 2 M. & Rob., 473.
(76) R. v. Hughes, 2 East, P. C., 1002; R. v. Macguire, Id., R. & R., 378.
(77) See R. v. Harvey, 11 Cox C. C., 546.
(78) R. v. Cator, 4 Esp., 117; 1 Esp., 14; Goodtitle v. Braham, 4 T. R., 497; Gurney v. Langlands, 5 B. & Ald., 330; R. v. Buckler, 5 C. & P., 118; Doe v. Suckermore, 5 A. & E., 703; 2 Nev. & Per., 16.
(79) R. v. Thomas Williams, 8 C. & P., 434.
(80) See R. v. Sponsonby, 2 East, P. C., 996, 997; R. v. Downes, *Id.*, 997.
(81) R. v. Hampton, 1 Mood. C. C., 255.
(82) R. v. Dick, 1 Leach, 68; R. v. McKay, R. & R., 71.
(83) R. v. Kirkwood, 1 Mood. C. C., 311.

the uncorroborated evidence of one witness. (See section 684, *post*). Where, on a charge of forgery, in addition to the evidence of one witness to the effect that the alleged forged documents were written by the accused, it was proved, by the same witness, that certain names in a book written in the same hand as the alleged forged documents were in the handwriting of the accused, it was held that this was not sufficient corroboration under section 684. (84)

**Forgery of bills of exchange, promissory notes, etc.** — (Sec. 423 A *r*). A bill payable ten days after sight purporting to be drawn upon the commissioners of the Navy, by a lieutenant, for the amount of certain pay due to him, has been held to be a bill of exchange. (85) And a note promising to pay A and B "*stewardesses*," of a Benefit Society, "*or their successors*," a certain sum, on demand, was held to be a promissory note, although the society was not duly enrolled according to law, it not being necessary that the note should be negociable. (86)

An instrument drawn by A on B requiring him to pay to the administrators of C a certain sum of money at a certain time, *without acceptance*, is a bill of exchange, and may be so described in the indictment. (87)

Even when there is no person named in the draft as drawee, the defendant may be indicted for uttering *a forged acceptance on a bill of exchange*. (88) But, it has been held that, such an instrument containing the name of no drawee and containing *no acceptance* was not a bill of exchange. (89) It has also been held that, where, at the time of forging an acceptance, the bill bore no signature of a *drawer*, it was not a bill of exchange. (90)

In the case of a document in the ordinary form of a bill of exchange, but requiring the drawee to pay to *his own* order, and purporting to be endorsed by the drawer and accepted by the drawer, it has been held that it could not, in an indictment for forgery, be treated as a bill of exchange. (91)

A seaman's advance note purporting to be signed by the master and owner, and in the following form, — "Ten days after the ship sails from the port of L., the undersigned hereby promise and agree to pay to any person who shall advance £4 to H., on this agreement, the sum of £4, provided that the said H shall sail in the said ship from the said port of L.," was held not to be a promissory note. (92)

But, although, in an indictment for forgery, a document like those above mentioned may not be properly described as a bill of exchange or promissory note, an indictment for the forgery of such a document would lie under clause C (*n*), which covers all documents not provided for by the other clauses of section 423; and, therefore, where there is any doubt as to the alleged forgery being a bill of exchange or a promissory note, a separate count should be framed describing or setting out the instrument so as to bring it within clause C (*n*).

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(84) R. v. McBride, 15 C. L. T., 274; 26 O. R., 639.
(85) R. v. Chisholm, R. & R., 297.
(86) R. v. Box, 6 Taunt., 325; R. & R., 300. See R. v. McKeny, 1 Mood. C. C., 130.
(87) R. v. Kinnear, 2 M. & Rob., 117.
(88) R. v. Hawkes, 2 Mood. C. C., 60.
(89) R. v. Curry, 2 Mood. C. C., 218.
(90) R. v. Mopsey, 11 Cox C. C., 143. See, also, R. v. Harper, 7 Q. B. D., 78; 50 L. J. (M. C.), 90.
(91) R. v. Bartlett, 2 M. & Rob., 362.
(92) R. v. Howie, 11 Cox C. C., 320.

An instrument payable to the order of A., and directed "At Messrs. P. & Co., Bankers," was held to be properly described as a bill of exchange. (93)

The adding of a false address to the name of the drawee of a bill, while the bill is in course of completion, in order to make the acceptance appear to be that of a different existing person, was held to be a forgery. (94) And so was the adding of an address to a bill so as to make it appear that the acceptance, though written by a person of the same name, is that of a different person, whether such person existed or not. (95)

An indictment charged that the defendant forged "a certain endorsement *of*" a bill of exchange, "which said forged endorsement" was as follows: — "Magdalene Isherwood;" and the bill as set out in the indictment and as proved in evidence was payable to four persons (of whom Magdalene Isherwood was one), as joint executrices. *Held*, by all the judges, that the indictment was sufficient, and that the charge was proved. (96)

**Deeds, bonds, debentures, etc.** — (Section 423 A *n*). A power of attorney to transfer government stock has been held to be a deed. (97) But, the forging of such a power of attorney is the subject of a distinct provision contained in clause A (*o*) of section 423, *ante*.

The giving of an administration bond, in a false name, is a forgery. (98)

**Warrants or orders, etc., for money, etc.** — (Section 423 A *n*). It is not necessary that a document, in order to constitute it a warrant or order for the payment of money, should appear to be so on its face. It is sufficient if the party to whom it is addressed has been in the habit of treating similar documents as warrants, etc., for the payment of money. Therefore, a document in the form of a mere receipt, given by a depositor to a building society that received money on deposit, may properly be described in an indictment, as a warrant for payment of money, if, by the custom of the society, such receipts are, in fact, treated as warrants for the payment of money. (99)

A draft upon a banker has been held to be a warrant and order for the payment of money, (100) although post-dated. (101) So, was even a bill of exchange; (102) and an order to pay "all my prize money due to me for my services on board His Majesty's Ship *Leander*," without specifying any particular sum. (103)

Where the instrument was an order to pay the prisoner, or order, the sum of £4. 5s. being a month's advance on an intended voyage to Quebec in the ship "Mary Ann" as per agreement with G. M., master; and the prisoner had written in the margin of the order, "On receiving this cheque I agree to sail, and to be on board within sixteen days from the date of this cheque;" it was held an order for the payment of money. (104)

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(93) R. v. Sidney Smith, 2 Mood. C. C., 295. See Gray v. Milner, 8 Taunt., 739.

(94) R. v. Blenkinsop, 1 Den., 275; 2 C. & K., 531; 17 L. J. (M. C.), 62.

(95) R. v. Epps, 4 F. & F., 85.

(96) R. v. Winterbottom, 1 Den., 41; 2 C. & K., 37; Arch. Cr. Pl. & Ev., 21st Ed., 667.

(97) R. v. Fauntleroy, 1 Mood. C. C., 52; 2 Bing., 413; 1 C. & P., 421.

(98) R. v. Barber, 1 C. & K., 434.

(99) R. v. Kay, L. R., 1 C. C. R., 257; 39 L. J. (M. C.), 118.

(100) R. v. Willoughby, 2 East, P. C., 944.

(101) R. v. Taylor, 1 C. & K., 213.

(102) R. v. Sheppard, 1 Leach, 226; R. v. Smith, 1 Den., 79.

(103) R. v. McIntosh, 2 East, P. C., 942.

(104) R. v. Bamfield, 1 Mood. C. C., 417. See R. v. Anderson, 2 M. & Rob., 469; and R. v. Howie, 11 Cox C. C., 320.

A foreign letter requesting a correspondent in Eng'and to advance money, it being proved that such letters are, in the course of business, treated as orders, was held to support a charge of forging an order for the payment of money. (105)

A writing, purporting to authorize the bearer to receive money deposited in a bank by a friendly society, and purporting to be signed by the principal officers of the society, (the bank having received the money on terms of repayment to the order of the society), was held to be well described as a warrant for the payment of money, and it was held no objection that the defendant was himself a member of the society. (106)

A forged paper was as follows: — "This is to certify R. R. has swept flues and cleaned the bilges, and repaired four bridges of the *Princess Victoria*. J. N. £4. 0s. 10;" and it was proved that, by the course of dealing between the parties, this voucher, if genuine, would have authorized L. & Co. to pay the £4. 0s. 10. *Held*, sufficient to support an indictment charging it as a warrant for the payment of money. (107) But a paper reading as follows: — "I hereby certify that the within named W. M. is gaining his living by hawking," the production of which was necessary to enable the defendant to obtain payment of a sum of money, — was held not to be a warrant or order for the payment of money, and to be the subject only of forgery at common law. (108)

Money orders issued by the Post-Office have been held to be warrants and orders for the payment of money. (109)

A writing in the form of a bill of exchange but without any drawee's name cannot be charged as an order for the payment of money; at least unless shewn by averments to be such. (110)

A forged draft on a banker, in a fictitious name, or in the name of a person who never kept cash with the banker is a warrant or order for the payment of money; for it imports, upon the face of it, to be an order by a person having authority to make it. (111)

A forged draft in the name of a person who *does* keep cash with the banker is an order, whatever be the state of that person's account at the time. (112)

Where, on the contrary, a man obtains goods upon his own draft on a banker, with whom he *does not* keep cash, the proper mode of proceeding against him criminally is by indictment for the false pretence. (113)

The cases on this subject were all considered by the judges in R. v. Vivian, (114) in which they laid down the principle that any instrument for the payment of money under which, if genuine, the payee might receive the amount against the party signing it, might properly be considered as a *warrant* for the payment of money; and that it was equally such, whatever were the state of account between the parties, and whether the party purporting to sign it had at the time funds in the hands of

(105) R. v. Raake, 2 Mood. C. C., 66; 8 C. & P., 626.
(106) R. v. Harris, 2 Mood. C. C., 267; 1 C. & K., 179.
(107) R. v. Rogers, 9 C. & P., 41.
(108) R. v. Mitchell, 2 F. & F., 44.
(109) R. v. Gilchrist, 2 Mood. C. C., 233; C. & Mar., 224.
(110) R. v. Curry, 2 Mood. C. C., 218.
(111) R. v. Lockett, 2 East, P. C., 840; 1 Leach, 94; R. v. Abraham, 2 East, P. C., 941.
(112) R. v. Carter, 1 Den. C. C., 65; 1 C. & K., 741.
(113) See R. v. Lara, 6 T. R., 565; R. v. Flint, R. & R., 460; R. v. Jackson, 3 Camp., 370; and see p. 404, *ante*.
(114) R. v. Vivian, 1 C. & K., 719.

the party to whom it was addressed or not. In that case, the forged instrument was as follows: — "Mr. M. will be pleased to send by the bearer £10 on Mr. H's account, as Mr. H. is very bad in bed, and cannot come himself." Signed "M. R., foreman, St. A. foundry." M. was a clerk of bankers, with whom H. kept an account, and by drafts on whom he paid his workmen. M. R. was H's foreman, having authority to pay the workmen, but not to draw for the money. H. being ill in bed, the defendant forged this paper in M. R's name, and obtained the £10 from M. by menas of it. Although M. R. had, himself, no account with the bankers, the defendant was held properly convicted; because by the instrument, if genuine, M. R. said in effect that he had authority from H., who had an account with the bankers; and as against him (M. R.), therefore, it was as much a warrant as if he himself had such account, and would equally have bound him.

It has been held that a warrant for the payment of money need not be addressed to a particular person; but, that it was sufficient if it would, if genuine, have been an authority to a certain person to pay the amount mentioned in it; (115) and, where the forged instrument was thus, "Sir, please pay," etc., it was held that it might be shewn by evidence to be an order for the payment of money, and for whom it was intended. (116)

A written promise to pay a specified sum or such other sum not exceeding the same, as A. B. may incur by reason of his suretyship is an *undertaking* for the payment of money. (117) So, also, is a document purporting to guarantee a master a certain amount in money against the dishonesty of a clerk; (118) and so is an I.O.U. given by a debtor to his crediter, to obtain further time for payment of the debt, to which I.O.U. the debtor affixes, besides his own signature, a forged signature of a third party as surety. (119)

A sailor's *shipping note* purporting to be signed by the master, and reading as follows: — "In consideration of F. sailing as steward in the brig K. from the port of L., I undertake to pay to F., or bearer, £2, five days after the said brig shall sail from the said port," is an *undertaking*. (120)

**Accountable receipts.** — (Section 423 *e*). It has been held that a pawnbroker's ticket or duplicate is an accountable receipt for goods. (121)

If a person with intent to defraud and to cause it to be supposed, contrary to the fact, that he has paid a certain sum into a bank, make in a book, purporting to be a pass-book of the bank, a false entry, which denotes that the bank has received the sum, he is guilty of forging an accountable receipt for money. (122)

**Warrants for the delivery of goods, etc.** — At the London docks a person bringing a "*tasting order*" from a merchant having wine there, is not allowed to taste until the order has across it the signature of a clerk of the company. The defendant uttered a tasting order with the merchant's name forged to it by presenting it to the company's clerk for his signature across it, which the clerk refused. It was held to be, in this state, a forged order for the delivery of goods. (123)

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(115) R. v. Rogers, 9 C. & P., 41.
(116) R. v. Snelling, Dears., 219; 23 L. J. (M. C.), 8.
(117) R. v. Reed, 2 Mood. C. C., 62; 8 C. & P., 623.
(118) R. v. Joyce, L. & C., 576; 34 L. J. (M. C.), 168.
(119) R. v. Chambers, L. R., 1 C. C. R., 341; 41 L. J. (M. C.), 15.
(120) R. v. Anderson, 2 M. & R., 469. See, also, R. v. Howie, 11 Cox C. C., 320; and R. v. Bamfield, 1 Mood. C. C., 417.
(121) R. v. Fitchie, Dears. & B., 175; 26 L. J. (M. C.), 90.
(122) R. v. Moody, L. & C., 173; 31 L. J. (M. C.), 156; R. v. Smith, L. & C., 168; 31 L. J. (M. C.), 154.
(123) R. v. Illidge, 1 Den. C. C., 404; 2 C. & K., 871.

An order "to deliver my work to bearer" (and which, in evidence, was explained to mean an order to Goldsmith's Hall to deliver certain plate which a silversmith had sent there to be marked), was held to be a warrant or order for the delivery of goods. (124)

**Requests for payment of money, or delivery of goods, etc.** — (Section 423, C *j*). It has been held that, a *request* for the delivery of goods need not be addressed to any one; (125) and, that it need not be signed by a person who can compel a performance of it, or who has any authority over or interest in the goods. (126)

Where the prisoner represented that M. C. was dead, and had left £50 or £60, which was in the hands of A. D., and that he wanted mourning, and brought a forged paper purporting to be signed by A. D., and containing the following: — "Please let W. T. have such things as he wants for the purpose; I have got the amount of £27 for M. C. in my keeping these many years," — it was held to be a forged request for goods. (127)

A paper which contained the following: — "Please let the lad have a hat, and I will answer for the money. E. B." — was held to be a *request* for the delivery of goods; and, it was also held that, it was not less a forged request for the delivery of goods because it might also be a forged *undertaking* for the payment of money. (128)

A letter written to a wholesale house in London in the name of a customer in the country, as follows: — "I shall feel obliged by your paying Mr. B. the sum of £2 7s. 8d., and debiting me with the same; you will please have a receipt, and add the amount to invoice of order on hand," — was held to be a request for the payment of money. (129)

**Acquittances, receipts, etc.** — (Section 423 C *k*). The difference between the receipts covered by this clause and the accountable receipts or acknowledgements dealt with in clause A (*e*) seems to be this, that, in the one case (clause A *e*) the receipt is for money or goods deposited with and left in charge of the person receiving the same, and to be accounted for, while, in the other, it is merely a receipt for money or goods in the nature of an acquittance or discharge. For instance, when A, a banker, receives a deposit of money from B, a depositor, A's receipt is an accountable receipt for money which he takes charge of for B, to whom he must account for it; but, when B, in afterwards withdrawing the money so deposited with A gives a receipt for it, B's receipt is then a mere acquittance or discharge.

A turnpike toll-gate ticket is a receipt for money. (130)

Where it was shewn to be the custom of bankers to give, on deposits of money, receipts in the following form, — "Received of A B £85 to his credit. This receipt not transferable;" and, to repay the same with interest, on the return of the receipt with a name written on it; it was held that, the forging the name of A B, and receiving the money due, on its return, was a forging and uttering of an acquittance for the £85 and interest. (131)

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(124) R. v. Jones, 1 Leach, 53.
(125) R. v. Carney, 1 Mood. C. C., 351; R. v. Cullen, 1 Mood. C. C., 300; R. v. James, 8 C. & P., 292; R. v. Pulbrook, 9 C. & P., 37.
(126) R. v. Thomas, 2 Mood. C. C., 16.
(127) R. v. Thomas, 7 C. & P., 851.
(128) R. v. White, 9 C. & P., 282.
(129) R. v. Thorn, 2 Mood. C. C., 210; C. & Mar., 206. See, also, R. v. Roberts, 2 Mood. C. C., 258; C. & Mar., 652.
(130) R. v. Fitch, R. v. Howley, L. & C., 159.
(131) R. v. Atkinson, 2 Mood. C. C., 215; C. & Mar., 325.

**424. Uttering forged documents.** — Every one is guilty of an indictable offence who, knowing a document to be forged, uses, deals with, or acts upon it, or *attempts to use*, deal with, or act upon it, or causes or *attempts to cause* any person to use, deal with, or act upon it, as if it were genuine, and is liable to the same punishment as if he had forged the document.

2. It is immaterial where the document was forged.

The mere shewing of a forged *receipt* to a person with whom the defendant was claiming credit for it has been held to be an uttering, although the defendant refused to part with the possession of it. (132)

Where a pawnbroker, upon the hearing of an application against him under 39 and 40 Geo. 3, c. 99, s. 14, to compel him to deliver up goods pledged with him, (the money advanced, with interest, having been repaid) produced and delivered to the magistrates, through the hand of his attorney, a forged duplicate, as the genuine one which he had given when the goods were pledged, and which he had received back when the money was repaid, it was held to be an uttering by the pawnbroker. (133)

A placed a forged receipt for poor-rates in the hands of B, for the purpose of inspection only, in order by representing himself as a person whose poor-rates were paid, to fraudulently induce B to advance money to C, for whom he, A, proposed to become surety for its repayment. *Held*, to be an uttering; the rule there laid down by the Court being that a using of the forged instrument in some way, in order to get money or credit on it, *or by means of it*, is sufficient to constitute the offence of uttering. (134)

On an indictment for uttering forged bonds in England, it was held that, such uttering was sufficiently proved by evidence of the bonds having been posted in England to a firm at Brussels for negociation. (135)

The giving of a forged note to an innocent agent, or to an accomplice is a disposing of and putting away of the note. (136)

Where several, by concert, were privy to the uttering of a forged note, which was uttered by one only in the absence of the others, he who uttered it was held to be a principal, and the others, accessories before the fact. (137) But, now, they would all be principals. (See sections 61 and 62, pp. 56 and 57, *ante*.)

A *conditional* uttering is as much a crime as any other. Where the defendant gave a forged acceptance, knowing it to be so, to the manager of a bank where he kept an account, saying that he hoped this bill would satisfy the bank as a security for the money he owed them, and the manager replied that that would depend on the result of enquiries as to the acceptors; this was holden a sufficient guilty uttering. (138)

The using, dealing with or acting upon the document knowing it to be a forgery constitutes the offence, under this section, 424.

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(132) R. v. Radford, 1 Den., 59; 1 C. & K., 707.
(133) R. v. Fitchie, Dears. & B., 175; 26 L. J. (M. C.), 90.
(134) R. v. Ion, 2 Den., 475; 23 L. J. (M. C.), 166.
(135) R. v. Finkelstein, 15 Cox C. C., 107.
(136) R. v. Palmer, 1 N. R., 93; R. & R., 72; R. v. Giles, 1 Mood. C. C., 166.
(137) R. v. Soares, R. & R., 25; R. v. Badcock, R. & R., 249; R. v. Stewart, R. & R., 363; R. v. Davis, R. & R., 113; R. v. Morris, R. & R., 270; 2 Leach, 1096; R. v. Harris, 7 C. & P., 416.
(138) R. v. Cooke, 8 C. & P., 582.

The guilty knowledge of the document being forged is, in nearly all cases, proved by evidence of facts from which the jury may presume it.

Upon an indictment for uttering a forged bank-note, knowing it to be forged, proof that the defendant had passed other forged notes, when proved by legitimate evidence, was held to raise a probable presumption that he knew the particular note in question to be forged. (139) And, if, in addition to this, it be proved also that the defendant, when he passed the notes, gave a false name or a false address, it will amount to a violent presumption.

Even where the uttering by the defendant of other forged notes is the subject of a distinct indictment, the evidence has been admitted. In one case, in which authorities against the admissibility of such evidence were cited, Lord Denman, C. J., said, that he "could not conceive how the relevancy of the fact to this charge could be affected by its being the subject of another charge." (140)

In another case, Alderson, B., admitted such evidence. (141)

On an indictment for engraving or uttering notes of a foreign prince, evidence of a recent engraving or uttering of notes of another foreign prince was held admissible in proof of guilty knowledge. (142)

Where it appeared that the defendant sold a forged note to an agent employed by the bank to procure it from him, the judges held him rightly convicted, although it was objected that the defendant was solicited to commit the act by the bank themselves by means of their agents. (143)

See section 431, *post*, and comments thereunder.

**425. Counterfeiting public seals.** — Every one is guilty of an indictable offence and liable to imprisonment for life who unlawfully *makes or counterfeits* any public seal of the United Kingdom or any part thereof, or of Canada or any part thereof, or of any dominion, possession or colony of Her Majesty, or the impression of any such seal, or *uses* any such seal or impression, knowing the same to be so counterfeited. R.S.C., c. 165, s. 4.

The words "His Majesty" should be substituted for "Her Majesty" in this section. (See section 7 of the *Interpretation Act*, at p. 9, *ante*.)

**426. Counterfeiting seals of courts, registry offices, etc.** — Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who unlawfully *makes or counterfeits* any seal of a court of justice, or any seal of or belonging to any registry office or burial board, or the impression of any such seal, or *uses* any such seal or impression knowing the same to be counterfeited. R.S.C., c. 165, ss. 35, 38 and 43.

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(139) R. v. Millard, R. & R., 245; R. v. Moore, 1 F. & F., 73; R. v. Wylie, 1 N. R., 92; R. v. Tattersal, 1 N. R., 94; R. v. Ball, 1 Camp., 324; R. & R., 132; R. v. Hough, R. & R., 120; R. v. Green, 3 C. & K., 209; R. v. Salt, 3 F. & F., 834; R. v. Colclough, 15 Cox C. C., (Ir. C. C. R.), 92.

(140) R. v. Cadwallader, Lewis, Carnarvon Sum. Ass., 1840.

(141) R. v. Acton, 1 Russ., 407. See, also, R. v. Foster, Dears., 456; 24 L. J. (M. C.), 134.

(142) R. v. Balls, 1 Mood. C. C., 470; 7 C. & P., 429.

(143) R. v. Holden, 2 Taunt., 334; R. & R., 154.

**427. Unlawfully printing proclamation, etc.** — Every one is guilty of an indictable offence and liable to seven years' imprisonment who prints any proclamation, order, regulation or appointment, or notice thereof, and causes the same falsely to purport to have been printed by the Queen's Printer for Canada, or the Government Printer for any province of Canada, as the case may be, or tenders in evidence any copy of any proclamation, order, regulation or appointment which falsely purports to have been printed as aforesaid, knowing that the same was not so printed. R.S.C., c. 165, s. 37.

The words "King's Printer" should be substituted for "Queen's Printer" in this section. (See section 7 of the *Interpretation Act*, at p. 9, *ante*.)

**428. Sending telegrams in false name.** — Every one is guilty of an indictable offence who *with intent to defraud*, causes or procures any telegram to be sent or delivered as being sent by the authority of any person, knowing that it is not sent by such authority, with intent that such telegram should be acted on as being sent by that person's authority, and is liable, upon conviction thereof, to the same punishment as if he had forged a document to the same effect as that of the telegram.

**429. Sending false telegrams, or letters.** — Every one is guilty of an indictable offence and liable to two years' imprisonment who, with intent to injure or alarm *any person*, sends, causes, or procures to be sent any telegram or letter or other message containing matter which he knows to be false.

**430. Possessing forged bank notes.** — Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, without lawful authority or excuse (the proof whereof shall lie on him), purchases or receives from any person, or *has in* his custody or *possession*, any forged bank note, or forged blank bank note, whether complete or not, knowing it to be forged. R.S.C., c. 165, s. 19.

For definition of *having in possession*, see section 3 (*k*), *ante*, p. 3.

**431. Drawing document without authority.** — Every one is guilty of an indictable offence who, *with intent to defraud* and without lawful authority or excuse, makes or executes, draws, signs, accepts or endorses, in the name or on the account of another person, *by procuration or otherwise*, ANY DOCUMENT, or makes use of or utters any such document knowing it to be so made, executed, signed, accepted or endorsed, and is liable to the same punishment as if he had forged such document. R.S.C., c. 165, s. 30.

For definition of "*document*" see section 419, *ante*.

This section, 431, creates two substantive and distinct offences, namely, 1, the making and signing of a document in the name of another, by proc-

uration, without lawful authority or excuse, and with intent to defraud, and, 2, the using or uttering of such document knowing it to have been so made and signed.

An indictment may be laid under this section for unlawfully and with intent to defraud making and signing a promissory note by procuration in the name of a testamentary succession or of an estate in liquidation, (*e. g.*, "Estate John Doe"), but, if the indictment does not disclose the names and capacities of the persons representing the succession or estate at the time when the offence was committed, an order will, in confirmity with the proviso of section 613, *post*, be made against the Crown to furnish these particulars and directing that the defendants be arraigned only after the particulars have been delivered. (144)

An indictment, in a first count, charged the defendants with having, without lawful authority or excuse, and with intent to defraud, made and signed, in the name of the estate F. X. Beaudry, "by procuration, William Weir," one of the defendants, a promissory note in favor of the Ville Marie Bank, for the sum of $4,266.21, and, in a second count charged them with having, with intent to defraud, unlawfully made use of and uttered the said promissory note so made and signed by procuration. It appeared that William Weir was the president and the other defendants were directors of the Ville Marie Bank, that the promissory note in question was said to have been drawn and signed by William Weir, by procuration, without any authority and with intent to defraud, and that the other defendants abetted him in doing so, and that the promissory note was then uttered by all of them, jointly, by being passed to the debit of the account of "current loans" in the books of the bank. Two of the defendants moved to quash the second count of the indictment on the ground that it failed to state the commission of an indictable offence by omitting one of the essential elements of the crime of uttering a forged instrument, namely, the guilty knowledge of the utterers that the instrument made use of and uttered had been forged, or, as in the present case, that it had been made and signed by procuration without lawful authority or excuse and with intent to defraud. *Held*, — quashing the said second count, — that, in the crime of uttering a forged instrument, knowledge by the utterer of the instrument uttered being forged, and being made with intent to defraud is an essential element, that, without such guilty knowledge, the making use of or uttering of a false instrument is no crime, and that, in the present case, the second count omitted to allege that the defendants made use of or uttered the promissory note, in question, knowing it to have been made and signed by procuration without lawful authority or excuse and with intent to defraud. (145)

**432. Using any forged instrument, or any probate obtained by forgery or perjury.** — Every one is guilty of an indictable offence and liable to fourteen years' imprisonment, who —

(*a*) demands, receives, obtains or causes, or procures to be delivered or paid to *any person* anything under, upon, or by virtue of *any forged instrument* knowing the same to be forged, *or* under, upon, or by virtue of *any probate or letters of administration*, knowing the will, codicil, or testamentary writing on which such probate or letters of administration were obtained to be forged, or knowing the probate or letters of administration to have been obtained by any false oath, affirmation, or affidavit; or

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(144) R. v. Weir and others, 3 Can. Cr. Cas., 155.
(145) R. v. Weir et al, Que. Jud. Rep., 9 Q. B., 253.

(*b*) attempts to do any such thing as aforesaid. R.S.C., c. 165, s. 45.

The Imperial Statute, 24-25 Vic., c. 98, s. 38, is to the same effect as this section, except that it contains the words "*with intent to defraud.*"

## PART XXXII.

## PREPARATION FOR FORGERY AND OFFENCES RESEMBLING FORGERY.

**433. Interpretation of terms.** — In this part the following expressions are used in the following senses:

(*a*) "Exchequer bill paper" means any paper provided by the proper authority for the purpose of being used as exchequer bills, exchequer bonds, notes, debentures, or other securities mentioned in section four hundred and twenty;

(*b*) "Revenue paper" means any paper provided by the proper authority for the purpose of being used for stamps, licenses, or permits, or for any other purpose connected with the public revenue.

**434. Instruments of forgery.** — Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, *without lawful authority or excuse* (the proof whereof shall lie on him) —

(*a*) makes, begins to make, uses or knowingly has in his possession, any machinery or instrument or material for making exchequer bill paper, revenue paper or paper intended to resemble the bill paper of any firm or body corporate, or person carrying on the business of banking. R.S.C., c. 165, ss. 14, 16, 20 and 24; or

(*b*) engraves or makes upon any plate or material anything purporting to be, or apparently intended to resemble, the whole or any part of any exchequer bill or bank note. R.S.C., c. 165, ss. 20, 22 and 24; or

(*c*) uses any such plate or material for printing any part of any such exchequer bill or bank note. R.S.C., c. 165, ss. 22 and 23; or

(*d*) knowingly has in his possession any such plate or material as aforesaid. R.S.C., c. 165, ss. 22 and 23; or

(*e*) makes, uses or knowingly has in his possession any exchequer bill paper, revenue paper, or any paper intended to resemble any bill paper of any firm, body corporate, company, or person, carrying on the business of banking, or any paper upon which is written or printed the whole or any part of any exchequer bill, or of any bank note. R.S.C., c. 165, ss. 15, 16, 20 and 24.

(*f*) engraves or makes upon any plate or material anything intended to resemble the whole or any distinguishing part of any bond or undertaking for the payment of money used by any dominion, colony or possession of Her Majesty, or by any foreign prince or state, or by any body corporate, or other body of the like nature, whether within Her Majesty's dominions or without. R.S.C., c. 165, s. 25; or

(*g*) uses any such plate or other material for printing the whole or any part of such bond or undertaking. R.S.C., c. 165, s. 25; or

(*h*) knowingly offers, disposes of or has in his possession any paper upon which such bond or undertaking, or any part thereof, has been printed. R.S.C., c. 165, s. 25.

The words "His Majesty" and "His Majesty's dominions" should be substituted for "Her Majesty" and "Her Majesty's dominions" in this section. (See section 7 of the *Interpretation Act*, at p. 9, *ante*.)

Before a forged note was first presented at the Bank of England, that establishment had freely circulated its notes for more than sixty years; no attempt to imitate its paper being made during all that time.

The man who led the van in this line of wrong doing was Richard William Vaughan, a linen draper, in 1758.

After the Vaughan forgeries, came those of a clever engraver named John Mathison. He forged a number of Bank of England notes; the paper, engraving, water-mark and general appearance of the counterfeits being superior almost to the genuine notes. He was ultimately detected and made a full confession, in which he said he could make a whole note in one day. He offered to explain the secret of his discovery of the water-mark, provided the bank officials would intercede with the Government to spare his life; but, his offer was rejected, and he was executed.

From 1797, executions for forgery of £1 notes increased to an alarming extent. During the six years prior to the issue of £1 notes there was but one capital conviction for counterfeiting. During the four following years there were eighty-five offenders convicted of the offence, and executed.

This enormous increase produced enquiry, which resulted in the passing of an Act, by which the most stringent penalties were provided.

This endeavor to repress crime fell far short of success, owing, as has been well said, "to the great truth that punishment is not a sufficient preventative of crime; but, that to teach men to be good is more effectual than to punish them for being bad."

At the beginning of the last century, Mr. Robert Astlett, the cashier of the Bank of England, was discovered to have perpetrated upon the bank a very serious fraud. It appears that Astlett had been in sole charge of all exchequer bills brought to the bank, and it was his duty to deliver them in person to the directors who counted them and gave Astlett a receipt. The prisoner had led the directors to believe that he had handed them bills to the amount of £700,000 when in fact he had only delivered to them, £500,000. So completely did the cashier deceive the directors that two of them by their signatures vouched for the delivery of the larger amount.

Astlett was in the first instance tried for the felonious embezzlement of three exchequer bills for £1000 each; but, by means of a technicality, he was acquitted. He was afterwards tried for his other thefts, and convicted. The total loss sustained by the Bank of England by Astlett's thefts amounted to £320,000.

The Bank of England also lost £360,000 by the Fauntleroy forgeries.

Henry Fauntleroy was a partner in a private banking house, and joint trustee in an account with some other gentlemen in the Imperial three per cents. He forged, for the sale of these, a power of attorney, which passed the ordeal of the bank examinations. In the management of the trust some difficulties arose; and the only plan which could save the executors was to throw the property into chancery. Fauntleroy strenuously objected. In the course of the dispute, one of the trustees visited the bank and learned the fearful intelligence which first led to the discovery of a series of forgeries, so gigantic and unparalleled in their nature, as to border on the regions of fiction.

Fauntleroy was arrested; and among his papers was found this unique document:

"In order to keep up the credit of our house, I have forged powers of attorney, and have, thereupon, sold out all these sums, without the knowledge of my partners. I have given credit in the accounts for interest when it became due. The Bank of England first began to refuse our acceptances, and thereby destroyed the credit of our house. The Bank shall smart for it."

Fauntleroy was tried, convicted and expiated his crime at Newgate amidst thousands of spectators.

Forgeries still continued, and executions occurred weekly. In April 1820, forty persons were held in London for counterfeiting, and men were hung in strings. From one or two manufactories issued most of the forged notes which were in circulation. The manufacturer of thousands of notes remained unmolested, while the utterer of one was hanged. The forgeries were sold to ignorant, uneducated men, for a few shillings in the pound; and there was always a sufficient number, urged by want, desire, or vice, to run the risk which attended the uttering of them.

It was eventually found that to prevent a crime was better than to punish it. Capital punishment for forgery and counterfeiting was abolished; and education, intelligence, and the adoption of a note almost impossible to imitate, have now rendered the forgery of Bank of England notes almost impossible. (1)

**435. Counterfeiting stamps, etc.** — Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who —

(*a*) *fraudulently* counterfeits any stamp, whether impressed or adhesive, used for the purposes of revenue by the Government of the United Kingdom or of Canada, or by the Government of any province of Canada, or of any possession or colony of Her Majesty, or by any foreign prince or state; or

(*b*) *knowingly* sells or exposes for sale, or utters or uses any such counterfeit stamp; or

(*c*) *without lawful excuse* (the proof whereof shall lie on him) makes, or has knowingly in his possession, any die or instrument capable of making the impression of any such stamp as aforesaid, or any part thereof; or

(*d*) *fraudulently* cuts, tears or in any way removes from any ma-

(1) Francis' Hist. Bk. of Eng., 155, 167.

terial any such stamp, with intent that any use should be made of such stamp or of any part thereof; or

(*e*) *fraudulently* mutilates any such stamp with intent that any use would be made of any part of such stamp; or

(*f*) *fraudulently* fixes or places upon any material, or upon any such stamp, as aforesaid, any stamp or part of a stamp which, whether fraudulently or not, has been cut, torn, or in any other way removed from any other material or out of or from any other stamp; or

(*g*) *fraudulently* erases, or otherwise, either really or apparently, removes, from any stamped material any name, sum, date, or other matter or thing thereon written, with the intent that any use should be made of the stamp upon such material; or

(*h*) *knowingly and without lawful excuse* (the proof whereof shall lie upon him) has in his possession any stamp or part of a stamp which has been fraudulently cut, torn, or otherwise removed from any material, or any stamp which has been fraudulently mutilated, or any stamped material out of which any name, sum, date, or other matter or thing has been fraudulently erased or otherwise, either really or apparently, removed. R.S.C., c. 165, s. 17; or

(*i*) *without lawful authority* makes or counterfeits any mark or brand used by the Government of the United Kingdom of Great Britain and Ireland, the Government of Canada, or the Government of any province of Canada, or by any department or officer of any such Government for any purpose in connection with the service or business of such Government, or the impression of any such mark or brand, or sells or exposes for sale or has in his possession any goods having thereon a counterfeit of any such mark or brand knowing the same to be a counterfeit, or affixes any such mark or brand to any goods required by law to be marked or branded other than those to which such mark or brand was originally affixed.

Section 7 of the Imperial *Post-Office Protection Act, 1884*, imposes a penalty upon any person who, "unless he shews a lawful excuse," has in his possession any die for making any fictitious stamp. The respondent in an appeal case had, in his possession, without the license or authority of the Crown, a die which was capable of making a representation of a current colonial postage stamp. This die was made abroad; and the only purpose, for which the respondent had it in his possession, was for making up illustrations of the stamp in question to appear with illustrations of other stamps in an illustrated stamp catalogue for sale to stamp collectors. The die was capable of making a fictitious stamp, but, the facts proved shewed absolute *bona fides* on the part of the respondent, and that there was a certainty that he would not use the die for any improper purpose. *Held*, however, that the circumstances under which the respondent had the die in his possession did not constitute a "lawful excuse," and that he was, therefore, liable to the penalty imposed by the statute. (2)

(2) Dickins (App.) v. Gill, (Resp.), 18 Cox C. C., 384.

**436. Falsifying registers.** — Every one is guilty of an indictable offence and liable to fourteen years' imprisonment, who —

(*a*) *unlawfully* destroys, defaces or injures any register of births, baptisms, marriages, deaths or burials required or authorized by law to be kept in Canada, or any part thereof, or any copy of such register, or any part thereof required by law to be transmitted to any registrar or other officer; or

(*b*) *unlawfully* inserts in any such register, or any such copy thereof, any entry, known by him to be false, of any matter relating to any birth, baptism, marriage, death or burial, or erases from any such register or document any material part thereof. R.S.C., c. 165, ss. 43 and 44.

Where a person, knowing his name to be A., signed, in the register, another name as a witness to a marriage, it was held, under the Imperial Statute (24-25 Vic., c. 98, s. 36), corresponding with the foregoing section, that he was guilty of inserting a false entry in the register. (3)

It has been held that, it is not less a "destroying, defacing or injuring" of a register, because the register, when produced in evidence has the torn part pasted in, and is as legible as before. (4)

Where a false entry had been actually made in a register of births, etc., on the information of the defendant, he was held under section 43 of 6 and 7 Will. 4, c. 86, (re-enacted in the 24 and 25 Vic., c. 98, s. 36), to be thereby guilty of the offence of causing the false entry to be made. (5)

**437. Falsifying extracts from registers.** — Every one is guilty of an indictable offence and liable to ten years' imprisonment, who —

(*a*) being a person authorized or required by law to give any certified copy of any entry in any such register as in the last preceding section mentioned, certifies any writing to be a true copy or extract, knowing it to be false, or knowingly utters any such certificate;

(*b*) *unlawfully* and for any *fraudulent* purpose takes any such register or certified copy from its place of deposit or conceals it;

(*c*) being a person having the custody of any such register or certified copy, permits it to be so taken or concealed as aforesaid. R.S.C., c. 165, s. 44.

**438. Uttering false certificates.** — Every one is guilty of an indictable offence and liable to seven years' imprisonment, who —

(*a*) being by law required to certify that any entry has been made in any such register as in the two last preceding sections mentioned makes such certificate *knowing* that such entry has not been made; or

(3) R. v. Asplin, 12 Cox C. C., 391.
(4) R. v. Bowen, 1 Den., 22.
(5) R. v. Mason, 2 C. & K., 622; R. v. Dewitt, 2 C. & K., 905.

(*b*) being by law required to make a certificate or declaration concerning any particular required for the purpose of making entries in such register *knowingly* makes such certificate or declaration containing a falsehood; or

(*c*) being an officer having custody of the records of any court, or being the deputy of any such officer, *wilfully* utters a false copy or certificate of any record; or

(*d*) not being such officer or deputy *fraudulently* signs or certifies any copy or certificate of any record, or any copy of any certificate, as if he were such officer or deputy. R.S.C., c. 165, ss. 35 and 43.

**439. Forging certificates.** — Every one is guilty of an indictable offence and liable to two years' imprisonment, who —

(*a*) being an officer required or authorized by law to make or issue any certified copy of any document or of any extract from any document *wilfully* certifies, as a true copy of any document or of any extract from any such document, any writing which he knows to be untrue in any material particular; or

(*b*) not being such officer as aforesaid *fraudulently* signs or certifies any copy of any document, or of any extract from any document, as if he were such officer.

**440. Making false entries in books relating to public funds.** — Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, *with intent to defraud* —

(*a*) makes any untrue entry or any alteration in any book of account kept by the Government of Canada, or of any province of Canada, or by any bank for any such Government, in which books are kept the accounts of the owners of any stock, annuity or other public fund transferable for the time being in any such books, or who, in any manner *wilfully* falsifies any of the said books; or

(*b*) makes any transfer of any share or interest of or in any stock, annuity or public fund, transferable for the time being at any of the said banks, in the name of any person other than the owner of such share or interest. R.S.C., c. 165, s. 11.

**441. Clerk issuing false dividend warrants.** — Every one is guilty of an indictable offence and liable to seven years' imprisonment who, being in the employment of the Government of Canada, or of any province of Canada, or of any bank in which any books of account mentioned in the last preceding section are kept, with intent to defraud, makes out or delivers any dividend warrant, or any warrant for the payment of any annuity, interest or money payable at any of the said banks, for an amount greater or less than that to which the person on whose account such warrant is made out is entitled. R.S.C., c. 165, s. 12.

**442. Printing circulars etc., in likeness of notes.** — Every one is guilty of an offence and liable, on summary conviction before two justices of the peace, to a fine of one hundred dollars or three months' imprisonment, or both, who designs, engraves, prints or in any manner makes, executes, utters, issues, distributes, circulates or uses any business or professional card, notice, placard, circular, hand-bill or advertisement in the likeness or similitude of any bank note, or any obligation or security of any Government or any bank. 50-51 V., c. 47, s. 2; 53 V., c. 31, s. 3.

## PART XXXIII.

## FORGERY OF TRADE MARKS — FRAUDULENT MARKING OF MERCHANDISE.

**443. Definitions.** — In this part —

(*a*) the expression "trade mark" means a trade mark or industrial design registered in accordance with *The Trade Mark and Design Act* (1), and the registration whereof is in force under the provisions of the said Act, and includes any trade mark which, either with or without registration, is protected by law in any British possession or foreign state to which the provisions of section one hundred and three of the Act of the United Kingdom, known as *The Patents, Designs, and Trade Marks Act*, 1883, are in accordance with the provisions of the said Act, for the time being applicable;

(*b*) the expression "trade description" means any description, statement, or other indication, direct or indirect —

(i) as to the number, quantity, measure, gauge or weight of any goods;

(ii) as to the place or country in which any goods are made or produced;

(iii) as to the mode of manufacturing or producing any goods;

(iv) as to the material of which any goods are composed;

(v) as to any goods being the subject of an existing patent, privilege or copyright;

And the use of any figure, word, or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters, is a trade description within the meaning of this part;

(*c*) the expression "false trade description" means a trade

(1) The Canadian *Trade Mark and Design Act*, is chapter 63 of the R. S. C., as amended by the 53 Vic., c. 14, and by the 54-55 Vic., c. 35.

description which is false in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise, where that alteration makes the description false in a material respect; and the fact that a trade description is a trade mark, or part of a trade mark, shall not prevent such trade description being a false trade description within the meaning of this part;

(*d*) the expression "goods" means anything which is merchandise or the subject of trade or manufacture;

(*e*) the expression "covering" includes any stopper, cask, bottle, vessel, box, cover, capsule, case, frame or wrapper; and the expression "label" includes any band or ticket;

(*f*) the expressions "person, manufacturer, dealer, or trader," and "proprietor" include any body of persons corporate or unincorporate;

(*g*) the expression "name" includes any abbreviation of a name.

2. The provisions of this part respecting the application of a false trade description to goods extend to the application to goods of any such figures, words or marks, or arrangement or combination thereof, whether including a trade mark or not, as are reasonably calculated to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they really are.

3. The provisions of this part respecting the application of a false trade description to goods, or respecting goods to which a false trade description is applied, extend to the application to goods of any false name or initials of a person, and to goods with the false name or initials of a person applied, in like manner as if such name or initials were a trade description, and the expression "false name or initials" means, as applied to any goods ,any name or initials of a person which —

(*a*) are not a trade mark, or part of a trade mark;

(*b*) are identical with, or a colourable imitation of the name or initials of a person carrying on business in connection with goods of the same description and not having authorized the use of such name or initials;

(*c*) are either those of a fictitious person or of some person not *bonâ fide* carrying on business in connection with such goods. 51 V., c. 41, s. 2.

**444. Words or marks on watch cases.** — Where a watch case has thereon any words or marks which constitute, or are, by common repute, considered as constituting a description of the country in which the watch was made, and the watch bears no such description, those words or marks shall *primâ facie* be deemed to

be a description of that country within the meaning of this part, and the provision of this part with respect to goods to which a false description has been applied, and with respect to selling or exposing, or having in possession, for sale, or any purpose of trade or manufacture, goods with a false trade description, shall apply accordingly; and, for the purposes of this section, the expression "watch" means all that portion of a watch which is not the watch case. 51 V., c. 41, s. 11.

**445. Forgery of trade-marks, etc.** — Every one is deemed to forge a trade mark who either, —

(*a.*) without the assent of the proprietor of the trade mark, makes that trade mark or a mark so nearly resembling it as to be calculated to deceive; or

(*b.*) falsifies any genuine trade mark, whether by alteration, addition, effacement or otherwise.

2. And any trade mark or mark, so made or falsified, is, in this part, referred to as a forged trade mark. 51 V., c. 41, s. 3.

**446. Applying trade-marks.** — Every one is deemed to apply a trade mark, or mark, or trade description to goods who, —

(*a.*) applies it to the goods themselves; or

(*b.*) applies it to any covering, label, reel, or other thing in or with which the goods are sold or exposed or had in possession for any purpose of sale, trade, or manufacture; or

(*c.*) places, incloses or annexes any goods which are sold or exposed or had in possession for any purpose of sale, trade, or manufacture in, with or to any covering, label, reel, or other thing to which a trade mark or trade description has been applied; or

(*d*) uses a trade mark, or mark, or trade description in any manner calculated to lead to the belief that the goods in connection with which it is used are designated or described by that trade mark, or mark, or trade description.

2. A trade mark, or mark, or trade description is deemed to be applied whether it is woven, impressed, or otherwise worked into, or annexed, or affixed to the goods, or to any covering, label, reel or other thing.

3. Every one is deemed to falsely apply to goods a trade mark, or mark, who, without the assent of the proprietor of the trade mark, applies such trade mark, or a mark, so nearly resembling it as to be calculated to deceive. 51 V., c. 41, s. 4.

**447. Forgery of a trade-mark, or false application of a trade-mark, etc., an indictable offence.** — Every one is guilty of an indictable offence who, with intent to defraud, —

(*a*) forges any trade mark; or

(*b*) falsely applies, to any goods, any trade mark, or any mark so nearly resembling a trade mark as to be calculated to deceive; or

(*c*) makes any die, block, machine or other instrument, for the purpose of forging, or being used for forging, a trade mark; or

(*d*) applies any false trade description to goods; or

(*e*) disposes of, or has in his possession, any die, block, machine or other instrument, for the purpose of forging a trade mark; or

(*f*) causes any of such things to be done. 51 V., c. 41, s. 6.

No prosecution for any offence under this part, (XXXIII), can be commenced after the expiration of three years from the time of its commission. (See section 551 *a*, *post*.)

Section 710, *post*, provides that, in cases under this part, if the offence relates to imported goods, evidence of the port of shipment shall be *primâ facie* evidence of the place or country in which the goods were made or produced; and that, in a prosecution for forging a trade-mark, the burden of proof of the proprietor's assent shall be on the defendant.

On a charge of *falsely applying* a trade-mark, the onus of proving that the assent of the proprietor of the trade-mark has not been given is upon the prosecution. Section 710, *post*, which shifts, to the accused, the onus of proving the proprietor's assent, applies only to cases of *forgery* of a trade-mark, and not to cases of "falsely applying." (2)

A gunpowder manufacturing company, — who were manufacturers of a certain class of gunpowder known in the trade as R. L. G., 4, — had contracted, with the English Government, to supply 5000 barrels of such gunpowder. There was no express stipulation in the agreement that the powder should be of the company's own manufacture or that it should be even of English manufacture. The company, being, — through the happening of two explosions, — unable to manufacture the gunpowder within the time stipulated by their contract, imported gunpowder from Germany. This imported gunpowder was equal in quality to and accurately described as R. L. G., 4, and was, on being received by the company, taken out of the cylinders in which it was imported, (and which cylinders were labelled "Manufactured in Germany"), and placed and supplied to the Government in barrels, to each of which was affixed the following label: — "Gunpowder, 110 lbs., Chilworth Gunpowder Co., Lim., R. L. G., 4," this being the label prescribed by the Government. On a prosecution of the Company, under the English *Merchandize Marks Act*, the magistrates found, upon the above facts, that the label was not "a false trade description," within the meaning of the Act, and that there had been "no intent to defraud;" and they dismissed the case. In appeal, it was argued, for the prosecution, that the German label on the cylinders was a trade-mark and that the label put by the Company upon the barrels was a false mark indicating that the gunpowder was manufactured by themselves; and, it was held, — reversing the decision of the magistrates, — that the label was "a false trade description," and that there had been an intent to defraud, in the sense of an intention to mislead the purchasers, — not in the sense of intending to put off on them an article of less value in money, but in the sense of putting off upon them an article which they were less inclined to take and which they had not agreed to buy. (3)

(2) R. v. Howarth, 1 Can. Cr. Cas., 243.

(3) Starey v. The Chilworth Gunpowder Manufacturing Co., 17 Cox C. C., 55.

Where a person buys goods of a person who is a manufacturer, and who is not otherwise a dealer in them, there is an implied warranty that the manufacturer supplies goods of his own manufacture. (4)

The addition in writing of a word to the invoice sent with goods sold, which addition induces the purchaser to believe the goods to be what he asked for, is a false trade description. (5)

An information charged the respondent, a brewer, with having unlawfully applied a certain false trade description, namely, "barrel" to certain goods, to wit, a certain cask of beer, false as to the measure or gauge thereof, contrary to the English *Merchandize Marks Act*. The respondent, by his carman, had delivered to the appellant six casks of beer, the carman, at the same time, or immediately after such delivery, leaving an invoice, (in the handwriting of the respondent's clerk), describing the six casks as *barrels*, — a barrel meaning, according to the custom of trade, 36 gallons. The appellant, finding that the measure of one of the casks was short, preferred the information; and, the justices were satisfied of the fact that short measure had been delivered, but they refused to receive evidence of previous deliveries of short measure, and considered that the respondent had no intention to defraud; and, they held that, the delivery of the invoice was not a false trade description, and dismissed the information, but they stated a case; upon which it was held, (remitting the case back to the justices), without expressing an opinion whether the justices ought to convict or not, on the evidence before them, that the delivery of the invoice with the goods might, under the circumstances, be a false trade description within the meaning of the Act, that the justices were wrong in excluding the evidence tendered as to previous short deliveries, and that the principle of law, that a master is *primâ facie* not liable criminally for the acts of his servant, has not been altered by the *Merchandize Marks Act*, with regard to the offences thereunder, with this exception, that the *onus* is placed upon the defendant of shewing that he acted without intent to defraud. (6)

Where a trade-mark is complained of as being a forged imitation of a duly registered trade-mark and as infringing the rights of the proprietor of the trade-mark so duly registered, any resemblance of a nature to mislead an incautious or unwary purchaser or calculated to lead persons to believe that the goods are the manufacture of some person other than the actual manufacturer is sufficient to bring the person using such trade-mark within the provisions of the above section 448. In such a case, it is not necessary that the resemblance should be such as to deceive persons who might see the two marks placed side by side or who might examine them critically. (7)

The Canadian Law respecting trade-marks being derived from English legislation, reference for its interpretation should be had to English decisions; and, a Quebec Court should not follow French authorities differing from English decisions on the same matter, — more especially as the law extends over the Dominion, and it is desirable that the jurisprudence should be uniform. (8)

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(4) Johnson v. Raylton, 7 Q. B. D., 438.

(5) Coppen v. Moore, [1898] 2 Q. B., 300, 306.

(6) Budd v. Lucas, 17 Cox C. C., 248; [1891] 1 Q. B., 408. And see, also, the case of *Coppen v. Moore*, (67 L. J., Q. B., 689, [1898] 2 Q. B., 300), with reference to the criminal responsibility of the master, under the English *Merchandize Marks Act*, for acts of his servant done within the scope of the servant's employment, unless the master can prove that he himself acted in good faith and had done all that was reasonably possible to prevent the servant's acts.

(7) R. v. Authier, Que. Jud. Rep., 6 Q. B., 146; 1 Can. Cr. Cas., 68.

(8) *Ib.*

**448. Selling goods falsely marked. — Defense.** — Every one is guilty of an indictable offence, who sells or exposes, or has in his possession for sale, or any purpose of trade or manufacture, any goods or things to which any forged trade-mark, or false trade description is applied, or to which any trade-mark, or mark so nearly resembling a trade mark as to be calculated to deceive, is falsely applied, as the case may be, unless he proves, —

(*a*) that, having taken all reasonable precaution against committing such an offence, he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the trade-mark, mark, or trade description; and

(*b*) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things; and

(*c*) that otherwise he had acted innocently. 51 V., c. 41, s. 6.

The use of the words "quadruple plate" in an advertisement offering silver plated ware, for sale, may constitute a false trade description, the application of which is an offence under the above sections; and, it is not necessary that the false description should be physically connected with the goods or that it should accompany the same; oral evidence being admissible to connect the description of the goods in the advertisement with the goods afterwards sold. Thus, where the defendants were convicted of wilfully selling, and having unlawfully exposed for sale and unlawfully had in their possession for sale, certain pieces of silver plated ware, to which a false trade description, namely, "quadruple plate" had been applied, and the evidence showed that the defendants inserted, in a newspaper, an advertisement offering, for sale, among other things, certain "tea-sets of quadruple plate," that a tea-set was afterwards sold to a purchaser, who enquired if the tea-set was one of those advertized as "quadruple plate" and was told by the saleswoman that it was and that he could rely on the advertisement, and the proof shewed that the tea-set so sold was not of the quality of the tea-sets advertized, it was held that the conviction was correct. (9)

The defendants sold *machine-made* cigarettes in packets labelled, "Guaranteed *hand-made* by experienced workmen," — their price being a half-penny per packet less than cigarettes of the same quality made by hand. The quality of tobacco, paper, starch, etc., used for the manufacture of these *machine-made* cigarettes was the same as in the case of *hand-made* cigarettes, and their construction was as proper: — *Held*, that the label was a false trade description in a material respect, and that the doctrine of equivalents, — that the article sold under the false description was as good as that asked for by the purchaser, — was inapplicable. (10)

It has been held that auctioneers, who have a suspicion that china, sent to them as genuine Dresden china and put up for sale at their rooms, is not genuine, but bears a forged trade mark, and who tell the assembled bidders that they sell the lot "for what it is," thereby suggesting suspicion in the minds of the bidders as to its genuineness, act innocently within the meaning of the English *Merchandise Marks Act*. (11)

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(9) R. v. T. Eaton Company, Lim., (No. 2), 3 Can. Cr. Cas., 421; 31 O. R., 276.

(10) Kirshenboim v. Salmon, 67 L. J., Q. B., 601; [1898] 2 Q. B., 19.

(11) Christie v. Cooper, 69 L. J., Q. B., 708; [1900] 2 Q. B., 522.

A went into the shop of B, who carried on business as a butcher, and asked him for a leg of New Zealand mutton. B, having produced and weighed a leg of mutton, A asked for an invoice and, on an invoice being handed to him, he asked B to put a mark on the invoice shewing that the mutton was New Zealand meat; and B then wrote upon it the letters "N. M." The mutton was not New Zealand mutton. Upon a charge made against B, under the English *Merchandise Marks Act*, the justices held that the letters "N. M." did not constitute a "trade description" on the ground that it was not established that, "according to the custom of trade," such letters were commonly taken to be an indication of the country in which the goods were produced. *Held*, in appeal, that the justices were wrong, and that, upon the facts as proved, B ought to be convicted. (12)

**449. Defacing trade marks on casks, etc. — Trading in bottles marked with a trade mark, without consent of owner.** — Every one is guilty of an indictable offence, who —

(*a*) without the consent of such other person wilfully defaces, conceals or removes the duly registered trade mark or name of another person upon any cask, keg, bottle, siphon, vessel, can, case or other package with intent to defraud such other person, or unless such package has been purchased from such other person;

(*b*) being a manufacturer, dealer or trader, or a bottler, without the written consent of such other person, trades or traffics in any bottle or siphon which has upon it the duly registered trade mark or name of another person, or fills such bottle or siphon with any beverage for the purpose of sale or traffic.

2. The using by any manufacturer, dealer or trader other than such other person of any bottle or siphon for the sale therein of any beverage, or the having upon it such trade mark or the name of another person, buying, selling or trafficking in any such bottle or siphon without such written permission of such other person, or the fact that any junk dealer has in his possession any such bottle or siphon having upon it such a trade mark or name without such written permission, shall be *prima facie* evidence that such use, buying, selling or trafficking or possession is unlawful within the meaning of this section. (As amended by the *Criminal Code Amendment Act*, 1900.)

The object of this enactment is to protect manufacturers, dealers and bottlers who, in their business, use casks, kegs, bottles, siphons, vessels, cans, cases or other packages upon which there is a trade-mark or name which has been duly registered under the Canadian *Trade-Mark and Design Act*, — namely, the R. S. C., c. 63, as amended by the 53 Vic., c. 14, and by the 54-55 Vic., c. 35.

**450. Punishments.** — Every one guilty of any offence defined in this part is liable —

(12) Cameron v. Wiggins, 70 L. J., Q. B., 15; [1901] 1 Q. B., 1.

(*a*) on conviction on indictment, to two years' imprisonment, with or without hard labour, or to fine, or to both imprisonment and fine; and

(*b*) on summary conviction, to four months' imprisonment, with or without hard labour, or to a fine not exceeding one hundred dollars; and, in case of a second or subsequent conviction, to six months' imprisonment, with or without hard labour, or to a fine not exceeding two hundred and fifty dollars.

2. In any case every chattel, article, instrument, or thing, by means of, or in relation to which, the offence has been committed, shall be forfeited. 51 V., c. 41, s. 8.

Magistrates have no jurisdiction to summarily try and adjudicate upon a charge, under section 448, *ante*, of selling goods to which a false trade description has been applied, the offence being an indictable one, and section 450, relating to punishments, having reference both to offences which under some of the sections of the present part, XXXIII, are punishable by proceedings on indictment and to offences which, under other sections of this part, are punishable on summary proceedings; and, moreover, proceedings upon a charge, under section 448, *against a Corporation* should be instituted by indictment, under sections 635-639, *post*, and not by a preliminary examination before a magistrate. (13)

**451. Falsely representing that goods are manufactured for Her Majesty, etc.** — Every one is guilty of an offence, and liable, on summary conviction, to a penalty not exceeding one hundred dollars, who falsely represents that any goods are made by a person holding a royal warrant, or for the service of Her Majesty or any of the royal family, or any Government department of the United Kingdom or of Canada. 51 V., c. 41, s. 21.

Substitute "His Majesty" for "Her Majesty" in this section. (See section 7 of the *Interpretation Act*, at p. 9, *ante*.)

**452. Unlawful importation of goods liable to forfeiture under this Part.** — Every one is guilty of an offence, and liable, on summary conviction, to a penalty of not more than five hundred dollars nor less than two hundred dollars, who imports or attempts to import any goods which, if sold, would be forfeited under the provisions of this part, or any goods manufactured in any foreign state or country which bear any name or trade mark which is or purports to be the name or trade mark of any manufacturer, dealer or trader in the United Kingdom or in Canada, unless such name or trade mark is accompanied by a definite indication of the foreign state or country in which the goods were made or produced; and such goods shall be forfeited. 51 V., c. 41, s. 22.

(13) R. v. T. Eaton Company, Lim., (No. 1), 29 O. R., 591; 2 Can. Cr. Cas., 252.

**453. Defence where accused has acted innocently in ordinary course of business.** — Any one who is charged with making any die, block, machine or other instrument for the purpose of forging, or being used for forging, a trade mark, or with falsely applying to goods any trade mark, or any mark so nearly resembling a trade mark as to be calculated to deceive, or with applying to goods any false trade description, or causing any of the things in this section mentioned to be done, and proves —

(*a*) that in the ordinary course of his business he is employed, on behalf of other persons, to make dies, blocks, machines or other instruments for making or being used in making trade marks, or, as the case may be, to apply marks or descriptions to goods, and that in the case which is the subject of the charge he was so employed by some person resident in Canada, and was not interested in the goods by way of profit or commission dependent on the sale of such goods; and

(*b*) that he took reasonable precaution against committing the offence charged; and

(*c*) that he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the trade mark, mark or trade description; and

(*d*) that he gave to the prosecutor all the information in his power with respect to the person by or on whose behalf the trade mark, mark or description was applied; —

shall be discharged from the prosecution, but is liable to pay the costs incurred by the prosecutor, unless he has given due notice to him that he will rely on the above defence. 51 V., c. 41, s. 5.

**454. Defence where accused is a servant.** — No servant of a master, resident in Canada, who *bonâ fide* acts in obedience to the instructions of such master, and, on demand made by or on behalf of the prosecutor, gives full information as to his master, is liable to any prosecution or punishment for any offence defined in this part. 51 V., c. 41, s. 20.

**455. Exception as to certain trade descriptions.** — The provisions of this part with respect to false trade descriptions do not apply to any trade description which, on the 22nd day of May, 1888, was lawfully and generally applied to goods of a particular class, or manufactured by a particular method, to indicate the particular class or method of manufacture of such goods: Provided, that where such trade description includes the name of a place or country, and is calculated to mislead as to the place or country where the goods to which it is applied were actually made or produced, and the goods are not actually made or produced in that place or country, such provisions shall apply unless there is added

to the trade description, immediately before or after the name of that place or country, in an equally conspicuous manner with that name, the name of the place or country in which the goods were actually made or produced, with a statement that they were made or produced there. 51 V., c. 41, s. 19.

## MERCHANDISE MARKS OFFENCES ACT.

The whole of the *Merchandise Marks Offences Act, 1888*, (51 Vic., c. 41), is repealed, with the exception of sections 15, 16, 18, 22 and 23, thereof, which remain unrepealed. (See Schedule Two, *post*), and are as follows:—

**Disposal of forfeited articles.** — "Any goods or things forfeited under any provision of this Act, may be destroyed or otherwise disposed of in such a manner as the Court, by which the same are declared forfeited, directs; and the Court may, out of any proceeds realized by the disposition of such goods (all trade marks and trade descriptions, being first obliterated), award to any innocent party any loss he may have innocently sustained in dealing with such goods." (Section 15, of 51 V., c. 41.)

**Costs.** — "On any prosecution under this Act, the Court may order costs to be paid to the defendant by the prosecutor, or to the prosecutor by the defendant, having regard to the information given by and the conduct of the defendant and prosecutor respectively." (Section 16, of 51 V., c. 41.)

**Warranty of trade-marks, etc.** — "On the sale or in the contract for the sale of any goods to which a trade mark or mark or trade description has been applied, the vendor shall be deemed to warrant that the mark is a genuine trade mark and not forged or falsely applied, or that the trade description is not a false trade description within the meaning of this Act, unless the contrary is expressed in some writing signed by or on behalf of the vendor and delivered at the time of the sale or contract to and accepted by the vendee." (Section 18, of 51 V., c. 41.)

**Importation of goods specially prohibited.** — "The importation of any goods which, if sold, would be forfeited under the foregoing provisions of this Act, and of goods manufactured in any foreign state or country which bear any name or trade mark, which is or purports to be the name or trade mark of any manufacturer, dealer or trader in the United Kingdom or in Canada, is hereby prohibited, unless such name or trade mark is accompanied by a definite indication of the foreign state or country in which the goods were made or produced: and any person, who imports or attempts to import any such goods, shall be liable to a penalty of not more than five hundred dollars, nor less than two hundred dollars, recoverable on summary conviction and the goods so imported or

attempted to be imported shall be forfeited and may be seized by any officer of the Customs and dealt with in like manner as any goods or things forfeited under this Act:

2. Whenever there is, on any goods, a name which is identical with or a colorable imitation of the name of a place in the United Kingdom or in Canada, such name, unless it is accompanied by the name of the state or country in which it is situate, shall, unless the Minister of Customs decides that the attaching of such name is not calculated to deceive, (of which matter the said Minister shall be the sole judge), be treated, for the purposes of this section, as if it was the name of a place in the United Kingdom or in Canada:

3. The Governor in Council may, whenever he deems it expedient in the public interest, declare that the provisions of the two subsections, next preceding, shall apply to any city or place in any foreign state or country, and after the publication in the *Canada Gazette* of the Order in Council made in that behalf, such provisions shall apply to such city or place in like manner as they apply to any place in the United Kingdom or in Canada, and may be enforced accordingly.

4. The Governor in Council may, from time to time, make regulations, either general or special, respecting the detention and seizure of goods, the importation of which is prohibited by this section, and the conditions, if any, to be fulfilled before such detention and seizure, and may, by such regulations, determine the information, notices and security to be given, and the evidence necessary for any of the purposes of this section, and the mode of verification of such evidence:

5. The regulations may provide for the reimbursing, by the informant to the Minister of Customs, of all expenses and damages incurred in respect of any detention made on his information, and of any proceedings, consequent upon such detention:

6. Such regulations may apply to all goods the importation of which is prohibited by this section, or different regulations may be made respecting different classes of such goods or of offences in relation to such goods;

7. All such regulations shall be published in the *Canada Gazette*, and shall have force and effect from the date of such publication." (Section 22, of 51 V., c. 41.)

**Repeal of chapter 106 of the R.S.C.** — This Act shall be substituted for chapter one hundred and sixty-six of the Revised Statutes, respecting the fraudulent marking of merchandise, which is hereby repealed. (Section 23 of 51 V., c. 41).

## FRAUDULENT SALE OR MARKING.

Special provisions in restraint of the fraudulent sale or marking of certain articles are contained in the 57-58 Vic., c. 37.

Section 1 of that Act provides that "No person shall mark, brand or label any article or any package containing any article mentioned in the first column of schedule A to this Act, with the word "pure," "genuine," or any word equivalent thereto, or sell, or offer or expose for sale, any such article or package so marked, branded, stamped or labelled, unless such article or the contents of such package are pure within the meaning of the second column of the said schedule." And section 2 of the Act provides that "No person shall sell, or offer or expose for sale, any article or any substance for domestic use under the name or designation contained in the first column of schedule B to this Act, unless such article or substance is free from adulteration or admixture of foreign matter and unless it possesses the composition and distinguishing characteristics stated in the second column of the said schedule."

Section 3 of the Act provides, that, every person who violates any of the provisions of section 1 or section 2 shall, for every violation, be liable to a penalty not exceeding $100, a moiety of which penalty shall belong to the prosecutor and the other moiety to the Crown, and that such penalty shall be recovered and enforced in the manner provided by the *Inland Revenue Act*, with respect to penalties incurred under it.

Section 4 of the Act provides, that, the Governor in Council may, by Order in Council to be published in four successive issues of the *Canada Gazette*, add to or remove from the schedules of the Act any articles; and section 5 of the Act empowers the Minister of Inland Revenue to order any officer of Inland Revenue or Customs to obtain samples of any of the articles or substances mentioned in the said schedules, in the manner prescribed with respect to the obtaining of samples under the *Adulteration Act*.

See pp. 176 *et seq.*, *ante*, for the provisions of the *Adulteration Act* and its amendments.

Schedules *A* and *B* of the *Fraudulent Sale or Marking Act*, (57-58 Vic., c. 37), are as follows: —

### "SCHEDULE A.

| 1 | 2 |
|---|---|
| Dry white lead .. ..... | Basic carbonate of lead prepared by corrosion of metallic lead. |
| White lead in oil'.. ..... | Dry white lead ground in pure linseed oil in the proportion of 90 to 92 per cent of the former to 8 to 10 per cent of the latter. |

SCHEDULE B.

| 1 | 2 |
|---|---|
| Paris green | An insecticide containing at least fifty per cent of arsenious acid and at least thirty per cent of cupric oxide and being completely soluble in aqueous ammonia. |
| Vinegar | A more or less coloured liquid, consisting essentially of impure dilute acetic acid obtained by the oxidation of wine, beer, cider, or other alcoholic liquid. |

PART XXXIV.

## PERSONATION.

**456. Personation with intent to obtain any property.** — Every one is guilty of an indictable offence, and liable to fourteen years' imprisonment, who, with intent fraudulently to obtain any *property*, personates any person, living or dead, or administrator, wife, widow, next of kin or relation of any person.

For the definition of "*property*," see section 3 (*r*), p. 6, *ante*.

Upon an indictment, under the 2 and 3 Will. 4, c. 53, s. 41, for personating a soldier, it was held to be no defence that the prisoner was authorized by the soldier to personate him, or that the prisoner had bought, from the soldier personated, the prize money to which the latter was entitled.(1)

Upon an indictment, under the 28 and 29 Vic., c. 124, s. 8, for personating a seaman in order to obtain his wages, it was held that the offence was complete, although the wages had already been paid. (2)

**457. Personation at examinations.** — Every one is guilty of an indictable offence, and liable, on indictment or summary conviction, to one year's imprisonment, or to a fine of one hundred dollars, who falsely, with intent to gain some advantage for himself or some other person, personates a candidate at any competitive or qualifying examination, held under the authority of any law or statute or in connection with any University or College or who procures himself or any other person to be personated at any such examination, or who knowingly avails himself of the results of such personation.

(1) R. v. Lake, 11 Cox C. C., 333.
(2) R. v. Cramp, R. & R., 327. See R. v. Pringle, 2 Mood. C. C., 127.

**458. Personation of owners of stock, etc.** — Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who falsely and deceitfully personates —

(*a*) any owner of any share or interest of or in any stock, annuity, or other public fund transferable in any book of account kept by the government of Canada or of any province thereof, or by any bank for any such government; or

(*b*) any owner of any share or interest of or in the debt of any public body, or of or in the debt or capital stock of any body corporate, company, or society; or

(*c*) any owner of any dividend, coupon, certificate or money payable in respect of any such share or interest as aforesaid; or

(*d*) any owner of any share or interest in any claim for a grant of land from the Crown, or for any scrip or other payment or allowance in lieu of such grant of land; or

(*e*) any person duly authorized by any power of attorney to transfer any such share, or interest, or to receive any dividend, coupon, certificate or money, on behalf of the person entitled thereto —

and thereby transfers or endeavours to transfer any share or interest belonging to such owner, or thereby obtains or endeavours to obtain, as if he were the true and lawful owner or were the person so authorized by such power of attorney, any money due to any such owner or payable to the person so authorized, or any certificate, coupon, or share warrant, grant of land, or scrip, or allowance in lieu thereof, or other document which, by any law in force, or any usage existing at the time, is deliverable to the owner of any such stock or fund, or to the person authorized by any such power of attorney. R.S.C., c. 165, s. 9.

**459. Acknowledging any instrument in a false name.** — Every one is guilty of an indictable offence and liable to seven years' imprisonment who, without lawful authority or excuse (the proof of which shall lie on him) acknowledges, in the name of any other person, before any court, judge or other person, lawfully authorized in that behalf, any recognizance of bail, or any *cognovit actionem*, or consent for judgment, or judgment, or any deed or other instrument. R.S.C., c. 165, s. 41.

## THE DOMINION ELECTIONS ACT.

The *Dominion Elections Act, 1900*, — (63-64 Vic., c. 12), — contains a number of provisions with reference to the forgery, etc., of ballot papers, also with reference to personation and other offences at elections, the principal of which provisions are the following : —

**Forgery of ballot papers, and ballot box frauds, etc.** — Section 79 enacts that " Every one who —

(*a*.) forges, counterfeits, fraudulently alters, defaces or fraudulently destroys a ballot paper or the initials of the deputy returning officer signed thereon, or —

(*b*) without authority supplies a ballot paper to any person, or —

(*c*) fraudulently puts into a ballot box a paper other than the ballot paper which he is authorized by law to put in, or —

(*d*) fraudulently takes a ballot paper out of the polling station, or —

(*e*) without due authority destroys, takes, opens or otherwise interferes with a ballot box or book or packet of ballot papers then in use for the purposes of the election, or —

(*f*) forges or counterfeits any stamp for the stamping of ballot papers as provided by paragraph (*e*) of section 41 of this Act, or uses any such stamp for any purpose other than the stamping of ballot papers pursuant to the said paragraph, or, not being a returning officer, has in his possession any such stamp or any counterfeit or imitation thereof, or —

(*g*) being a deputy returning officer, fraudulently puts, otherwise than as authorized by section 70 of this Act, his initials on the back of any paper purporting to be or capable of being used as a ballot paper at an election, or —

(*h*) with fraudulent intent, prints any ballot paper or what purports to be or is capable of being used as a ballot paper at an election, or —

(*i*) being authorized by the returning officer to print the ballot papers for an election, with fraudulent intent prints more ballot papers than he is authorized to print, or —

(*j*) attempts to commit any offence specified in this section, —

is guilty of an indictable offence, and shall be liable, if he is a returning officer, deputy returning officer or other officer engaged at the election, to a fine not exceeding one thousand dollars and not less than three hundred dollars, or to imprisonment for a term not exceeding five years and not less than one year, with or without hard labour, in default of paying such fine, — and if he is any other person, to a fine not less than one hundred dollars and not exceeding five hundred dollars, or to imprisonment for any term not exceeding two years and not less than six months, with or without hard labour, in default of paying such fine."

**Secrecy of Voting.** — Section 96 contains special provisions for ensuring the secrecy of voting and for the punishment of any interference therewith; and section 97 provides, that, no person who has voted at an election shall, in any legal proceeding questioning the election or return be required to state for whom he voted.

**No flags nor party badges to be furnished or used at elections.** — Sec-

tions 104 and 106 of the *Dominion Elections Act*, make it an indictable offence, (punishable on *summary conviction*, by fine, not exceeding $100, or imprisonment, not exceeding three months, or both), for any person to furnish any party flag, etc., or any ribbon or badge, with intent that the same shall be carried, or worn, or used, on or for eight days prior to an election day, for distinguishing the bearers or wearers thereof as supporters of any candidate, or for any person, during such period, to carry, or wear, or use any such party flag, etc., or any such ribbon or badge.

It will be noticed that the offences created by these sections, although indictable, are punishable on *summary conviction*; which seems to indicate that they are to be included among the indictable offences over which a magistrate is given absolute summary jurisdiction under Part LV, *post*, of the present Code.

**Bribery.** — Bribery is defined by section 108 of the *Dominion Elections Act*, and is thereby made indictable and punishable by imprisonment for a term not exceeding six months; and a person guilty thereof is, moreover, rendered liable to forfeit $200 and costs to any one who sues therefor.

See sections 109, *et seq.*, as to other corrupt practices, etc., at elections.

**Personation at Elections.** — Section 114 enacts that "Every person who, at an election —

(*a*) applies for a ballot paper in the name of some other person, whether such name is that of a person living or dead, or of a fictitious person; or —

(*b*) having voted once at any such election, applies at the same election for a ballot paper in his own name —

is guilty of personation and liable to a penalty not exceeding two hundred dollars and not less than fifty dollars and to imprisonment for a term not exceeding two years and not less than three months." And by section 115 it is enacted that, "Every person who aids, abets, counsels or procures the commission by any person of the offence of personation shall be liable to a penalty not exceeding two hundred dollars and not less than one hundred dollars, and to imprisonment for a term not exceeding two years and not less than three months."

See also sections 116 and 117 of the Act, as to other offences of the same nature.

A prisoner was convicted of having, while acting as a deputy returning officer, put false ballot papers into the ballot box; and, upon a case being reserved as to whether the prisoner was legally chargeable with the offence seeing that he was not legally appointed by reason of the fact that, although, the commission for appointing him was signed by the returning officer and delivered to him, his name as appointee had been left in blank, it was held that, as the prisoner had acted as returning officer, he was such officer *de facto*, if not *de jure*, and that he was rightly convicted. (3)

Where a defendant was charged with having, — while acting as a deputy returning officer at a Dominion election, — fraudulently put, into

(3) R. v. Holman, 14 C. L. T., 376.

the ballot box, false ballot papers, and, a witness for the Crown deposed that he voted at the election in question, and the Crown proposed to ask him for which candidate he marked his ballot paper,—the proposed question was objected to, on behalf of the defendant, on the ground that it was inconsistent with the secrecy of the ballot, contrary to the *Dominion Election Act* then in force, and against public policy, and on the further ground that the witness' answer, as to how he marked his ballot paper and voted, would be only secondary evidence. The question was allowed, and, upon the defendant being convicted, the above points were reserved; and it was held,—affirming the conviction,—that the evidence was admissible, that the provision of the *Election Act*, rendering it illegal to ask a person for whom he voted, refers to legal proceedings *questioning the election or return*, and not to other legal proceedings, and that the evidence tendered must be considered as primary and not secondary evidence, as there is no other mode of ascertaining how an elector had voted than the evidence of the elector himself. (4)

Where a person who applied for a ballot paper in a name which was not his own nor the name by which he was generally known, but which name appeared on the voters' list, and had been inserted therein by the officials who prepared the list under the belief that it was the applicant's real name, he was held entitled to vote, and not guilty of the offence of personation. (5)

It has been held that, in an indictment for the offence of personating a voter, there should be an averment negativing the identity of the defendant with the voter alleged to have been personated. (6)

A conviction for the offence of inducing a person to personate a voter was held good, though it did not set out the mode or facts of the inducement. (7)

In a prosecution for personation of a voter, it was held unnecessary to state in the indictment or to prove at the trial that the officer presiding at the polling booth, where the offence was committed, was duly appointed. (8)

A defendant was convicted by a Toronto police magistrate of an offence, under section 167 of the Consolidated Municipal Act, (55 Vic., c. 42),—of applying, at a municipal election for a ballot paper in the name of some other person, and was sentenced to one month's imprisonment with hard labor. Upon a motion for the defendant's discharge, the question was raised as to whether the conviction was valid, in view of a subsequent provision, (as to the same offence), contained in section 210 of the same Act, providing that every person who applies for a ballot paper in the name of some other person, shall be deemed to have committed the offence of personation and shall incur a penalty of $200, with imprisonment for sixty days in default of payment. *Held*, that the two provisions could not be read together or reconciled as providing cumulative punishments for the same offence, nor could they be allowed to stand as providing alternative punishments for the one offence at the option of the magistrate,—the very essence of the criminal law being that it should be certain and so plainly expressed as to be intelligible to the sense of ordinary people, and that the law which is later in date as well as later in position in the statute book must in case of inconsistency or repugnancy prevail against the

(4) R. v. Saunders, 17 C. L. T., 266; 11 Man. L. R., 559; 3 Can. Cr. Cas., 278.
(5) R. v. Fox, 16 Cox C. C., 166.
(6) R. v. Hogg, 25 U. C. Q. B., 68.
(7) R. v. Hague, 12 W. R., 310.
(8) R. v. Garvey, 16 Cox C. C., (Ir. C. C. R.), 252.

earlier in time and place. Order made discharging the prisoner, as illegally held in custody. (9)

A prisoner was charged with having, on a Dominion Election day, presented himself at a polling station and applied for a ballot, stating that he was Mathew Leggatt, an elector on the list of voters for the district, and with having, on being required to be sworn, taken the book and falsely sworn that he was Mathew Leggatt and that he was an elector on the list of voters. The prisoner was convicted; but, as it did not appear that he was an elector, the questions were raised and reserved, as to whether the deputy returning officer was authorized to administer the oath to electors, only, whether, as the prisoner was not an elector, the deputy returning officer had authority to administer the oath to him, and, whether, therefore, the prisoner, although he had falsely sworn that he was an elector, could be legally convicted. *Held*—affirming the conviction,—that the word "elector" applies to any person acting or representing himself as an elector. (10)

Where a defendant was convicted of inducing one James Fogle to personate a voter at an election of town councillors, it was held by the English Court of Appeal,—affirming the conviction,—that the offence of inducing another to personate a voter is complete upon the personator tendering the voting paper, although, on being asked if he is the person whose name is signed to the voting paper, he answers, "No," and the vote is accordingly rejected. In this case, Blackburn, J., said, "I take it that as soon as a man holds himself out to be the person entitled to vote, and does this in the name of another, he commits the offence; and, that it is utterly immaterial that he is stopped before he succeeds in his object. Upon his tendering, his voting paper, he has done sufficient to warrant the conclusion that he personated." (11)

It will be seen that section 114, (*ante*), of our *Dominion Elections Act*, follows this view of the law by expressly enacting that every person who, at an election, *applies* for a ballot paper in the name of some other person, is guilty of personation.

**Procedure.**—By section 131 of the *Dominion Elections Act*, it is provided that, (except in cases of indictable offences and offences made punishable on summary conviction), all penalties and forfeitures imposed by the Act shall be recoverable or enforceable with full costs of suit by any person who sues therefor by action of debt or information, in any Court of competent jurisdiction in the province in which the cause of action arises, and that, in default of payment of the amount which the offender is compelled to pay, within the period fixed by the Court, the offender shall be imprisoned for any term less than two years, unless such penalty and costs are sooner paid; but, that no action or information for the recovery of any such penalty or forfeiture shall be commenced unless the person suing therefor has given security, to the amount of $50, for the defendant's costs of defence.

By section 141 of the Act, it is enacted that no indictment for corrupt practices shall be tried before any Court of Quarter Sessions or General Sessions; and section 540, *post*, of the present Code, provides, (by an addition made thereto by the *Criminal Code Amendment Act, 1900*), that no Court of General or Quarter Sessions shall have power to try any indictment for bribery or other corrupt practice under the *Dominion Elections Act*; and section 142 of the *Dominion Elections Act* provides, that, every prosecution for an indictable offence under the Act, and every action, suit

(9) R. v. Rose, 16 C. L. T., 60.
(10) R. v. Chamberlain, 14 C. L. T., 283; 10 Man. L. R., 261.
(11) R. v. Hague, 9 Cox C. C., 412.

or proceeding for any pecuniary penalty given by the Act to the person suing therefor shall be commenced within one year next after the act committed, and not afterwards, (unless the *prosecution* is prevented by the withdrawal or absconding of the defendant out of the jurisdiction of the Court), and when commenced shall be proceeded with and carried on without wilful delay.

## PART XXXV.

## OFFENCES RELATING TO THE COIN.

**460. Interpretation of terms.** — In this part, unless the context otherwise requires, the following words and expressions are used in the following senses:

(*a.*) "Current gold or silver coin," includes any gold or silver coin coined in any of Her Majesty's mints, or gold or silver coin of any foreign prince or state or country, or other coin lawfully current, by virtue of any proclamation or otherwise, in any part of Her Majesty's dominions.

(*b*) "Current copper coin," includes copper coin coined in any of Her Majesty's mints, or lawfully current, by virtue of any proclamation or otherwise, in any part of Her Majesty's dominions.

(*c.*) "Copper coin," includes any coin of bronze or mixed metal and every other kind of coin other than gold or silver.

(*d.*) "Counterfeit" means false, not genuine.

(i) Any genuine coin prepared or altered so as to *resemble* or *pass* for any current coin of a higher denomination is a counterfeit coin.

(ii) A coin fraudulently filed or cut at the edges so as to remove the milling, and on which a new milling has been added to restore the appearance of the coin, is a counterfeit coin.

(*e*) "Gild" and "silver," as applied to coin, include casing with gold or silver respectively, and washing and colouring by any means whatsoever with any wash or materials capable of producing the appearance of gold or silver respectively.

(*f*) "Utter" includes "tender" and "put off." R.S.C., c. 167, s. 1.

The words "His Majesty's" are now to be substituted for "Her Majesty's," in this section. (See section 7 of the *Interpretation Act*, at p. 9, *ante*.)

**Counterfeiting.** — It is "one of the Royal prerogatives belonging to every sovereign prince that he alone in his own dominions may order and dispose the quantity, value, and fashion of his coin:" (1) and the coining

(1) Tomlin's Law Dict., *Coin*.

of money, the legitimation of foreign coin, and the giving of value to coin, foreign and domestic, are branches of the ancient prerogative of the Crown of England. (2)

Lord Hale observes that money consists principally of three parts: 1. The material of which it is made; 2. The denomination or extrinsic value; and 3. The impression or Stamp; and that, anciently, all coin was of gold or silver, alloyed with a given proportion of copper, constituting what is called sterling, or its legal standard; but that in 1672 a copper coin was added. (3)

From the relation of thr Ceown to the coin, it became judicially established from the earliest times that the counterfeiting of the king's coin was treason, though the counterfeiting of foreign money made current by the king's proclamation was at one time a misdemeanor. (4) But, the Statute of 1 Mary, sess. 2, c. 6, made the latter treason likewise. (5) In England, at the present time, the principal offences against the coin are felonies, (6) and the simple uttering of counterfeit coin is a misdemeanor. (7)

Counterfeiting is the making of false or spurious coin to imitate the genuine. (See section 460, *ante*.)

See section 560, *post*, as to search warrants, and see clause 6 of that section as to powers of justices to deface or otherwise dispose of counterfeit money found and brought before them under any search warrant.

**461. When offence is complete.** — Every offense of making any counterfeit coin, or of buying, selling, receiving, paying, tendering, uttering, or putting off, or of offering to buy, sell, receive, pay, utter or put off, any counterfeit coin is deemed to be complete, *although the coin* so made or counterfeited, or bought, sold, received, paid, tendered, uttered or put off, or offered to be bought, sold, received, paid, tendered, uttered or put off, *was not in a fit state to be uttered*, or *the counterfeiting* thereof *was not finished or perfected*. R.S.C., c. 167, s. 27.

This section is to the same effect as section 30 of the Imperial Statute 24 and 25 Vic., c. 99.

**462. Counterfeiting coins, &c.** — Every one is guilty of an indictable offence and liable to imprisonment for life who —

(*a*) makes or begins to make any counterfeit coin resembling, or apparently intended to resemble or pass for, any current gold or silver coin; or

(*b*) gilds or silvers any coin resembling or apparently intended to resemble or pass for, any current gold or silver coin; or

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(2) 2 Bish. New Cr. Law Com., ss. 276, 277.
(3) 1 Hale P. C., 188, 195.
(4) 1 Hale P. C., 192, 210, 215, 219; Case of Mixed Money, 2 How. St. Tr., 113, 116; Case of Mines, Plow., 310, 316.
(5) 1 Hale P. C., 192, 216.
(6) See 24 and 25 Vic., c. 99, (Imp.), ss. 2, 3, 4, 5, 6, 7, 14, 18, 19, 24 and 25.
(7) 24 and 25 Vic., c. 99, (Imp.), ss. 9, 13, 15, 20 and 21.

(*c*) gilds or silvers any piece of silver or copper, or of coarse gold or coarse silver, or of any metal or mixture of metals respectively, being of a fit size and figure to be coined, and with intent that the same shall be coined into counterfeit coin resembling, or apparently intended to resemble or pass for, any current gold or silver coin; or

(*d*) gilds any current silver coin, or files or in any manner alters such coin, with intent to make the same resemble or pass for any current gold coin; or

(*e*) gilds or silvers any current copper coin, or files or in any manner alters such coin, with intent to make the same resemble or pass for any current gold or silver coin. R.S.C., c. 167, s.s. 3 and 4.

The money charged as being counterfeited should bear such a resemblance or be apparently intended to bear such a resemblance to the genuine coin as may, in circulation, be likely to impose upon people generally. It was formerly necessary that the coin should have been in a complete and perfect state ready for circulation; (8) and, therefore, where the defendants were taken in the very act of coining shillings, but the shillings coined by them were then in an imperfect state, it being requisite that they should undergo another process, namely immersion in diluted *aqua fortis*, before they could pass as shillings, the judges held that the offence was not complete. (9) But by section 461, *ante*, the offence is deemed complete although the coin be not in a fit state to be uttered or the counterfeiting thereof be not finished or perfected. (10)

It is quite clear that there will be a sufficient counterfeiting where the counterfeit money is made to resemble coin, the impression on which has been *worn away by time*. In one case, the shillings produced in evidence were quite smooth, without the smallest vestige of either head or tail, and without any resemblance to the shillings in circulation, except their colour, size and shape; and the Master of the Mint proved that they were bad, but that they were very like shillings the impression on which had been worn away by time, and might very probably be taken, by persons having less skill than himself, for good shillings. And the Court were of opinion that *a blank* that is smoothed, and made like a piece of legal coin, the impression of which is worn out, and yet suffered to remain in circulation, is sufficiently counterfeited to the similitude of the current coin of the realm to bring the counterfeiters and coiners of such blanks within the statute: these blanks having some reasonable likeness to coin which has been defaced by time, and yet passed in circulation. (11)

Counterfeiting can rarely be proved directly by positive proof; but it is usually made out by circumstantial evidence, such as finding the necessary coining instruments in the defendant's house, together with some pieces of the counterfeit money in a finished and some in an unfinished state, or such other circumstances as may fairly warrant the jury in presuming that the defendant either counterfeited or caused to be counterfeited

(8) R. v. Varley, 2 W. Bl., 682.

(9) R. v. Harris, 1 Leach, 165. See R. v. Case, 1 Leach, 145; and R. v. Lavey, 1 Leach, 153.

(10) See R. v. Hermann, 4 Q. B. D., 284; 48 L. J. (M. C.), 106; 14 Cox C. C., 279.

(11) R. v. Wilson, 1 Leach, 285; See R. v. Welsh, 1 Leach, 364.

or was present, aiding and abetting in counterfeiting the coin in question. (12)

Any credible witness may prove the coin to be counterfeit; and it is not necessary for this purpose to produce any moneyer or other officer from the Mint, whether the coin counterfeited be current coin, or the coin of any foreign prince, state, or country. (13)

**463. Dealing in and importing counterfeit coin.** — Every one is guilty of an indictable offence and liable to imprisonment for life who, without lawful authority or excuse, the proof whereof shall lie on him —

(*a*) buys, sells, receives, pays or puts off, or *offers to buy, sell, receive, pay or put off*, at or for a lower rate or value than the same imports or was apparently intended to import, any counterfeit coin resembling or apparently intended to resemble or pass for any current gold or silver coin; or

(*b*) imports or receives into Canada any counterfeit coin resembling or apparently intended to resemble or pass for, any current gold or silver coin *knowing* the same to be counterfeit. R. S. C., c. 162, ss. 7 and 8.

**464. Manufacture of copper coin and importation of uncurrent copper coin.** — Every one who manufactures in Canada any *copper* coin, or imports into Canada any *copper* coin, other than current copper coin, with the intention of putting the same into circulation as current copper coin, is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars for every pound Troy of the weight thereof; and all such *copper* coin so manufactured or imported shall be forfeited to Her Majesty. R.S.C., c. 167, s. 28.

Copper coin includes coin of bronze or mixed metal and every other kind of coin other than gold or silver. (See section 460 *c*.)

Sections 26, 29, 30, 31, 32, 33 and 34 of R. S. C., c. 167, remain unrepealed. (See Schedule 2, *post*.); and are as follows: —

**Suspected coin may be cut.** — " If any coin is tendered as current gold or silver coin to any person who suspects the same to be diminished otherwise than by reasonable wearing, or to be counterfeit, such person may cut, break, bend or deface such coin, and if any coin so cut, broken, bent or defaced appears to be diminished otherwise than by reasonable wearing, or to be counterfeit, the person tendering the same, shall bear the loss thereof; but if the same is of due weight, and appears to be lawful coin, the person cutting, breaking, bending or defacing the same, shall be bound to receive the same at the rate for which it was coined:

(12) Arch. Cr. Pl. & Ev., 21st Ed., 859.
(13) See section 692, *post*.

2. If any dispute arises whether the coin so cut, broken, bent or defaced, is diminished in manner aforesaid, or counterfeit, it shall be heard and finally determined in a summary manner by any justice of the peace, who may examine, upon oath, the parties as well as any other person, for the purpose of deciding such dispute, and if he entertains any doubt in that behalf, he may summon three persons, the decision of a majority of whom shall be final:

3. Every officer employed in the collection of the revenue in Canada shall cut, break or deface, or cause to be cut, broken or defaced every piece of counterfeit or unlawfully diminished gold or silver coin which is tendered to him in payment of any part of such revenue in Canada." (Section 26.)

**Seizure of unlawfully manufactured or imported copper coin.**—"Any two or more justices of the peace, on the oath of a credible person, that any copper or brass coin has been unlawfully manufactured or imported, shall cause the same to be seized and detained, and shall summon the person in whose possession the same is found, to appear before them; and if it appears to their satisfaction, on the oath of a credible witness, other than the informer, that such copper or brass coin has been manufactured or imported in violation of this Act, such justice shall declare the same forfeited, and shall place the same in safe keeping to await the disposal of the Governor General for the public uses of Canada." (Section 29.)

**Enforcing penalty.**—"If it appears to the satisfaction of such justices that the person in whose possession such copper or brass coin was found, knew the same to have been so unlawfully manufactured or imported, they may condemn him to pay the penalty aforesaid, with costs, and may cause him to be imprisoned for a term not exceeding two months, if such penalty and costs are not forthwith paid." (Section 30.)

**Recovery of penalty from owner of copper coin.**—"If it appears to the satisfaction of such justices that the person in whose possession such copper or brass coin was found was not aware of it having been so unlawfully manufactured or imported, the penalty may, on the oath of any one credible witness other than the plaintiff, be recovered from the owner thereof, by any person who sues for the same in any court of competent jurisdiction." (Sec. 31.)

**Seizure by customs officers.**—"Any officer of Her Majesty's customs may seize any copper or brass coin imported or attempted to be imported into Canada in violation of this Act, and may detain the same as forfeited, to await the disposal of the Governor General, for the public uses of Canada." (Sec. 32.)

**Uttering unlawful copper coin.**—"Every one who utters, ten-

ders or offers in payment any copper or brass coin, other than current copper coin, shall forfeit double the nominal value thereof:

2. Such penalty may be recovered, with costs, in a summary manner, on the oath of one credible witness other than the informer, before any justice of the peace, who, if such penalty and costs are not forthwith paid, may cause the offender to be imprisoned for a term not exceeding eight days." (Sec. 33.)

**Application of penalties.** — "A moiety of any of the penalties imposed by any of the five sections next preceding, but not the copper or brass coins forfeited under the provisions thereof, shall belong to the informer or person who sues for the same, and the other moiety shall belong to Her Majesty, for the public uses of Canada." (Sec. 34.)

The words "His Majesty" should now be substituted for "Her Majesty." (See section 7 of the *Interpretation Act*, at p. 9, *ante*.)

**465. Exportation of counterfeit coin.** — Every one is guilty of an indictable offence and liable to two years' imprisonment, who, without lawful authority or excuse, the proof whereof shall lie on him, exports or puts on board any ship, vessel or boat, or on any railway or carriage or vehicle of any description whatsoever, for the purpose of being exported from Canada, any counterfeit coin resembling, or apparently intended to resemble or pass for, any current coin or for any foreign coin of any prince, country or state, *knowing* the same to be counterfeit. R.S.C., c. 167, s. 9.

**466. Making instruments for coining.** — Every one is guilty of an indictable offence and liable to imprisonment for life, who, *without lawful authority or excuse*, the proof whereof shall lie on him, makes, or mends, or begins or proceeds to make or mend, or buys or sells, or has in his *custody or possession* —

(*a*) any puncheon, counter puncheon, matrix, stamp, die, pattern or mould, in or upon which there is made or impressed, or which will make or impress, or which is adapted and intended to make or impress, the figure, stamp or apparent resemblance of both or either of the sides of any current gold or silver coin, or of any coin of any foreign prince, state or country, *or any part or parts* of both or either of such sides; or

(*b*) any edger, edging or other tool, collar, instrument or engine adapted and intended for the marking of coin round the edges with letters, grainings, or other marks or figures apparently resembling those on the edges of any such coin, *knowing* the same to be so adapted and intended; or

(*c*) any press for coinage, or any cutting engine for cutting, by force of a screw or of any other contrivance, round blanks out of

gold, silver or other metal or mixture of metals, or any other machine, *knowing* such press to be a press for coinage, or *knowing* such engine or machine to have been used or to be intended to be used for or in order to the false making or counterfeiting of any such coin. R. S. C., c. 167, s. 24.

For definition of *having in possession*, see section 3 (*k*), *ante*.

Although it is more accurate to describe the instruments according to their actual use, it is not necessary. And, where a prisoner was indicted for having in his possession, without lawful excuse, one *mould* made of lead, on which was made and impressed the figure, stamp, resemblance and similitude of the head side or flat of a shilling, and, the prisoner being convicted, it was submitted to the judges whether the mould in question was comprised under the general words of the statute "other *tool* or *instrument* before mentioned," and whether it should not have been laid in the indictment to be a *tool* or *instrument* in the words of the Act; the judges were unanimously of opinion that this mould was a tool or instrument mentioned in the former part of the statute, and was therefore comprised under these general words; and that, as a mould is expressly mentioned by name in the first clause of the Act, it need not be averred to be a tool or instrument so mentioned; but they considered that the indictment would have been more accurate had it charged that the prisoner had, in his possession, a mould that would make and impress the similitude of the head side of a shilling. (14)

It is not necessary that the instrument should be capable of making an impression of the whole of one side of the coin; for the words "or any part or parts" are introduced into the above section, and consequently the difficulty in Sutton's case, (15) where the instrument was capable of making the sceptre only, cannot now occur.

On an indictment for making a mould *intended to make and impress the figure and apparent resemblance of the obverse side* of a shilling, it was held sufficient to prove that the prisoner made the mould and a part of the impression, though he had not completed the entire impression. (16)

It is unnecessary, under this section, to prove the intent of the defendant, the mere similitude being treated as evidence of the intent. Neither is it essential to shew that money was actually made with the instrument in question. (17)

In Ridgeley's case, the prisoner, was indicted for having in his possession, without lawful authority, etc., a puncheon made of iron and steel, in and upon which was made and impressed the figure, resemblance, and similitude of the head side of a shilling. It was proved that several puncheons were found in the prisoner's lodgings, together with a quantity of counterfeit money, and that he had them knowingly for the purpose of coining. These puncheons were complete and hardened, ready for use; but, it was impossible to say that the shillings which were found were actually made with these puncheons, the impressions being too faint to be exactly compared; but they had the appearance of having been made with them. The manner of making the puncheons was as follows. A true shilling was cut away to the outline of the head; that outline was then fixed on a piece of steel, which was filed and cut close to the outline, and this made the puncheon; the puncheon then made the die, or counter-puncheon. A

(14) R. v. Lennard, 1 Leach, 85.
(15) R. v. Sutton, 2 Str., 1074.
(16) R. v. Foster, 7 C. & P., 405.
(17) R. v. Ridgeley, 1 Leach, 189; 1 East, P. C., 171.

puncheon is complete without letters, but it may be made with letters upon it; though, from the difficulty and inconvenience, it is never so made, at the Mint; but after the die is struck the letters are engraved on it; a puncheon alone, without the counter-puncheon, will not make the figure; but to make an old shilling or a base shilling current, nothing more is necessary than the instrument now produced. They may be used not only for counterfeiting coins, but also for other purposes, such as making seals, buttons, medals, and so forth, where such impressions are wanted. Eleven of the judges were unanimously of opinion that this was *a puncheon* within the meaning of the Act; for the word "puncheon" is expressly mentioned in the statutes, and will, by the means of the counter-puncheon or matrix, "make or impress the *figure, stamp, resemblance, or similitude of the current coin;*" and that these words do not mean an exact figure, but if the instrument impress a resemblance, in fact, such as will impose on the world, it is sufficient, whether the letters are apparent on the puncheon or not; otherwise the Act would be quite evaded, for the letters would be omitted on purpose. The puncheon in question was one to impress the head of King William; and the shillings of his reign, even when the letters were worn out, were current coin of the kingdom. The puncheon made an impression like them, and the coin stamped with it would resemble them on the head side, though there were no letters. This was compared to the case mentioned by Sir Mathew Hale, (18) that the omission or addition of words in the inscription of the true seals, for the purpose of evading the law, would not alter the case. (19)

Where the defendant employed a man, who was a die-sinker, to make, for a pretended innocent purpose, a die calculated to make shillings, and the die-sinker, suspecting fraud, informed the authorities at the Mint, and, under their directions, made the die for the purpose of bringing the offence home to the prisoner, it was held that the die-sinker was an innocent agent, and that the defendant was rightly convicted as a principal offender. (20)

The *making* and *procuring* dies and other materials, with the intention of using them in coining Peruvian half dollars, in England, not in order to utter or pass them in England, but, so as to try whether the apparatus would answer before sending the same out to Peru, to be there used in making the counterfeit coin for circulation in that country, was held indictable at common law. (21)

Section 466 has the words "*without lawful authority or excuse.*" It is sufficient, however, if the possession is averred to have been "*without lawful excuse,*" on the ground that there can be no authority which could not also be an excuse, and therefore to negative excuse is to negative authority. (22)

To prove the guilty knowledge of the defendant upon an indictment for having coining instruments, evidence may be given of his having previously uttered counterfeit money. (23)

The guilty knowledge required is the being, knowingly, in possession of the instrument, without lawful authority or excuse. A guilty *intention* in reference to the use or possession of the instrument is not necessary. (24)

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(18) 1 Hale, 184; 2 Hale, 212, 215; R. v. Robinson, 2 Roll. Rep., 50; 1 East, P. C., 86.

(19) R. v. Ridgeley, *ante.*

(20) R. v. Bannon, 2 Mood. C. C., 309; 1 C. & K., 295. See section 62, and comments at pp. 57-59, *ante.*

(21) R. v. Roberts, Dears., 539; 25 L. J. (M. C.), 17; Arch. Cr. Pl. & Ev., 21st Ed., 875, 876.

(22) R. v. Harvey, L. R., 1 C. C. R., 284; 40 L. J. (M. C.), 63.

(23) R. v. Weeks, L. & C., 18; 30 L. J. (M. C.), 141.

(24) R. v. Harvey, *ante.*

In the case of R. v. Harvey, the prisoner had ordered, of a die-sinker, two dies having an apparent resemblance to the two sides of a sovereign, whereupon the die-sinker communicated with the police, who, in pursuance of orders from the Mint, told him to furnish the dies to the prisoner, which he did. *Held*, that the facts constituted unlawful authority or excuse for the prisoner's possession of the dies.

**467. Bringing instruments for coining, from Mints, into Canada.** — Every one is guilty of an indictable offence and liable to imprisonment for life, who, without lawful authority or excuse, the proof whereof shall lie on him, knowingly conveys out of any of Her Majesty's Mints into Canada, any puncheon, counter puncheon, matrix, stamp, die, pattern, mould, edger, edging or other tool, collar, instrument, press or engine, used or employed in or about the coining of coin, or any useful part of any of the several articles aforesaid, or any coin bullion, metal or mixture of metals. R.S.C., c. 167, s. 25.

**468. Clipping current gold or silver Coin.** — Every one is guilty of an indictable offence and liable to fourteen years' imprisonment, who impairs, diminishes or lightens any current gold or silver coin, with intent that the coin, so impaired, diminished, or lightened, may pass for current gold or silver coin. R.S.C., c. 167, s. 5.

**469. Defacing current coins.** — Every one is guilty of an indictable offence and liable to one year's imprisonment who defaces any current gold, silver or copper coin by stamping thereon any names or words, whether such coin is or is not thereby diminished or lightened, and afterwards tenders the same. R.S.C., c. 167, s. 17.

**470. Possessing clippings of current coin.** — Every one is guilty of an indictable offence and liable to seven years' imprisonment, who unlawfully has in his *custody* or *possession* any filings or clippings, or any gold or silver bullion, or any gold or silver in dust, solution or otherwise which have been produced or obtained by impairing, diminishing or lightening any current gold or silver coin, knowing the same to have been so produced or obtained. R.S.C., c. 167, s. 6.

**471. Possessing counterfeit coins.** — Every one is guilty of an indictable offence and liable to three years' imprisonment, who has in his *custody* or *possession*, knowing the same to be counterfeit, and with intent to utter the same or any of them —

(*a*) any counterfeit coin resembling, or apparently intended to resemble or pass for, any current gold or silver coin; or

(*b*) three or more pieces of counterfeit coin resembling, or apparently intended to resemble or pass for, any current copper coin. R.S.C., c. 167, ss. 12 and 16.

See section 3 (*k*), *ante*, for meaning of "*having in possession*."

**472. Offences respecting copper coins.** — Every one is guilty of an indictable offence and liable to three years' imprisonment who—

(*a*) makes, or begins to make, any counterfeit coin resembling, or apparently intended to resemble or pass for, any current copper coin; or

(*b*) without lawful authority or excuse, the proof of which shall lie on him, knowingly —

(i) makes or mends, or begins or proceeds to make or mend, or buys or sells, or has in his custody or possession, any instrument tool or engine adapted and intended for counterfeiting any current copper coin;

(ii) buys, sells, receives, pays or puts off, or offers to buy, sell, receive, pay or put off any counterfeit coin resembling, or apparently intended to resemble or pass for any current copper coin, at or for a lower rate of value than the same imports or was apparently intended to import. R.S.C., c. 167, s. 15.

**473. Offences respecting foreign coins.** — Every one is guilty of an indictable offence and liable to three years' imprisonment, who —

(*a*) makes, or begins to make, any counterfeit coin or silver coin resembling, or apparently intended to resemble or pass for, any gold or silver coin of any foreign prince, state or country, not being current coin;

(*b*) *without lawful authority or excuse*, the proof of which shall lie on him —

(i) brings into or receives in Canada any such counterfeit coin, knowing the same to be counterfeit;

(ii) has in his *custody or possession* any such counterfeit coin *knowing* the same to be counterfeit, and with intent to put off the same; or

(*c*) utters any such counterfeit coin; or

(*d*) makes any counterfeit coin resembling, or apparently intended to resemble or pass for, any copper coin of any foreign prince, state or country, not being current coin. R.S.C., c. 167, ss. 19, 20, 21, 22 and 23.

Where a prisoner was indicted for having in his possession a counterfeit coin intended to resemble an American silver dollar, and the Crown sought to adduce, — as evidence of the prisoner's guilty knowledge, — proof that the prisoner had attempted to put off a number of genuine American trade dollars, (worth only sixty cents each), as being worth one dollar each, the evidence was objected to by the prisoner's counsel, and, the objection was maintained, on the ground that it is essential, upon an accusation of having possession of counterfeit coins, that the coins offered in evidence of guilty knowledge should themselves be counterfeit. (25)

(25) R. v. Benham, Que. Jud. Rep., 8 Q. B., 448.

## UTTERING.

**474. Uttering counterfeit gold or silver coins.** — Every one is guilty of an indictable offence, and liable to fourteen years' imprisonment, who *utters* any counterfeit coin resembling, or apparently intended to resemble or pass for, any current gold or silver coin, *knowing the same to be counterfeit.* R.S.C., c. 167, s. 10.

The word "*utter*" includes "*tender*," and "*put off*." (See section 460 (*f*), *ante.*)

A "*groat*" is a sufficient description of the English silver four penny piece. (26)

Where a good shilling was handed to a Jew boy for fruit, and he put it into his mouth, under pretence of trying whether it was a genuine coin, and, then, (instead of the good shilling handed to him), he took, out of his mouth, a bad shilling, which he delivered to the prosecutor, saying it was not good; this, (which is one of the modes of ringing the changes), was held to be an uttering of the bad shilling. (27)

It is an "uttering and putting off," as well as a "tendering," if the counterfeit coin be offered in payment, though it be refused by the person to whom it is offered. (28)

The proof that the defendant knew the money to be counterfeit at the time of uttering it will be by circumstantial evidence. If, for instance, it be proved that the defendant uttered, either on the same day or at other times, whether before or after the uttering charged, base money, either of the same or a different denomination, to the same or a different person, or had other pieces of base money about him when he uttered the counterfeit money in question, this will be evidence from which the jury may presume a guilty knowledge. (29)

Where one of two persons in company utters bad coin and other bad coin is found on the other of them, they are jointly guilty. (30) If two jointly prepare counterfeit coin and utter it in different shops, apart from each other, but in concert and intending to share the proceeds, their respective utterings are the joint utterings of both. (31)

**475. Uttering light coins, medals, &c.** — Every one is guilty of an indictable offence and liable to three years' imprisonment, who —

(*a*) utters, as being current, any gold or silver coin of less than its lawful weight, knowing such coin to have been impaired, diminished or lightened, otherwise than by lawful wear; or

(*b*) *with intent to defraud*, utters, as or for any current gold or

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(26) R. v. Connell, 1 C. & K., 190.
(27) R. v. Franks, 2 Leach, 736.
(28) R. v. Welch, 2 Den., 78; 20 L. J. (M. C.), 101. See R. v. Radford, 1 Den., 59; R. v. Ion, 2 Den., 475; 21 L. J. (M. C.), 166.
(29) R. v. Whiley, 2 Leach, 983; R. v. Foster, Dears., 456; 24 L. J. (M. C.), 134.
(30) R. v. Gerrish, 2 M. & Rob., 219. And see R. v. Skerritt, 2 C. & P., 427.
(31) R. v. Hurse, 2 M. & Rob., 360.

silver coin, any coin not being such current gold or silver coin, or any medal, or piece of metal or mixed metals, resembling, in size, figure and colour, the current coin as or for which the same is so uttered, such coin, medal or piece of metal or mixed metals so uttered being of less value than the current coin as or for which the same is so uttered; or

(*c*) utters any counterfeit coin resembling or apparently intended to resemble or pass for any current copper coin, *knowing the same to be counterfeit.* R.S.C., c. 167, ss. 11, 14 and 16.

A person knowingly passed, as and for a half sovereign, a medal of about the same size and color as a half sovereign, but with a different inscription. The medal itself, however, was not seen by the jury it being accidently lost in the course of being produced in evidence by a witness at the trial; and there was no evidence as to the appearance of the reverse side. *Held*, that there was some evidence, nevertheless, of the medal being one, in size, figure and color, resembling a half sovereign. (32)

**476. Uttering defaced coin.** — Every one who utters any coin defaced by having stamped thereon any names or words, is guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty not exceeding ten dollars R.S.C., c. 167, s. 18.

No prosecution for any offence under this section can be commenced without the leave of the Attorney-General. (See section 549, *post.*)

**477. Uttering uncurrent copper coins.** — Every one who utters, or offers in payment, any copper coin, other than current copper coin, is guilty of an offence and liable on summary conviction, to a penalty of double the nominal value thereof, and, in default of payment of such penalty, to eight days' imprisonment. R.S.C., c. 167, s. 33.

**478. Punishment after previous conviction.** — Every one, who, after a previous conviction of any offence relating to the coin under this or any other Act, is convicted of any offence specified in this part, is liable to the following punishment: —

(*a*) to imprisonment for life, if otherwise fourteen years would have been the longest term of imprisonment to which he would have been liable;

(*b*) to fourteen years' imprisonment, if otherwise seven years would have been the longest term of imprisonment to which he would have been liable;

(*c*) to seven years' imprisonment, if otherwise he would not have been liable to seven years' imprisonment. R.S.C., c. 167, s. 13.

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(32) R. v. Robinson, L. & C., 604; 34 L. J. (M. C.), 176.

See section 628, *post*, as to indictment, and see section 676, *post*, as to procedure, in cases in which a previous conviction is charged.

A second offence, to be punishable, as such, must be one committed after a conviction for a previous offence. For instance, suppose A were to pass a base coin on the first of August, another on the second of August, and still another on the third of August, thus making three distinct offences; and suppose in the first instance, he is prosecuted and convicted of the offence committed on the third of August, he cannot, upon a subsequent indictment being laid against him, for either of the previous offences be charged with and punished as having been *previously* convicted of the offence of the third of August; or, suppose, again, that he is, in the first instance, prosecuted, after the third of August, for the offence of the first of August and convicted of such first offence, say, on the tenth of August, he cannot upon a subsequent indictment being laid against him, for either of the offences of the second or third of August be charged with and punished as having been previously convicted of the offence of the first of August; the principle upon which the law proceeds in providing a severer punishment for the repetition of an offence being this, not because the offender has committed the offence more than once, but because when an offender has committed and been convicted of an offence he is looked upon as incorrigible, and as treating with contempt his first conviction, if, afterwards, he repeats the offence; but, if the repetition of the offence takes place without his having been convicted, he cannot be said to have treated with contempt a conviction which has not yet taken place; and, therefore, each repetition of the offence, when it takes place before any actual conviction, is looked upon and dealt with as merely a first offence, and is punishable as such. This point was raised, at Montreal, in 1887, upon a petition for *habeas corpus*, before the late Chief Justice Dorion, who quashed a conviction for an offence charged as a second offence, because such second offence was committed prior to the date of the conviction for the first offence. (33)

Before the prisoner has pleaded guilty or been found guilty of the subsequent offence, the previous conviction cannot be given in evidence. (34)

If the prisoner is found guilty of the subsequent offence, and, then, upon being asked whether he has been previously convicted, denies that he has, and the jury, upon the proof, find that he has not been so previously convicted, it has been held, under the English Statute, (in which, however, the distinction between a felony and a misdemeanor is still recognized), that he is entitled to be acquitted of the whole charge, inasmuch as, under the English Act, the whole charge is a felony, and he cannot be convicted merely of the uttering, which by the English Act is a misdemeanor; (35) although it was held that, after such acquittal, he could, under the English Act, be re-indicted for the uttering, merely, and that he could not, to such indictment, plead *autrefois acquit*. (36) But, with us, if the prosecution were to fail in proving the previous conviction, the verdict would stand good as to the offence actually proved. (See section 675, *post*.)

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(33) Lambe v. Hall, & Hall, Petitioner, Court of Queen's Bench, Montreal, (not reported). See 1 Hawk. P. C., 72. Tuttle v. Com., 2 Gray, (Mass.), 505; Com. v. Daley, 4 Gray, (Mass.), 209; People v. Rutter, 3 Cowen, (N. Y.), 347.

(34) Section 676, *post*; R. v. Martin, L. R., 1 C. C. R., 214; 39 L. J. (M. C.), 31.

(35) R. v. Thomas, L. R., 2 C. C. R., 141; 44 L. J. (M. C.), 42.

(36) Id. Mellor, J.

## PART XXXVI.

## ADVERTISING COUNTERFEIT MONEY.

**479.** In this Part, the expression "counterfeit token of value" means any spurious or counterfeit coin, paper money, inland revenue stamp, postage stamp, or other evidence of value, by whatever technical, trivial or deceptive designation the same may be described, and includes also any coin or paper money, which although genuine has no value as money, but in the case of such last mentioned coin or paper money it is necessary in order to constitute an offence under this part that there should be knowledge on the part of the person charged that such coin or paper money was of no value as money, and a fraudulent intent on his part in his dealings with or with respect to the same. (As amended by the *Criminal Code Amendment Act 1900.*)

**480.** — Every one is guilty of an indictable offence and liable to five years' imprisonment, who —

(*a*) prints, writes, utters, publishes, sells, lends, gives away, circulates or distributes any letter, writing, circular, paper, pamphlet, handbill or any written or printed matter advertising, or offering or purporting to advertise or offer for sale, loan, exchange, gift or distribution, or to furnish, procure or distribute, any counterfeit token of value, or what purports to be a counterfeit token of value, or giving or purporting to give, either directly or indirectly, information where, how, of whom, or by what means any counterfeit token of value, or what purports to be a counterfeit token of value, may be procured or had; or

(*b*) purchases, exchanges, accepts, takes possesion of or in any way uses, or offers to purchase, exchange, accept, take possession of or in any way use, or negociates or offers to negociate with a view of purchasing or obtaining or using any such counterfeit token of value, or what purports so to be; or

(*c*) in executing, operating, promoting or carrying on any scheme or device to defraud, by the use or by means of any papers, writings, letters, circulars or written or printed matters concerning the offering for sale, loan, gift, distribution or exchange of counterfeit tokens of value, uses any fictitious, false or assumed name or address, or any name or address other than his own right, proper and lawful name; or

(*d*) in the execution, operating, promoting or carrying on, of any scheme or device offering for sale, loan, gift or distribution, or purporting to offer for sale, loan, gift or distribution, or giving or purporting to give information, directly or indirectly, where,

how, of whom or by what means any counterfeit token of value may be obtained or had, knowingly receives or takes from the mails, or from the post office, any letter or package addressed to any such fictitious false or assumed name or address, or name other than his own right, proper or lawful name. 51 V., c. 40, ss. 2 and 3.

A prisoner cannot, — on an indictment for offering to purchase counterfeit tokens of value, — be convicted upon evidence that the notes which he offered to purchase were not counterfeit notes but genuine bank notes *unsigned*, — although he offered to purchase in the belief that they were counterfeit. (1)

It has been held that papers, which are spurious imitations of United States Government Treasury notes, are counterfeit or what purport to be counterfeit tokens of value under sections 479 and 480, although there are no originals of their description. (2)

As to *primâ facie* evidence of the fraudulent character of any letter, circular or paper relating to counterfeit tokens of value, see section 693, *post*.

## PART XXXVII.

## MISCHIEF.

"Part XXXIV (1) is founded on the provisions of 24 and 25 Vict. c. 97, in which the word *maliciously* very frequently occurs.

"Section 381 (2) is meant to give what we believe to be the legal effect of that word. The first portion of the section is intended to meet such a state of facts as that in the case of Reg., v. Child, (3), where a man, — who, out of malice to a fellow lodger, made a bonfire of her furniture on the floor of her room, not meaning that his landlord's house should catch fire, — escaped punishment.

"Under the proviso, (4), a tenant for years, burning his landlord's house, commits an offence, though, in so doing, he burns his own leasehold; and a freeholder burning his own house commits an offence, if he does so *with intent to defraud* the insurers.

"The rest of this part re-enacts 24 and 25 Vict. c. 97, with little substantial alteration." (Eng. Commrs'. Rep., p. 30).

**481. Preliminary.** — Every one who causes any event by an act which he knew would probably cause it, being reckless whether

(1) R. v. Attwood, 20 O. R., 574, 581.
(2) R. v. Corey, 33 N. B. Rep., 81; 1 Can. Cr. Cas., 161.
(1) Part XXXIV of the English Draft corresponds with Part XXXVII of the present Code.
(2) Section 381 of the English Draft corresponds with our section 481.
(3) Reg. v. Child, L. R., 1 C. C. R., 307; 40 L. J. (M. C.), 127. See, also, R. v. Harris, 15 Cox C. C., 75, and R. v. Batstone, 10 Cox C. C., 20.
(4) Clause 3 of section 481.

such event happens or not, is deemed to have caused it *wilfully*, for the purposes of this part.

2. Nothing shall be an offence under any provision contained in this part, unless it is done without legal justification or excuse, and without colour of right.

3. Where the offence consists in an injury to anything in which the offender has an interest, the existence of such interest, if partial, shall not prevent his act being an offence, and, if total, shall not prevent his act being an offence, if done *with intent to defraud*. R.S.C., c. 168, ss. 60 and 61.

**482. Arson.** — Every one is guilty of the indictable offence of arson, and liable to imprisonment for life, who *wilfully sets fire to* any building or structure, whether such building, erection or structure is completed or not, or to any stack of vegetable produce or of mineral or vegetable fuel, or to any mine, or any well of oil or other combustible substance, or to any ship or vessel, whether completed or not, or to any timber or materials placed in any shipyard for building or repairing or fitting out any ship, or to any of Her Majesty's stores or munitions of war. R.S.C., c. 168, ss. 2 to 5, 7, 8, 19, 28, 46 and 47.

The words "His Majesty's" should be substituted for "Her Majesty's." (See section 7 of the *Interpretation Act*, at p. 9, *ante*.)

Arson, at common law, was a felony, and was the *malicious and wilful burning of the house of another*. (5) The burning of a party's own house did not come within this definition; although the burning of a man's own house in a town or so near to other houses as to create danger to them was a great misdemeanor at common law; (6) and, to constitute arson at common law, there must have been an actual *burning* of the whole or some part of the house. (7) although it was not necessary that any flame should be visible. (8)

It will be seen, by the above section, 481, that a person will be guilty of arson, even if he be the owner of the building, etc., if he wilfully sets fire to it, *with intent to defraud*; and, if he be not the owner of, but have only some partial interest in the building, etc., he will be guilty of arson by wilfully setting fire to it, whether he does it with intent to defraud or not.

It will, also, be seen that, instead of the words *wilful burning* used in the common law definition of arson, the words used in section 482 are, *wilfully sets fire to*, merely; and the burning, (however slight), of any part of the building, etc., will be sufficient, although the fire be afterwards extinguished. (9)

It is generally by circumstantial evidence that the wilfully setting fire by the defendant must be made out.

(5) 3 Inst., 66; 4 Bl. Com., 220.
(6) 1 Hale, 568; 2 East, P. C., 1027.
(7) 1 Hale 569.
(8) R. v. Russell, 1 C. & M., 541; R. v. Stallion, R. & M., C. C. R., 398; R. v. Parker, 9 C. & P., 45.
(9) 1 Hawk., c. 39, s. 17; 1 Hale, 569; Dalt., 506.

Where a house was robbed and burnt, evidence of the fact of the defendant being found in possession of some of the goods, which were in the house, at the time it was burnt, was admitted, as tending to prove him guilty of the arson. (10)

Where the question is, whether the burning was accidental or wilful, evidence is admissible to shew that, on another occasion, the defendant was in such a situation as to render it probable that he was then engaged in the commission of the like offence against the same property; (11) or, that he had previously occupied houses which had been on fire and in respect of which he made insurance claims and got paid; (12) but, on a charge of arson, where the question was as to the identity of the prisoner, evidence that, a few days previous to the fire in question, another building of the prosecutor's was on fire, and that the prisoner was then standing by with a demeanor which shewed indifference or gratification, was rejected. (13)

Where a person, by shooting at game or by shooting at another's poultry, happened to set fire to the thatch of a house, it was held not to be arson. (14)

An unfinished house, of which all the walls, external and internal, are built and finished, the roof on, and completed, the flooring of a considerable part laid, and the internal walls and ceilings prepared for plastering, was held to be a "*building*." (15)

It will be seen, that, section 482 covers any building or structure whatever, whether completed or not; and, therefore, the distinctions formerly existing, as shewn by a number of cases cited in Archbold, (16) in regard to the description of the building, or its state of completeness or incompleteness, are no longer material.

When a person is charged with setting fire to his own house, the intent to defraud, — which, according to section 481, clause 3, is an essential ingredient of the offence, — cannot be inferred from the act itself, but must be proved by other evidence. Where, therefore, a defendant was charged with arson with intent to defraud an insurance company, and a sufficient notice to produce the insurance policy had not been given, it was held that secondary evidence of it could not be given, and, that, there being no other evidence of the insurance, the defendant must be acquitted. (17)

Where, on a trial for arson, with intent to defraud an insurance office, no policy of insurance was produced, and the only evidence of the existence of the insurance was the testimony of the insurance company's agent, who stated that the prisoner came to him, in May 1867, about effecting an insurance on the premises, the subject of the alleged arson, and that, on the 30th August 1871, (about a month before the alleged arson), the prisoner came again to him, and said he wished *to renew* his policy, and then paid ten shillings; this was held to be sufficient evidence of the existence of an insurance, inasmuch as it was evidence of an admission by the prisoner that there was a policy. (18)

(10) R. v. Rickman, 2 East, P. C., 1035.
(11) R. v. Dossett, 2 C. & K., 306.
(12) R. v. Gray, 4 F. & F., 1102; and R. v. Voke, R. & R., 531.
(13) R. v. Harris, 4 F. & F., 342.
(14) 2 East, P. C., 1019.
(15) R. v. Manning, L. R., 1 C. C. R., 338; 41 L. J. (M. C.), 11.
(16) Arch. Cr. Pl. & Ev., 21st Ed., pp. 590, 591.
(17) R. v. Kitson, Dears., 187; 22 L. J. (M. C.), 118. See R. v. Greenwood, 23 U. C., Q. B., 250.
(18) R. v. Newboult, L. R., 1 C. C. R., 344; 41 L. J. (M. C.), 63.

In one case, the counsel for the prosecution suggested, as a motive for the act, the defendant's desire to realise the amount of an insurance which she had upon her goods; and, upon evidence being tendered to shew that she was in easy circumstances, so as to negative the suggested motive, it was admitted. (19)

A quantity of straw, packed on a lurry, in course of transmission to market, and left for the night in an inn-yard, was held not to be a *stack* of straw. (20)

Where a sailor on board a ship entered a part of the vessel, where spirits were kept, for the purpose of stealing some rum, and, while he was tapping a cask, a lighted match held by him, came in contact with the spirits which were flowing from the cask tapped by him, and a fire ensued, which destroyed the vessel, it was held that a conviction for arson of the ship could not, under these circumstances, be upheld. (21)

A pleasure boat, eighteen feet long, was set fire to, and Patteson, J., inclined to think that it was a vessel within the meaning of the Act, but the prisoner was acquitted on the merits, and no decided opinion was given.(22)

**483. Attempt to commit Arson.** — Every one is guilty of an indictable offence and liable to fourteen years' imprisonment, who wilfully attempts to set fire to anything mentioned in the last preceding section, or who wilfully sets fire to any substance so situated that he knows that anything mentioned in the last preceding section is likely to catch fire therefrom. R.S.C., c. 168, ss. 9, 10, 20, 29, and 48.

See section 64, and general remarks and authorities, on "*attempts*," at pp. 70-73, *ante*.

**484. Setting fire to crops, etc.** — Every one is guilty of an indictable offence, and liable to fourteen years' imprisonment, who wilfully sets fire to —

(*a*) any crop, whether standing or cut down or any wood, forest, coppice or plantation, or any heath, gorse, furze or fern; or

(*b*) any tree, lumber, timber, logs, or floats, boom, dam or slide, and thereby injures or destroys the same. R.S.C., c. 168, ss. 18 and 12.

**485.** Every one is guilty of an indictable offence and liable to seven years' imprisonment who wilfully attempts to set fire to anything mentioned in the last preceding section, or who wilfully sets fire to any substance so situated that he konws that anything mentioned in the last preceding section is likely to catch fire therefrom. R.S.C., c. 168, s. 20.

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(19) R. v. Grant, 4 F. & F., 322.
(20) R. v. Satchwell, L. R., 2 C. C. R., 21; 42 L. J. (M. C.), 63.
(21) R. v. Faulkner, 13 Cox C. C., 550.
(22) R. v. Bowyer, 4 C. & P., 559.

A defendant, who set fire to a summer-house in a wood, which fire was thence communicated to the wood, was held to be properly convicted on an indictment charging him with setting fire to the wood. (23)

Where a prisoner was indicted for setting fire to growing furze, Lopez, J., directed the jury that if she set fire to the furze, thinking, although erroneously, that she had a right to do so, they ought not to convict.(24)

**486. Recklessly setting fire to any forest, tree, etc.** — Every one is guilty of an indictable offence and liable to two years' imprisonment, who, by such negligence as shows him to be reckless or wantonly regardless of consequences, or in violation of a provincial or municipal law of the locality, sets fire to any forest, tree, manufactured lumber, square timber, logs or floats, boom, dam or slide on the Crown domain, or land leased or lawfully held for the purpose of cutting timber, or on private property, on any creek or river, or rollway, beach or wharf, *so that the same is injured or destroyed.*

2. The magistrate investigating any such charge may, in his discretion, if the consequences have not been serious, dispose of the matter summarily, without sending the offender for trial, by imposing a fine not exceeding fifty dollars, and in default of payment, by the committal of the offender to prison for any term not exceeding six months, with or without hard labour. R.S.C., c. 168, s. 11.

**487. Threats to burn.** — Every one is guilty of an indictable offence and liable to ten years' imprisonment who sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing threatening to burn or destroy any building, or any rick or stack of grain hay or straw or other agricultural produce, or any grain, hay, or straw, or other agricultural produce in or under any building, or any ship or vessel. R.S.C., c. 173, s. 8.

As to threats to murder, see section 233, *ante*. See, also, sections 463-6, and notes and authorities at pp. 445-451, *ante*, as to threatening letters and other threats.

Clause 2 of section 959, provides that, upon complaint by any person, that, on account of threats or on any other account, the complainant is, on reasonable grounds, afraid that his property will be set fire to, the justice hearing the complaint may require the person, who has made the threats, to give security to keep the peace.

**488. Placing or throwing explosives with intent to damage or destroy anything.** — Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who *wilfully* places or throws any explosive substance *into* or *near* any building or ship

(23) R. v. Price, 9 C. & P., 729.
(24) R. v. Twose, 14 Cox C. C., 327.

with intent to destroy or damage the same or any machinery, working tools, or chattels whatever, whether or not any explosion takes place. R.S.C., c. 168, ss. 14 and 49.

For definition of "*explosive substance*," see section 3 (*i*), *ante*, p. 3.

Where a prisoner was indicted for throwing gun powder against a house and the evidence was that the prisoner had thrown against the house a bottle containing gunpowder, and that there was a fuse in the neck of the bottle, *Kelly*, C. B., ruled that, unless the fuse was lighted at the time the bottle was thrown against the house, the offence was not made out. His Lordship said that "if any body merely threw a bottle containing gunpowder, that would not be sufficient: for if the fuse was not lighted, it could not cause an explosion and it would be merely throwing a *bottle* against a house. (25)

**489. Mischief on railways.**. — Every one is guilty of an indictable offence and liable to five years' imprisonment, who, in manner likely to cause danger to valuable property, *without endangering life or person*, —

(*a*) places any obstruction upon any railway, or takes up, removes, displaces, breaks or injures any rail, sleeper or other mat ter or thing belonging to any railway; or

(*b*) shoots or throws anything at an engine or other railway vehicle; or

(*c*) interferes without authority with the points, signals or other appliances upon any railway; or

(*d*) makes any false signal on or near any railway; or

(*e*) wilfully omits to do any act which it is his duty to do; or

(*f*) does any other unlawful act.

2. Every one who does any of the acts above mentioned, with *intent* to cause such danger, is liable to imprisonment for life. R. S. C., c. 168, ss. 37 and 38.

**490. Obstructing the construction or use of any railway.** Every one is guilty of an indictable offence and liable to two years' imprisonment, who, by any act or wilful omission, obstructs or interrupts, or causes to be obstructed or interrupted, the construction, maintenance or free use of any railway or any part thereof, or any matter or thing appertaining thereto or connected therewith. R.S.C., c. 168, ss. 38 and 39.

A line of railway constructed and completed under the powers of an Act of Parliament and intended for the conveyance of passengers by locomotive power, but not yet used for that purpose, but only for the carriage of materials and workmen, is within the above section. (26)

(25) R. v. Sheppard, 11 Cox C. C., 302.
(26) R. v. Bradford, Bell, 268; 29 L. J. (M. C.), 171.

Where a defendant had unlawfully altered some railway signals, at a railway station, and this alteration caused a train, (which would otherwise have passed the station without slackening speed), to slacken speed and to come nearly to a stand, it was held that he was guilty of *obstructing* a train within the meaning of section 36 of 24-25 Vic., c. 97, which is to the same effect as onr section 490. (27)

Where a defendant, by holding up his arms in the mode used by inspectors of the line, when desirous of stopping a train, intentionally induced the driver of a train to reduce his speed, although the train was not wholly stopped, but immediately afterwards resumed its ordinary speed, he was held to be guilty of an unlawful obstruction. (28)

A, without the consent of the railway company, took a trolley or hand-car, placed it on the track, and ran with it, upon the railway for several miles; and although it was at a time when, ordinarily, no train was running thereon, A was held to have obstructed the free use of the railway. (29)

See section 499 A (*d*), *post*, as to other mischiefs on railwoys.

**491. Injuries to packages in custody of railways.** — Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars over and above the value of the goods or liquors so destroyed or damaged or to one month's imprisonment, with or without hard labour, or to both, who —

(*a*) wilfully destroys or damages anything containing any goods or liquors in or about any railway station or building or any vehicle of any kind on any railway, or in any warehouse, ship or vessel, with intent to steal or otherwise unlawfully to obtain or to injure the contents, or any part thereof; or

(*b*) unlawfully drinks or wilfully spills or allows to run to waste any such liquors, or any part thereof. R.S.C., c. 38, s. 62; 51 V., c. 29, s. 297.

**492. Injuries to electric telegraphs, &c.** — Every one is guilty of an indictable offence and liable to two years' imprisonment who wilfully —

(*a*) destroys, removes or damages anything which forms part of, or is used or employed in or about any electric or magnetic telegraph, electric light, telephone or fire-alarm, or in the working thereof, or for the transmission of electricity for other lawful purposes; or

(*b*) prevents or obstructs the sending, conveyance or delivery of any communication by any such telegraph, telephone or fire-alarm, or the transmission of electricity for any such electric light or for any such purpose as aforesaid.

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(27) R. v. Hadfield, L. R., 1 C. C. R., 253; 39 L. J. (M. C.), 131; 11 Cox C. C., 574.
(28) R. v. Hardy, L. R., 1 C. C. R., 278; 40 L. J. (M. C.), 62.
(29) R. v. Brownell, 26 N. B. R., 579; Bur. Dig., 164.

2. Every one who wilfully, by any overt act, *attempts* to commit any such offence is guilty of an offence and liable, on summary conviction, to a penalty not exceeding fifty dollars, or to three months' imprisonment with or without hard labour. R.S.C., c. 168, ss. 40 and 41.

**493. Wrecking.** — Every one is guilty of an indictable offence and liable to imprisonment for life who wilfully —

(*a*) casts away or destroys any ship, whether complete or unfinished; or

(*b*) does any act tending to the immedia : loss or destruction of any ship in distress; or

(*c*) interferes with any marine signal, or exhibits any false signal, with intent to bring a ship or boat into danger. R.S.C., c. 168, ss. 46 and 51.

**494.** Every one is guilty of an indictable offence, and liable to fourteen years' imprisonment, who *attempts* to cast away or destroy any ship, whether complete or unfinished. R.S.C., c. 168, s. 48.

**495. Interfering with marine signals, buoys, etc.** — Every one is guilty of an indictable offence and liable to seven years' imprisonment who wilfully alters, removes or conceals, or *attempts* to alter, remove or conceal, any signal, buoy or other sea mark used for the purposes of navigation.

2. Every one who makes fast any vessel or boat to any such signal, buoy, or sea mark is liable, on summary conviction, to a penalty not exceeding ten dollars, and, in default of payment, to one month's imprisonment. R.S.C., c. 168, ss. 52 and 53.

**496. Preventing saving of wrecked vessels or wreck.** — Every one is guilty of an indictable offence and liable to seven years' imprisonment who wilfully prevents or impedes, or *endeavours* to prevent or impede —

(*a*) the saving of any vessel that is wrecked, stranded, abandoned or in distress; or

(*b*) any person in his endeavour to save such vessel.

2. Every one who wilfully prevents or impedes, or *endeavours* to prevent or impede, the saving of any wreck is guilty of an indictable offence and liable, on conviction on indictment, to two years' imprisonment, and on summary conviction before two justices of the peace, to a fine of four hundred dollars or six months' imprisonment with or without hard labour. R. S. C., c. 81, ss. 36 (*b*) and 37 (*c*).

For definition of "Wreck," see section 3 (*dd*), p. 8, *ante*.

**497. Injuries to rafts.** — Every one is guilty of an indictable offence and liable to two years' imprisonment who wilfully —

(*a*) breaks, injures, cuts, loosens, removes or destroys, in whole or in part, any dam, pier, slide, boom or other such work, or any chain or other fastening attached thereto, or any raft, crib of timber or saw-logs; or

(*b*) impedes or blocks up any channel or passage intended for the transmission of timber. R.S.C., c. 168, s. 54.

**498. Mischief to mines.** — Every one is guilty of an indictable offence and liable to seven years' imprisonment who, *with intent to injure* a mine or oil well, *or obstruct* the working thereof —

(*a*) causes any water, earth, rubbish or other substance to be conveyed into the mine or oil well or any subterranean channel communicating with such mine or well; or

(*b*) damages any shaft or any passage of the mine or well; or

(*c*) damages, *with intent to render useless*, any appraatus, building, erection, bridge or road belonging to the mine or well, whether the object damaged be complete or not; or

(*d*) hinders the working of any such apparatus; or

(*e*) damages or unfastens, *with intent to render useless*,, any rope, chain or tackle used in any mine or well or upon any way or work connected therewith. R. S. C., c. 168, ss. 30 and 31.

The mine may be laid as the property of a person in possession of and working it, though only as agent for others. (30)

If any act covered by this section be done under a *bonâ fide* claim of right, it will not be punishable. (31)

A scaffold erected at some distance above the bottom of a mine, for the purpose of working a vein of coal on a level with the scaffold, was held to be an erection used in conducting the business of the mine. (32)

**499. Mischiefs causing danger to life, etc.** — Every one is guilty of the indictable offence of mischief who *wilfully destroys or damages* any of the property hereinafter mentioned, and is liable to the punishments hereinafter specified : —

(*A*) **To imprisonment for life.**, if the object damaged be —

(*a*) a dwelling-house, ship or boat, and the damage be caused by an explosion, and any person be in such dwelling-house, ship or boat; *and the damage causes actual danger to life;* or

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(30) R. v. John Jones, 1 C. & K., 181.
(31) R. v. Matthews, 14 Cox C. C., 5.
(32) R. v. Whittingham, 9 C. & P., 234, Arch. Cr. Pl. & Ev., 21st Ed., 616.

(*b*) a bank, dyke or wall of the sea, or of any inland water, natural or artificial, or any work in, on, or belonging to any port, harbour, dock or inland water, natural or artificial, and the damage *causes actual danger of inundation*; or

(*c*) any bridge (whether over any stream of water or not) or any viaduct, or aqueduct, over or under which bridge, viaduct or aqueduct any highway, railway or canal passes, and the damage is done *with intent and so as to render such bridge*, viaduct or aqueduct, or the highway, railway or canal passing over or under the same, or any part thereof, *dangerous or impassable*; or

(*d*) a railway damaged with the intent of rendering and so as to render such railway *dangerous or impassable*;. R.S.C., c. 168, ss. 13, 32 and 49; c. 32, s. 213,

(*B*) **To fourteen years' imprisonment,** if the object damaged be —

(*a*) a ship in distress or wrecked, or any goods, merchandise or articles belonging thereto; or

(*b*) any cattle or the young thereof, and the damage be caused by killing, maiming, poisoning or wounding.

(*C*) **To seven year's imprisonment,** if the object damaged be —

(*a*) a ship damaged *with intent to destroy or render useless* such ship; or

(*b*) a signal or mark used for purposes of navigation ; or

(*c*) a bank, dyke or wall of the sea or of any inland water or canal, or any materials fixed in the ground for securing the same, or any work belonging to any port, harbour, dock, or inland water or canal; or

(*d*) a navigable river or canal damaged by interference with the flood gates or sluices thereof or otherwise, *with intent and so as to obstruct the navigation* thereof; or

(*e*) the flood gate or sluice of any private water *with intent to take or destroy*, or so as to cause the loss or destruction of the fish therein; or

(*f*) a private fishery or salmon river damaged by lime or other noxious material put into the water *with intent to destroy fish* then being or to be put therein; or

(*g*) the flood gate of any mill-pond, reservoir or pool cut through or destroyed; or

(*h*) goods in process of manufacture damaged *with intent to render them useless;* or

(*i*) agricultural or manufacturing machines, or manufacturing implements, damaged *with intent to render them useless;* or

(*j*) a hop bind growing in a plantation of hops, or a grape vine growing in a vineyard. R. S. C., c. 168, ss. 16, 17, 21, 33, 34, 50 and 52.

(*D*) **To five year's imprisonment,** if the object damaged be—

(*a*) a tree, shrub or underwood growing in a park, pleasure ground or garden, or in any land adjoining or belonging to a dwelling-house, injured to an extent exceeding in value five dollars; or

(*b*) a post letter bag or post letter; or

(*c*) any street letter box, pillar box or other receptacle established by authority of the Postmaster-General for the deposit of letters or other mailable matter; or

(*d*) any parcel sent by parcel post, any packet or package of patterns or samples of merchandise or goods, or of seeds, cuttings, bulbs, roots ,scions or grafts, or any printed vote or proceeding, newspaper, printed paper or book or other mailable matter, not being a post letter, sent by mail; or

(*e*) any property, real or personal, *corporeal or incorporeal*, for damage to which no special punishment is by law prescribed, damaged *by night* to the value of twenty dollars. R. S. C., c. 168, ss. 22, 23, 38 and 58; c. 35, ss. 79, 91, 96 and 107; 53 V., c. 37, s. 17.

(*E*) **To two years' imprisonment,** if the object damaged be—

(*a*) any property, real or personal, *corporeal or incorporeal*, for damage to which no special punishment is by law prescribed, damaged to the value of twenty dollars. R. S. C., c. 168, ss. 36, 42 and 58; 53 V., c. 37, s. 17.

**Wilfully destroying or damaging a dwelling-house, ship, or boat.**—(Section 499 A *a*.). To render an offender liable under this clause, the destruction or damage to the house, ship, or boat must be wilful; the means used must be an explosion; there must be some person in the dwelling-house, ship, or boat at the time; and there must be actual danger to life.

If the means used be not an explosion, and if no person be in the house, ship, or boat, at the time, and there be no actual danger to life, the offence will come under clause D (*c*), if the offence be committed in the night, or it will come under clause E (*a*), if committed in the day.

If the object damaged be a ship in distress, or wrecked, and there be no person in it, and no actual danger to life, the offence will come under clause B (*a*); and if it be a ship which is not in distress or wrecked, and if there be no person in it, and no actual danger to life, the offence will then come under clause C (*a*), provided the act be done with intent to destroy or render the ship useless.

A person is deemed to have acted *wilfully*, when he has caused anything to happen by an act which he knew would probably cause it, and was reckless whether the thing happened or not. (See section 481, *ante*.)

**Wilfully destroying or damaging sea or river banks, etc.**—(Sec. 499, A *b*). To render an offender liable under this clause, the act done must

cause actual danger of inundation, that is to say, that some adjoining land was put in danger of being overflowed.

If the act done causes no actual danger of inundation, the offence will come under clause C (*c*).

**Wilfully destroying or damaging bridges, etc.** — (Section 499, A *c*). This clause is to the same effect as the Imperial Statute, section 33 of 24-25 Vic., c. 97. To render an offender liable under it, the act done must be with intent and so as to render the bridge, etc., or the highway, railway or canal passing over or under it, *dangerous* or *impassable*.

The term "bridge" conveys the idea of a passage by which travellers are enabled to pass over streams and other impediments. Under the common law, it was, in general, essential that, to constitute it a bridge, the structure should have a footway and be built across such a stream of water, as answers to the description of *flumen vel cursus aquæ*, that is, water flowing in a channel between banks, more or less defined. So, that, for instance, where the county of Oxford was indicted for not repairing some arches in a raised causeway which, though built over solid meadow ground, was the continuation of a bridge over a river, the arches themselves being three hundred feet from the foot of the bridge, it was held that there was not sufficient to shew that these arches were bridges such as the county was liable to repair, because they were not over a stream of water, and it was not found by the jury either that they were erected at the same time as the river bridge, or that they were erected for the purpose of enabling the public to pass. (33)

Clause A (*c*), however, covers *any* bridge, *whether over a stream of water or not*.

**Wilfully destroying or damaging cattle.** — (Section 499, B *b*). This clause is to the same effect as section 40 of the Imperial Statute, 24-25 Vic., c. 97, except that the latter contains the word *maliciously*.

The act of wilfully destroying by killing, or of wilfully destroying or damaging by maiming, poisoning, or wounding, constitutes this offence, independently of any intention to steal the animal or any part of it.

The killing of any cattle with intent to steal its carcase, skin, etc., is also punishable by fourteen years imprisonment, by the terms of sections 307 and 331, *ante*, pp. 364 and 386.

For the meaning of the expression, "cattle," see section 3 (*d*), *ante*.

The particular species of cattle killed, maimed, poisoned, or wounded, should be specified in the indictment; (34) for, although section 613 (*g*), *post*, provides that an indictment shall not be deemed objectionable or insufficient, on the ground that it does not name or describe with precision any person, place or thing, that section contains a clause empowering the Court to order the prosecutor to furnish particulars further describing any person, place or thing mentioned in the indictment.

Under the English Statute, the act of killing, etc., must be proved to have been done *maliciously*, though it need not be proved to have been done with *malice to the owner* of the cattle. (35) With us, it must be proved that it was done *wilfully;* and a person is deemed to have acted *wilfully* when he causes anything to happen by an act which he knows will probably cause it, and is reckless whether it happens or not. (See sec.

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(33) R. v. Oxfordshire, 1 B & Ad., 289, 297. See, also, R. v. Gloucestershire, 1 C. & M., 506; R. v. Whitney, 3 A. & E., 69; 7 C. & P., 208; 4 L. J. (M. C.), 86; R. v. Derbyshire, 2 G. & D., 97; 11 L. J. (M. C.), 51.

(34) R. v. Chalkley, R. & R., 258.

(35) R. v. Tivey, 1 Den., 63; 1 C. & K., 704.

481, *ante*.) Between this definition of the word *wilfully* and the meaning of the word *maliciously*, as used in the English Statute, there seems, however, to be little or no difference. For, where, upon an indictment for unlawfully and *maliciously* killing a mare, it was proved that the prisoner caused the death of the mare through injuries inflicted by inserting the handle of a fork into her vagina, and the jury found that the prisoner was not actuated by any motive except the gratification of his own depraved taste, and that he did not intend to kill the mare, but knew that what he was doing would or might kill her, and nevertheless did what he did recklessly, and not caring whether the mare was injured or not, it was held that there was sufficient malice, and that his conviction was right. (36)

Upon an indictment for administering sulphuric acid to a horse, evidence of other acts of administering poison to cattle was allowed, in order to shew the prisoner's guilty intent. (37)

To constitute a *maiming*, the injury inflicted on the animal must be a *permanent* one. (38)

Where it is a *wounding* that is alleged, the injury or damage inflicted upon or done to the animal need not be a permanent one. In one case, the wounding proved was the driving a nail into the frog of a horse's foot, but it appeared that the horse was likely to recover, and it was objected that no wounding was within the meaning of the statute, unless it was such a wounding as was productive of permanent injury to the animal wounded. The judges, however, held that the wounding need not be one producing a permanent injury, inasmuch as the legislature used the word "*wounding*" as contradistinguished from *maiming*, which is a permanent injury. (39)

Where, upon an indictment for killing, wounding and maiming a mare, it appeared that the defendant poured nitrous acid into her ears, some of which acid ran into her eye or was poured into it, and blinded her; upon which the owner killed her; and it appeared from the evidence of the surgeons that the injuries done to the mare's ears were wounds; the defendant was convicted of maiming; and the judges held the conviction right. (40)

Upon an indictment for setting fire to a cow-house in which was a cow, which was burnt to death, Taunton, J., held that the prisoner could be convicted of killing the cow. (41)

It is not necessary that, to constitute a wounding within the meaning of this section, any instrument should be used, but it may be a wounding inflicted by the hand alone. (42)

See sections 500 and 502, *post*, as to attempts and written threats to kill or injure cattle.

As to cruelty to animals (inclusive of cattle), see sections 512 and 514, *post*.

**Wilfully destroying or damaging agricultural or manufacturing machines, etc.** — (Section 499 C *i*). The destruction or damage must be done, not only wilfully, but also with intent to render the machine or implements useless.

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(36) R. v. Welch, 1 Q. B. D., 23; 45 L. J. (M. C.), 17.
(37) R. v. Mogg, 4 C. & P., 364.
(38) R. v. Jeans, 1 C. & K., 539.
(39) R. v. Haywood, 2 East, P. C., 1076; R. & R., 16.
(40) R. v. Owens, 1 Mood. C. C., 205.
(41) R. v. Haughton, 5 C. & P., 559.
(42) R. v. Bullock, L. R., 1 C. C. R., 115; 37 L. J. (M. C.), 47.

Upon an indictment for breaking a threshing machine, Patterson, J., allowed the prisoner's counsel to ask whether the mob had not compelled several persons to join them, and obliged each to give a blow with a sledge-hammer to every machine that was broken; and he also allowed the witnesses to prove that the prisoner had been forced by the mob to join them, and that he had resolved to escape on the first opportunity. (43) See as to compulsion by threats, section 12, and comments thereon at pp. 21 and 22, *ante*.

The destruction of any part of a threshing machine which has been taken to pieces and separated by the owner is punishable under this clause; (44) and so is the destruction of a water-wheel by which a threshing machine is worked. (45) Even if the sides of the machine be wanting, without which it will only work imperfectly, it will be within the meaning of the above clause. (46) But it has been held, that where the machine had been taken to pieces and in part destroyed by the owner, from fear, the remaining parts did not constitute a machine. (47)

It is not necessary that the damage done should be of a permanent kind. Therefore, where it was shewn, upon an indictment for damaging a steam-engine, that the prisoner had screwed up parts of the engine, so that, while so screwed up, they would not work, and that he had reversed the plug of the pump which supplied the engine with water, and that the engine was thus rendered *temporarily* useless and liable to burst, but that the prosecutor discovered the state of the engine and loosened the screws and properly replaced the plug before any *permanent* damage was done, it was held that the prisoner was properly convicted. (48)

And, where a prisoner, in company with some other persons, unfastened and took away a certain part, — called the *half-jack*, — of a machine, called a stocking-frame, without which the frame was useless, but did no further injury either to the half-jack or to the frame, than the removal of the half-jack, the judges held that this was a damaging of the frame, as it made the frame imperfect and inoperative. (49)

**Wilfully destroying or damaging trees, etc., in a park, etc.** — (Section 499 D *a*). It has been held that, the words "adjoining any dwelling-house" import *actual contact*, and, that, therefore, ground separated from a house by a narrow walk and paling, wall, or gate is not within their meaning. (50)

The amount of injury done means the actual injury done to the tree, etc., itself, and does not extend to *consequential* injury resulting from the act of the defendant; and, so, where the actual injury done to the tree, etc., damaged by the defendant, was less than the value of five dollars, but it appeared that it would, in consequence of the damage done, be necessary to stub up and replace part of an old hedge at an expense greater than five dollars, it was held to be insufficient. (51) But, if several trees, etc., be destroyed or damaged, at the same time, or so continuously as to form one transaction, and the actual injury done to them amounts in the aggregate to more than five dollars, it will be sufficient. (52)

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(43) R. v. Crutchley, 5 C. & P., 133.
(44) R. v. Mackerel, 4 C. & P., 448.
(45) R. v. Tidler, 4 C. & P., 449.
(46) R. v. Bartlett, 2 Deacon, C. L., 1517.
(47) R. v. West, 2 Deacon, C. L., 1518.
(48) R. v. Fisher, L. R., 1 C. C. R., 7; 35 L. J. (M. C.), 57.
(49) R. v. Tacey, R. & R., 452.
(50) R. v. Hodges, M. & M., 341.
(51) R. v. Whiteman, Dears., 353; 23 L. J. (M. C.), 120.
(52) R. v. Shepherd, L. R., 1 C. C. R., 118; 37 L. J. (M. C.), 45; Arch. Cr. Pl. & Ev., 21st Ed., 421, 635.

It has been held that one who cuts off a portion of his neighbour's trees to protect his own property from the nuisance caused by boys throwing stones at the blossoms on such trees, and to secure the entrance of air and light to his own dwelling, cannot be said to be acting under a fair and reasonable supposition that he has a right to do the acts complained of. (53)

As to injuries to trees, etc., growing anywhere but in a park, etc., and to which the damage done amounts to twenty-five cents, see section 50*b*, *post*.

**Wilfully destroying or damaging any real or personal property by night.** — (Section 599 D *e*). The actual injury done must amount to the value of twenty dollars, and the offence must be committed *at night*. If the offence be committed during the day, it will, instead of being punishable under this clause, D *e*, by *five* years' imprisonment, be punishable, under clause E (*a*), by two years' imprisonment.

"*Night*" is the period between nine o'clock in the evening and six o'clock of the following morning. (Section 3 (*q*), *ante*, p. 5.)

In an indictment for damaging several articles of personal property, at one time, it is not necessary to allege separately the value of each article injured, but it will be sufficient to allege that the amount of damage done to them is twenty dollars in the aggregate. (54)

The soil of a town moor was vested in the Corporation of the town, in fee, but *free-men* were entitled, under statute, to the "full right and benefit to the herbage" of the moor, for pasturing cows; and it was held that, the freehold estate of the moor being vested in the Corporation, the right of the *free-men* to the herbage was not "any real and personal property whatever," within the meaning of section 52 of the Imperial Statute, (relating to malicious injuries to property), which only applies to *tangible* property and not to mere incorporeal rights, such as rights of pasture.(55) The principle of this decision, however, is not applicable to clauses D (*e*), and E (*a*) of our section 499; for these clauses expressly include *corporeal* and *incorporeal* property.

As the act of the offender must be done wilfully, it was held, in a case where the defendant threw, at some people with whom he had been fighting, a stone which struck and broke the windows of a house, that he was wrongly convicted of unlawfully and maliciously committing damage, although it was intimated that, if the jury had found that the defendant knew that the window was where it was, when he threw the stone, and that he was likely to break it, and was reckless whether he did so or not, the decision might have been different. (56)

It has been held, in England, that, where, — upon an indictment, (under the *Malicious Damage Act*), for malicious damage to property to an extent exceeding £5, — the defence is an assertion of right, the jury must be directed, — first, Did the defendants do what they did in the assertion of a supposed right? and, secondly, If so, did they do more than was necessary for the assertion of that right? — that is to say, if, upon the evidence, the jury were reasonably convinced that the defendants used greater violence than it could be properly supposed was necessary for the assertion of the right or its protection, the jury ought to find the defendants guilty of doing malicious damage. (57)

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(53) Hamilton v. Bone, 16 Cox C. C., 437; Burb. Dig. Cr. L., 476.
(54) R. v. Thoman, 12 Cox C. C., 54.
(55) Laws v. Eltringham, 8 Q. B. D., 283; 51 L. J. (M. C.), 13.
(56) R. v. Pembliton, L. R., 2 C. C. R., 119; 43 L. J. (M. C.), 91. See R. v. Welch, cited at p. 550, *ante*.
(57) R. v. Clemens, 67 L. J., Q. B., 482; [1898] 1 Q. B., 556; 17 Cox C. C., 18.

As to all other injuries to real or personal property, irrespective of the amount of damage, see section 511, *post*, and comments and authorities thereunder.

**500. Attempting to injure or poison cattle.**—Every one is guilty of an indictable offence and liable to two years' imprisonment who wilfully —

(*a*) attempts to kill, maim, wound, poison or injure any cattle, or the young thereof; or

(*b*) places poison in such a position as to be easily partaken of by any such animal. R. S. C., c. 168, s. 44.

See comments upon section 499 B (*b*), *ante*, pp. 549 and 550.

See, also, section 64, and comments at pp. 70-73, *ante*, as to Attempts.

**501. Injuries to animals, not being cattle.** — Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding one hundred dollars over and above the amount of injury done, or to three months' imprisonment, with or without hard labour, who wilfully kills, maims, wounds, poisons or injures any dog, bird, beast, or other animal, not being cattle, but being either the subject of larceny at common law, or being ordinarily kept in a state of confinement, or kept for any lawful purpose.

2. Every one who, having been convicted of any such offence, afterwards commits any offence under this section, is guilty of an indictable offence, and liable to a fine or imprisonment, or both, in the discretion of the court. R. S. C., c. 168, s. 45; 53 V., c. 37, s. 16.

The imprisonment under clause 2 of this section will be five years. (See section 951, *post*.)

See section 304, *ante*, p. 344, as to animals capable of being stolen; and see, also, the remarks of the Royal Commissioners, on the subject, at pp. 338 and 339, *ante*.

**502. Threats to injure cattle.**— Every one is guilty of an indictable offence and liable to two years' imprisonment who sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing threatening to kill, maim, wound, poison, or injure any cattle. R. S. C., c. 173, s. 8.

**503. Injuries to poll books, etc.** — Every one is guilty of an indictable offence and liable to seven years' imprisonment who wilfully —

(*a*) destroys, injures or obliterates, or causes to be destroyed, injured or obliterated; or

(*b*) makes or causes to be made any erasure, addition of names or interlineation of names in or upon —

any writ of election, or any return to a writ of election, or any indenture, poll-book, voters' list, certificate, affidavit or report, or any document, ballot or paper made, prepared or drawn out according to any law in regard to Dominion, provincial, municipal or civic elections. R. S. C., c. 168, s. 55.

**504. Injuries to buildings, etc., by tenants.** — Every one is guilty of an indictable offence and liable to five years' imprisonment, who, being possessed of any dwelling-house or other building, or part of any dwelling-house or other building which is built on lands subject to a mortgage or which is held for any term of years or other less term, or at will, or held over after the termination of any tenancy, wilfully and to the prejudice of the mortgagee or owner —

(*a*) pulls down or demolishes, or begins to pull down or demolish the same or any part thereof, or removes or begins to remove the same or any part thereof from the premises on which it is erected; or

(*b*) pulls down or severs from the freehold any fixture fixed in or to such dwelling-house or building, or part of such dwelling-house or building.

As to thefts of fixtures, etc., by tenants, see section 322, *ante*.

**505. Injuries to land-marks, etc.** — Every one is guilty of an indictable offence and liable to seven years' imprisonment, who *wilfully* pulls down, defaces, alters or removes any mound, land mark, post or monument *lawfully* erected, planted or placed to mark or determine the boundaries of any province, county, city, town, township, parish or other municipal division. R. S. C., c. 168, s. 56.

**506.** Every one is guilty of an indictable offence and liable to five years' imprisonment, who *wilfully* defaces, alters or removes any mound, land mark, post or monument *lawfully* placed by any land surveyor to mark any limit, boundary or angle of any concession, range, lot or parcel of land.

2. It is not an offence for any land surveyor in his operations to take up such posts or other boundary marks, when necessary, if he carefully replaces them as they were before. R. S. C., c. 168, s. 57.

**507. Injuries to fences, etc.** — Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding

twenty dollars over and above the amount of the injury done, who, *wilfully destroys or damages* any fence, or any wall, stile or gate, or any part thereof respectively, or any post or stake planted or set up on any land, marsh, swamp or land covered by water, on or as the boundary or part of the boundary line thereof, or in lieu of a fence thereto.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence is liable, on summary conviction, to three months' imprisonment with hard labour. R. S. C., c. 168, s. 27; 53 V., c. 38, s. 15.

See comments under section 478, *ante*, p. 436, as to second offences.

**507a. Injuries to Harbor Bars.** — Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding fifty dollars, who *wilfully* and *without* the *permission of the Minister of Marine and Fisheries* (the burden of proving which permission shall lie on the accused), removes any stone, wood, earth or other material forming a natural bar necessary to the existence of a public harbour, or forming a natural protection to such bar. (Added by 56 V., c. 32).

**508. Injuries to trees, etc., wheresoever growing.** — Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty-five dollars over and above the amount of the injury done, or to two months' imprisonment with or without hard labour, who *wilfully destroys or damages* the whole or any part of any tree, sapling or shrub, or any underwood, *wheresoever the same is growing*, the injury done being to the amount of twenty-five cents, at the least.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence is liable, on summary conviction, to a penalty not exceeding fifty dollars over and above the amount of the injury done, or to four months' imprisonment with hard labour.

3. Every one who, having been twice convicted of any such offence, afterwards commits any such offence, is guilty of an indictable offence and liable to two years' imprisonment. R. S. C., c. 168, s. 24.

See comments under section 478, *ante*, p. 436, as to second offences.

**509. Injuries to vegetable productions growing in gardens, orchards, etc.** — Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars over and above the amount of the injury done, or to three months' imprisonment with or without hard labour, who *wilfully* destroys,

or damages with intent to destroy, any vegetable production growing in any garden, orchard, nursery ground, house, hot-house, green-house or conservatory.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence is guilty of an indictable offence, and liable to two years' imprisonment. R. S. C., c. 168, s. 25.

See section 478 and comments, as to second offences, at p. 536, *ante*.

**510. Injuries to cultivated roots and plants not growing in a garden, etc.**— Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding five dollars over and above the amount of the injury done, or to one month's imprisonment with or without hard labour, who *wilfully* destroys, or damages with intent to destroy, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land, open or inclosed, *not being a garden*, orchard or nursery ground.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence is liable, on summary conviction, to three months' imprisonment with hard labour. R. S. C., c. 168, s. 26.

See comments under section 478, *ante*, p. 536, as to second offences.

**511. Injuries not otherwise provided for.** — Every one who *wilfully* commits any damage, injury or spoil to or upon any *real or personal property* either *corporeal or incorporeal*, and either of a public or private nature, for which no punishment is hereinbefore provided, is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars, and such further sum not exceeding twenty dollars, as appears to the justice to be a reasonable compensation for the damage, injury or spoil so committed, — which last mentioned sum of money shall, in the case of private property, be paid to the person aggrieved ; and if such sums of money, together with the costs, if ordered, are not paid, either immediately after the conviction, or within such period as the justice, at the time of the conviction appoints, the justice may cause the offender to be imprisoned for any term not exceeding two months, with or without hard labour.

2. Nothing herein extends to —

(*a*) any case where the person acted under a fair and reasonable supposition that he had a right to do the act complained of ; or

(*b*) any trespass, not being wilful and malicious, committed in hunting or fishing, or in the pursuit of game. R. S. C., c. 168, s. 59; 53 V., c. 37, s. 18.

The *mere honest belief* of a person charged with an offence under the above section, 511, that he had the right to do the act complained of is not sufficient to protect him. There must be fair and reasonable ground for such belief. The usual reservation, — in a patent of land bounded by navigable water, — of "free access to the shore for all vessels, boats and persons," gives a right of access only from the water to the shore; so, that, where a person had broken down fences and had driven across private property to the shore, it was held that, — when charged with an offence under section 511, — he could not successfully assert that he "acted under a fair and reasonable supposition of right" in doing what he did. (58)

In an English case, under the *Malicious Damage Act, 1861*, for unlawfully and maliciously damaging certain grass, it was proved that the appellant, — in passing from one footpath to another, — walked across the respondent's grass field for a distance of about 130 yards, the grass being thick and deep, that he passed notice boards shewing that there was no right of way, and that he claimed no right of way, but, that, after the respondent had told him he had no right to be there, he persisted in going on, and said he should continue to cross the field when he chose. The justices found as a fact that, as the grass was long and thick, the appellant must have done some damage to the grass and that he did actual damage to the amount of six pence, and, being of opinion that the trespass was a wilful and malicious act, they convicted the appellant. *Held*, that, upon the facts proved, the appellant was properly convicted of having committed a wilful and malicious damage to property. (59)

In order to constitute the offence of committing damage, injury or spoil to property, it has been held that, it is not necessary that there should be malice towards or intention to damage the owner of the property or that loss should in fact be caused to him. It is sufficient if the act which causes damage to the property is done with intent to cause the damage done or with knowledge that the act will result in damage to the property damaged. So, that, where a person fraudulently adds water to milk which he is employed to sell, his intention being to thereby increase the quantity and to appropriate the surplus price, and the milk is thereby damaged by reducing its quality, but, he has no malice or intention to injure his employer, the owner of the milk, he commits the offence of wilfully committing damage to property. (60)

B was the owner of a house and demesne, (grounds). The house, — with the exception of the kitchen, (in which there was some furniture, including two mirrors), — had been burnt down. A military chaplain, at a camp in the neighborhood, obtained permission to bring some of the band boys, who were stationed at the camp, to the demesne for a day's holiday. Some of the boys strolled over to the burnt building, and, from curiosity to see what was in it, smashed open the doors and windows, and five of them entered. One of them, in struggling to get out, broke the two mirrors. *Held*, that the acts of the boys were malicious and punishable as an offence under the English *Malicious Damage Act*. (61)

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(58) R. v. Davy, 20 C. L. T., 345. See White v. Feast, L. R., 7 Q. B., 353.
(59) Gayford (Appt.) v. Chouler (Resp.), 18 Cox C. C., 702.
(60) Roper v. Knott, 67 L. J., Q. B., 574; [1898] 1 Q. B., 868; 19 Cox C. C., 69.
(61) In re Borrowes, Mews. Ann. Dig. (1900), 102.

PART XXXVIII.

## CRUELTY TO ANIMALS.

**512.** (Amended by 58-59 V., c. 40). — Every one is guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty not exceeding fifty dollars, or to three months' imprisonment, with or without hard labour, or to both, who —

(*a*) wantonly, cruelly or *unnecessarily* beats, binds, illtreats, abuses, overdrives or tortures any cattle, poultry, dog, domestic animal or bird, *or any wild animal or bird in captivity ;* or

(*b*) while driving any cattle or other animal is, by *negligence* or *ill-usage* in the driving thereof, the means whereby any mischief, damage or injury is done by any such cattle or other animal; or

(*c*) in any manner encourages, aids or assists at the fighting or baiting of any bull, bear, badger, dog, cock, or other kind of animal, whether of domestic or wild nature. R. S. C., c. 172, s. 2.

For the meaning of the expression "cattle," see section 3 (*d*), *ante*.

This offence is a statutory one. It was not an offence at common law; and the statutes upon the subject are of comparatively recent origin.

Before the amendment of the above section by the 58-59 Vic., c. 40, the cruelty punishable under it was cruelty to any cattle, poultry, dog, *domestic animal or bird;* but the amendment extends it so as to cover cruelty to any *wild* animal or bird *in captivity*.

So, that, the cases, — in which it has been held that, a person could not be convicted of cruelty to lions kept in a cage, (1), to wild rabbits caught in nets and kept for several days in confinement, (2), to a tame sea-gull, (3), or to lizards or American chameleons offered for sale as pet ornaments and toys, with rings fastened round their necks to which chains and pins were attached, (4), because they were not *domestic* but *wild* animals *in captivity*, would not, now, apply to Canada.

With regard to the meaning of the words "*wanton*" and "*cruel*," any act which is unjustifiable by the circumstances is wanton; and cruelty exists whenever the animal is subjected to unnecessary pain or suffering. But the mere infliction of some bodily pain will not, of itself, constitute the offence. There must be not only some ill-usage, from which the animal suffers, but the ill-usage must be without any *necessity*, actually existing or honestly believed to exist. If there be a necessity for it, or a reasonable ground for believing that there is a necessity for it, there will be no offence.

Where a defendant was tried on a charge of alleged cruelty to a horse by the use of the overdraw check rein, and the evidence shewed that on a

(1) Harper v. Marcks, 63 L. J., M. C., 167; [1894] 2 Q. B., 319.
(2) Aplin v. Perritt, 62 L. J., M. C., 144; [1893] 2 Q. B., 57.
(3) Yates v. Higgins, [1896] 1 Q. B., 166.
(4) Soc. for Prev. Cruelty v. Graetz, 17 L. N., 74.

certain day the defendant's horse, attached to a vehicle, was standing in front of a building on a certain street, that the horse being held by an overdraw check-rein, was throwing its head about and appeared to be in great pain until a bystander unfastened the overdraw check-rein, when the horse became quiet, and defendant, when he came upon the scene and was spoken to about it, replied, — and he repeated this in his evidence at the trial, — that the horse was one which was a very hard puller and could not be driven without the check-rein. Other evidence was adduced and the case was dismissed, on the ground, that it had been proved, that, the check-rein was necessary to manage the horse and that although it caused the horse a certain amount of annoyance, the annoyance was not caused unnecessarily. (5)

The most common case to which the law, as contained in the above section, 512, would apply is that in which an animal is cruelly beaten or tortured for the mere purpose of causing pain, or for the gratification of a malignant or vindictive temper; although other cases may be suggested, which would be within the meaning of the law. Thus, cruel and unnecessary beating or torture in training or correcting an intractable animal, pain inflicted in wanton or reckless disregard of the suffering it occasioned, and so excessive in degree as to be cruel; torture inflicted by mere inattention and criminal indifference to the agony resulting from it, as in the case of an animal confined and left to perish from starvation, would undoubtedly be punishable. (6)

The mere inconvenience and discomfort attendant upon the transporting of animals from one place to another, by rail or by water, does not constitute cruelty; especially if there were no guilty knowledge on the part of the person charged and no intentional cruelty on his part. Thus, where a receiver of large consignments of cattle which he was supposed to personally receive and attend to had not removed the head ropes from the cattle, (which arrived in port on a Saturday), until the Monday following, it was held on an appeal from his conviction by the Magistrates that there being no evidence of a guilty knowledge on the part of the Appellant or that he had abstained *wilfully* from the knowledge of the alleged cruelty, the conviction must be quashed. (7)

See section 514, *post*, for special provisions as to the treatment of cattle while in transit by rail or water.

A surgeon who performs, upon an animal, some operation which he honestly believes to be of benefit to the animal, will be guilty of no offence, under the above section, although the performance of the operation may cause the animal severe pain and suffering. (8)

Nor does the law interfere with the infliction of any chastisement which may be necessary for the training or discipline of animals. Chastisement resorted to in good faith and for a proper purpose will not, in general, be deemed excessive; but, if the chastisement is unduly severe, it may be taken into consideration by the jury in determining whether or not it was prompted by a malevolent spirit, and not by a justifiable motive. Chastisement of an animal is not so restricted as that which a parent or a master is entitled to exercise over his child or his pupil. The parent or master is liable to punishment, if, in chastising his child or his pupil, he exceed what is moderate and reasonable; but, in the case of an animal, there is no liability for any such excess, unless it be such an excess as is unnecessary and

(5) Soc. for Prev. Cruelty v. Lowry, 17 L. N., 118.
(6) Budge v. Parsons, 7 L. T., 184; 11 W. R., 424; Swan v. Saunders, 14 Cox C. C., 566; 50 L. J. (M. C.), 67.
(7) Elliott v. Osborne, 17 Cox C. C., 346.
(8) C. v. Lufkin, 7 Allen (Mass.), 579.

wantonly cruel. In an American case, under a statute making it an offence to "*needlessly mutilate or kill any living creature*," the proof shewed that the defendant had, in his own corn-field, killed his neighbor's small pig, with one blow of a club, thereby producing immediate death. The pig with others had been in the habit of trespassing in the defendant's corn-field; and the defendant had repeatedly requested its owner to pen it up or keep it out of the field, which the owner did for a while; and then she turned all the pigs out again. There were no more circumstances of cruelty than the taking of life at one blow. The Court refused the request of the defendant's counsel that the jury should be instructed, *first*, that a "*needless*" killing meant a killing in *mere idle wantonness*, without being in any sense beneficial or useful to the accused; *second*, that the jury were to determine whether or not it was "*needless*," and, that, for that purpose, they might consider the facts of the pig being found in the corn-field and its having been frequently there before; *third*, that they must find, before convicting, that there was no necessity or cause whatever to kill the animal; *fourth*, that if the jury found that the animal was destroying the accused's crops, and that he had used all reasonable means to prevent it, and that the act of killing did prevent it, they would be warranted in finding that it was not *needless; fifth*, that the word "needless" related to a wanton and cruel act, and not to one which was the result of necessity or reasonable cause; and, *sixth*, that unless the accused was guilty of wanton and needless acts of cruelty to the pig, resulting in unjustifiable pain, they should acquit. But the Court, of its own motion, told the jury that, if the accused *needlessly* killed the pig, they should convict, notwithstanding it may have been trespassing within the corn-field at the time; and that "*needlessly*" means *without necessity*, or *unnecessarily*, as where one kills a domesticated animal of another, either in mere wantonness or to satisfy a depraved disposition, or for sport or pastime, or to gratify one's anger, *or for any other unlawful purpose*." It was held error in the Court to refuse the instructions asked, except the last; and, in defining the word "needless," the Court said, "It is obvious that the term '*needless*" cannot be reasonably construed as characterizing an act which might by care be avoided. It simply means an act done without any useful motive, in a spirit of wanton cruelty, or for the mere pleasure of destruction." And it was added that the accused ought not to be convicted "if he had some useful object in the killing, such as the protection of his wheat and corn. (9)

In another case, a farmer was indicted for "needlessly torturing and mutilating" a dog. The proof showed that the accused had for some time been annoyed by a dog, or some other animal, invading his premises at night, and breaking up the nests of his hens, sucking the eggs and disturbing his poultry. He suspected his father's dog, and had no suspicions of the dog injured, whose master lived a quarter of a mile distant. The accused borrowed a steel-trap, set it in a bucket of slop, placed the latter in his garden, and tied the trap to a post. In the night the dog injured was caught in this trap by his tongue and a part of it torn out, permanently injuring it, so that it could scarcely bark. This dog was in the habit of raiding the other neighbors' premises. The accused was held not guilty. "The defendant had a right to protect his premises against such invasions, and to adopt such means as were necessary for that purpose. And, if a night-prowling dog, in the habit of invading premises and breaking up hens' nests and sucking the eggs, while so transgressing, is caught in a steel-trap, though set by the owner for that purpose, and then suffers pain or mutilation, we are not prepared to say that it would be needless torture or mutilation, within the meaning of the statute. * * * While the statute's object was to prevent cruelty to animals, and it was intended as a humane

(9) Grise v. S., 37 Ark., 456.

provision for their protection, it was not intended to deprive a man of the right to protect himself, his premises and property against the intrusions of worthless, mischievous and vicious animals by such means as are reasonably necessary for that purpose. The object of the statute was to protect animals from wilful or wanton abuse, neglect or cruel treatment, and not from the incidental pain or suffering that may be casually or incidentally inflicted by the use of lawful means of protection against them." (10)

Where the prevention of cruelty and suffering is concerned there is plainly a difference between *instantaneous* death and *lingering* death; the former being generally, if not always, painless. In favor of those sports which are considered healthful recreations and exercise, tending to promote strength, bodily agility, and courage, even the pain which comes with a lingering death in the lower animals is often disregarded in the customs and laws of human and highly civilized people; so, that the angler, who catches fish for pastime, or the marksman who, as an exercise of skill, or as a diversion, shoots pigeons as they fly wild in the woods is not considered guilty of any violation of the essential objects of the law in question.

The cutting of the combs of cocks in order to fit them for cock-fighting or winning prizes at exhibitions was held, by Kelly, C. B., to be cruelty, abuse, and ill-treatment; (11) and so was the dishorning of cattle, in reference to which Coleridge, C. J., said, "*Abuse* of the animal means substantial pain inflicted upon it, and '*unnecessary*' means that it is inflicted, without necessity, and under the word '*necessity*' I should include adequate and reasonable object. (12)

In another case, however, the Court of Common Pleas held that dishorning cattle was not forbidden by the statute against cruelty. (13)

To turpentine a goose and then set it on fire is cruelty. (14) So it is to plunge a hog, (which is being slaughtered), into boiling hot water, after it has been stuck, and before it is dead. (15)

It has been said that whenever the purpose for which the act is done to make the animal more serviceable for the use of man, the law ought not to be held to apply. And, so, the castration of horses or other animals or the spaying of sows has been held not to be cruelty, if done with reasonable care and skill, even though it be a mistaken idea that it improves them. (16)

In a prosecution for cruelty, the question is, Did the accused intend to do the act which caused the pain? Thus, where the accused, while hauling lumber, after trying to get a balky horse to pull, picked up a stick, four feet in length and two inches thick, and struck the horse on the head and instantly killed it, the court held him guilty of *cruelly killing* an animal, and refused to enquire into the motive he had in striking the blow, namely, to make the horse pull. (17)

With regard to overdriving, if an injury be inflicted, the overdriving must be wanton. If the driver, while honestly exercising his judgment,

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(10) Hodge v. S., 11 Lea (Tenn.), 528; S. C., 47 Am. Rep., 307.
(11) Murphy v. Manning, L. R., 2 Exch. Div., 312.
(12) Ford v. Wiley, L. R., 23 Q. B. D., 203.
(13) Callaghan v. Society, etc., 11 Cox C. C., 101; and see Brady v. McArgle, 14 L. R. (Irish), 174; 15 Cox C. C., 516.
(14) S. v. Branner, 111 Ind., 98.
(15) Davis v. Soc. for Prev. of Cruelty, 16 Abb. (N. Y.), Pr. N. S., 73.
(16) Lewis v. Fermer, 18 Q. B. D., 532.
(17) S. v. Hackfath, 20 Mo. App., 614, S. C., 2 West. Rep., 588.

happen to err, he is not guilty. An error of judgment[s] is to be distinguished from mere recklessness of consequence or wilful cruelty. (18)

It must appear from the evidence that the accused did the act knowingly. Thus, in a colliery, certain horses were worked, while suffering from raw wounds. T was the owner of the colliery, and S the certificated manager, but neither was proved to have been present or to have had any notice or knowledge of the condition of the horses. They were acquitted, the court holding that some knowledge of the matter was essential to the commission of the crime. (19)

No one can be excused by shewing that he was authorized by another to inflict a cruel injury. And, so, a conductor and a street-car driver are liable for over-loading a street-car, even though directed to do so by a superior officer of the street-car company. (20)

Cruelty usually results from an act done; but, there are instances, where cruelty may arise from a failure to perform an act. *A failure to kill a wounded* animal in great pain and incurable is not "cruelty." (21) But, if an animal, a horse, for instance, is fatally diseased, and its owner or keeper turns it into a field to feed on the pasturage, and it has to go about in great pain in its efforts to get food in order to support its life, such owner or keeper is guilty of torturing, or causing it to be tortured, the same as if he had tortured it with his own hand. (22) But, where the owner of parrots sold ten and put them in a box, and some corn with them, to ship a long distance, providing no water for them, and ten hours afterwards, at an intermediate station, they were found making a fuss, three being down on the floor, and the person so finding them gave them two saucers of water, which they drank with evident great relish and seemed refreshed, the person shipping them was held not guilty of cruelty, that the mere non-supply of water was not sufficient evidence of cruelty. (23)

See section 499, clause B (*b*), and comments at pp. 549 and 550, *ante*.

Section 7 of R. S. C., c. 172, is unrepealed, (see Schedule 2, *post*), and is as follows: —

"Every pecuniary penalty recovered, with respect to any such offence shall be applied in the following manner, that is to say: one moiety thereof to the corporation of the city, town, village, township, parish or place in which the offence was committed, and the other moiety, with full costs, to the person who informed and prosecuted for the same, or to such other person as to the justices of the peace seems proper."

No prosecution for any offence, under sections 512, 513, 514 and 515, can be commenced after the expiration of three months from its commission. (See section 551 *e*.)

**513. Keeping cockpit.** — Every one is guilty of an offence and liable, on summary conviction before two justices of the peace, to

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(18) C. v. Wood, 111 Mass., 408.
(19) Small v. Warr, 47 J. P., 20; P. v. Brunnell, 48 How, (N. Y.). Pr., 436.
(20) P. v. Tinsdale, 10 Abb, (N. Y.), Pr., N. S., 374.
(21) Powell v. Knights, 38 L. T., 607; 26 W. R., 721.
(22) Everitt v. Davis, 38 L. T., 360; 26 W. R., 332.
(23) Swan v. Saunders, 14 Cox C. C., 566.

a penalty not exceeding fifty dollars, or to three months' imprisonment, with or without hard labour, or to both, who builds, makes, maintains or keeps a cock-pit on premises belonging to or occupied by him, or allows a cock-pit to be built, made, maintained or kept on premises belonging to or occupied by him.

2. All cocks found in any such cock-pit, or on the premises wherein such cock-pit is, shall be confiscated and sold for the benefit of the municipality in which such cock-pit is situated. R. S. C., c. 172, s. 3.

**514. Treatment of cattle while in transit by rail or water.** — No railway company within Canada whose railway forms any part of a line of road over which cattle are conveyed from one province to another province, or from the United States to or through any province, or from any part of a province to another part of the same, and no owner or master of any vessel carrying or transporting cattle from one province to another province, or within any province, or from the United States through or to any province, shall confine the same in any car, or vessel of any description, for a longer period than twenty-eight hours without unlading the same for rest, water and feeding, for a period of at least five consecutive hours, unless prevented from so unlading and furnishing water and food, by storm or other unavoidable cause, or by necessary delay or detention in the crossing of trains.

2. In reckoning the period of confinement, the time during which the cattle have been confined without such rest, and without the furnishing of food and water, on any connecting railways or vessels from which they are received, whether in the United States or in Canada, shall be included.

3. The foregoing provisions as to cattle being unladen shall not apply when cattle are carried in any car or vessel in which they have proper space and opportunity for rest, and proper food and water.

4. Cattle so unloaded shall be properly fed and watered during such rest by the owner or person having the custody thereof or, in case of his default in so doing, by the railway company, or owner or master of the vessel transporting the same, at the expense of the owner or person in custody thereof; and such company, owner or master shall in such case have a lien upon such cattle, for food, care and custody, furnished, and shall not be liable for any detention of such cattle.

5. Where cattle are unladen from cars for the purpose of receiving food, water and rest, the railway company, then having charge of the cars in which they have been transported, shall, except during a period of frost, clear the floors of such cars, and lit-

ter the same properly with clean sawdust or sand, before reloading them with live stock.

6. Every railway company ,or owner, or master of a vessel, having cattle in transit, or the owner or person having the custody of such cattle, as aforesaid, who knowingly and wilfully fails to comply with the foregoing provisions of this section, is liable for every such failure on summary conviction to a penalty not exceeding one hundred dollars. R. S. C., c. 172, ss. 8, 9, 10 and 11.

**515.** Any peace officer or constable may, at all times, enter any premises where he has reasonable ground for supposing that any car, truck or vehicle, in respect whereof any company or person has failed to comply with the provisions of the next preceding section, is to be found, or enter on board any vessel in respect whereof he has reasonable ground for supposing that any company or person has, on any occasion, so failed.

2. Every one who refuses admission to such peace officer or constable is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars and not less than five dollars, and costs, and in default of payment, to thirty days' imprisonment. R. S. C., c. 171, s. 12.

## PART XXXIX.

## OFFENCES CONNECTED WITH TRADE, AND BREACHES OF CONTRACT.

**516. Conspiracy in restraint of trade.** — A conspiracy in restraint of trade is an agreement between two or more persons to do or procure to be done any *unlawful act* in restraint of trade.

See general comments on conspiracy, under section 394, *ante*, p. 430. See, also, section 527, *post*.

**517. What acts in restraint of trade are not unlawful.** — The purposes of a trade union are *not*, by reason merely that they are in restraint of trade *unlawful*, within the meaning of the next preceding section. R. S. C., c. 131, s. 22.

The expression "Trade Union" means such combination, whether temporary or permanent, for regulating the relations between workmen and masters, or for imposing restrictive conditions on the conduct of any trade or business, as would, but for this Act, have been deemed to be an unlawful combination by reason of some one or more of its purposes being in restraint of trade. (Section 2 of "*The Trade Unions Act*," R. S. C., c. 131.)

The law of England in regard to combinations of workmen organized for the purpose of raising wages, shortening the hours of labor, dictating to masters what workmen they shall employ and so forth, was formerly regulated by the common law relating to conspiracy, by various statutes, (in-

cluding the 6 Geo. 4, c. 129, the 22 Vic., c. 34, and the 24 and 25 Vic., c. 100, section 41), and by the judicial decisions which were rendered from time to time in a number of cases which arose upon the subject. (1)

Complaints, on the part of the working classes, that the law as it stood prevented them from entering into reasonable combinations for the purpose of employing their time and skill to the best advantage, led to a change, by the passing of chapter 31 of 34 and 35 Vic., section 2 of which declared that the purposes of any trade union should not be deemed unlawful by being merely in restraint of trade; and by the passing of chapter 32 of 34 and 35 Vic., section 7 of which repealed the old statutes. The 34 and 35 Vic., chap. 32, however, specified, as unlawful, certain special acts which often occur in the course of disputes between masters and workmen, and affixed to them appropriate punishments.

Although, after the passing of the 34 and 35 Vic., c. 32, no indictment would lie for conspiracy to do any act on the mere ground of its being in restraint of the free course of trade, unless it was one of the special acts mentioned in the statute itself, as punishable, it was held nevertheless that an agreement or combination to force, — by improper threats or improper molestation, — a master to conduct his business contrary to his own will, was still an indictable conspiracy; and, further, that there was an improper molestation whenever anything was done with an improper intent, and whenever it was something that would have the effect of annoying or interfering with the minds of ordinary persons carrying on such business as the master carried on. Such an agreement, by improper molestation, to control the master was a conspiracy at common law, and it was held that such an offence at common law was not abrogated by the 34 and 35 Vic., c. 32. (2) It was also held that, a combination between workmen or servants to hinder or prevent their master from carrying on his business, by means of the workmen or servants simultaneously breaking unexpired contracts of service, into which they had entered with the master, was also an indictable conspiracy, notwithstanding the 34 and 35 Vic., c. 32. (3)

The decision in the case of R. v. Bunn, led to the repeal of the 34 and 35 Vict., c. 32, and to the enactment of the 38 and 39 Vic., c. 86, which, by section 3, declares that "an agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act *committed by one person* would not be punishable as a crime."

Under our own law, as contained in section 518, there can be no prosecution for conspiracy in respect of any act done for the purpose of a trade combination, unless the act itself (which forms the subject matter of the conspiracy), is a punishable offence by statute.

See sections 523, 524, 525, 526, as to punishable acts of intimidation.

**518. Prosecution for conspiracy.** — No prosecution shall be maintainable against any person for conspiracy in refusing to work with or for any employer or workman, or for doing any *act* or causing any *act* to be done for the purpose of a trade combination, unless such *act* is an *offence* punishable by statute. 53 V., c. 37, s. 19.

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(1) For a list of these cases, see Arch. Cr. Pl. and Ev., 21st Ed., 1014.

(2) R. v. Bunn, 12 Cox C. C., 316, 339, 340, per Brett, J., (dissented from in Gibson v. Lawson, [1891], 2 Q. B., 545).

(3) R. v. Bunn, *Id.*

Where the defendants, who were members of a trade union, conspired together to injure a non-unionist workman, by depriving him of his employment, it was held to be a misdemeanor, and not for the purposes of their trade combination, within the meaning of the law. (4)

**519. Meaning of the expressions, "trade combination," and "act."** — The expression "trade combination" means any combination between masters or workmen or other persons for regulating or altering the relations between any persons being masters or workmen, or the conduct of any master or workman in or in respect of his business or employment, or contract of employment or service; and the expression "*act*" includes a default, breach or omission. R. S. C., c. 173, s. 13.

**520. Combinations in restraint of trade.** (As amended by the *Criminal Code Amendment Act 1900*, which came into operation on the 1st January 1901). — *Every one* is guilty of an indictable offence and liable to a penalty not exceeding four thousand dollars and not less than two hundred dollars, or to two years' imprisonment, and if *a corporation* is liable to a penalty not exceeding ten thousand dollars and not less than one thousand dollars, who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company —

(*a*) to unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or

(*b*) to restrain or injure trade or commerce in relation to any such article or commodity; or

(*c*) to unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or

(*d*) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property.

2. Nothing in this section shall be construed to apply to combinations of workmen or employees for their own reasonable protection as such workmen or employees.

The defendants, (who were shipowners), agreed that, if persons in a certain trade would deal with them, exclusively, such persons should have certain advantages at their hands, and that if they dealt with any other shipowner, to however small an extent, they should lose all the advantages which they would derive from dealing with the defendants. The plaintiffs, (who were also shipowners), alleged that this was done for the purpose of

(4) R. v. Gibson, 16 O. R., 704.

injuring them by driving them out of the trade. But the defendants said it was done for the protection of their own trade. *Held*, that the question would be which of these two views was, in fact, true. (5)

The above section, 520,—as it stood before its amendment by the 63-64 Vic., c. 46,—was, in effect, and nearly word for word, a re-enactment of section 1 of the Dominion Act, 52 Vic., c. 41; and sections 4 and 5 of that statute, which are unrepealed, (as will be seen by Schedule Two, *post*), are as follows:—

"Where an indictment is found against any person for offences provided against in this Act, the defendant or person accused shall have the option to be tried before the judge presiding at the court at which such indictment is found, or the judge presiding at any subsequent sitting of such court, or at nny court where the indictment comes on for trial, without the intervention of a jury; and in the event of such option being exercised the proceedings subsequent thereto shall be regulated in so far as may be applicable by "*The Speedy Trials Act.*" (Sec. 4). (6)

"An appeal shall lie from any conviction under this Act by the judge without the intervention of a jury to the highest court of appeal in criminal matters, in the province where such conviction shall have been made, upon all issues of law and fact ; and the evidence taken in the trial shall form part of the record in appeal, and for that purpose the court, before which the case is tried, shall take note of the evidence and of all legal objections thereto." (Sec. 5).

It is the policy of the law to encourage trade and commerce; and it is against public policy and illegal to enter into a combination or agreement for the purpose of restraining trade, or tending to take it out of the realm of competition; even although it may not appear that the combination or agreement has *actually* produced any result detrimental to public interests. (7)

Where the proprietors of five several lines of boats, engaged in the business of transporting persons and freight on the Erie and Oswego canals, entered into an agreement among themselves, fixing the rates of freight and passage upon their boats, and to divide the net earnings, among themselves, according to certain proportions fixed in the agreement, it was held to be a combination, tending to destroy competition between the several lines engaged in the business, and unlawful. (8)

An association of Manufacturers of wire cloth, formed, for the avowed purpose of regulating the price of the commodity, each of the members stipulating, under a heavy penalty, that he would not sell at less than a specified rate, was held to be contrary to public policy, and illegal. (9)

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(5) Mogul Steamship Co. v. McGregor, 15 Q. B. D., 476.

(6) For the provisions of the present Code relating to *speedy trials*, see sections 762-781, *post*.

(7) Santa Clara V. M. & L. Co. v. Hayes, 76 Cal., 387; Atcheson v. Mallow, 43 N. Y., 147.

(8) Hooker v. Vandewater, 4 Den. (N. Y.), 349.

(9) De Witt Wire Cloth Co. v. New Jersey Wire Cloth Co., 14 N. Y. Supp. Rep., 277.

The retail coal dealers of the City of Lockport formed an association called the Lockport Coal Exchange, the main purpose of which was to fix a minimum retail price of coal for the city and vicinity, with the design practically to compel, under prescribed penalties, every coal dealer in the city to join it and regulate his business by its constitution and by-laws, which prohibited soliciting business except as provided therein, and the taking of club orders of associated buyers at reduced prices, and provided for keeping the retail price of coal uniform, so far as practicable, and required a certain vote of the association to change the price. The constitution also provided that no price was to be made amounting to more than a fair and reasonable advance over wholesale rates, or more than the current prices of the coal exchanges at certain designated neighboring cities, when figured upon corresponding freight tariffs; and the retail price of coal actually fixed by the association was a fair price. *Held*, on an appeal to the N. Y. Supreme Court, that as the purpose and object of the association had a tendency to practically prevent competition in one of the necessaries of life, it constituted a combination in restraint of trade, and that membership in such association would support a conviction on an indictment for conspiracy to commit acts injurious to trade. (10)

The amendment made to the above section, 520, by the *Criminal Code Amendment Act, 1900*, consisted in the striking out of the word "*unlawfully*" previously contained therein, and qualifying each of the sub-sections (*a*), (*b*), (*c*), (*d*), thereof. Prior to this amendment, it had been held that, to constitute an offence under the section, the combination must be formed with a view of *unlawfully* attaining one or more of the restrictions of trade therein mentioned, and that it was not *unlawful* for a company proprietor of certain manufactured goods, — *cigarettes*, — to make, with a view to secure an extensive circulation for its goods, agreements, with as many parties as it could obtain, to sell its cigarettes, exclusively of the cigarettes of other proprietors or manufacturers. (11)

**521. Criminal breaches of contract.** — Every one is guilty of an indictable offence and liable on indictment or on summary conviction before two justices of the peace, to a penalty not exceeding one hundred dollars or to three months' imprisonment, with or without hard labour, who —

(*a*) wilfully breaks any contract made by him knowing, or having reasonable cause to believe, that the probable consequences of his so doing, either alone or in combination with others, will be to endanger human life, or to cause serious bodily injury, or to expose valuable property, whether real or personal, to destruction or serious injury; or

(*b*) being under any contract made by him with any municipal corporation or authority, or with any company, bound, agreeing or assuming to supply any city or any other place, or any part thereof, with electric light or power, gas or water, wilfully breaks such contract knowing, or having reasonable cause to believe, that the probable consequences of his so doing, either alone or in com-

(10) People v. Sheldon and others, S. C., 47 Alb. L. J., 185; 15 Cr. L. Mag., 412.

(11) R. v. American Tobacco Company of Canada, 3 La. Rev. de Jur., 453.

bination with others, will be to deprive the inhabitants of that city or place, or part thereof, wholly or to a great extent, of their supply of power, light, gas or water; or

(*c*) being under any contract made by him with a railway company, bound, agreeing or assuming to carry Her Majesty's mails, or to carry passengers or freight, or with Her Majesty, or any one on behalf of Her Majesty, in connection with a Government railway on which Her Majesty's mails, or passengers or freight are carried, wilfully breaks such contract knowing, or having reason to believe that the probable consequences of his so doing, either alone or in combination with others, will be to delay or prevent the running of any locomotive engine, or tender, or freight or passenger train or car, on the railway.

2. Every municipal corporation or authority or company which, being bound, agreeing or assuming to supply any city, or any other place, or any part thereof, with electric light or power, gas or water, wilfully breaks any contract made by such municipal corporation, authority, or company, knowing or having reason to believe that the probable consequences of its so doing will be to deprive the inhabitants of that city or place or part thereof wholly, or to a great extent, of their supply of electric light or power, gas or water, is liable to a penalty not exceeding one thousand dollars.

3. Every railway company which, being bound, agreeing or assuming to carry Her Majesty's mails, or to carry passengers or freight, wilfully breaks any contract made by such railway company, knowing or having reason to believe that the probable consequences of its so doing will be to delay or prevent the running of any locomotive engine or tender, or freight or passenger train or car on the railway, is liable to a penalty not exceeding one hundred dollars.

4. It is not material whether any offence defined in this section is committed from malice conceived against the person, corporation, authority or company with which the contract is made or otherwise. R. S. C., c. 173, ss. 15 and 17.

The words "His Majesty" and "His Majesty's mails" should be substituted for "Her Majesty" and "Her Majesty's mails" in this section. (See section 7 of the *Interpretation Act*, at p. 9, *ante*.)

**522. Posting up the provisions of law respecting criminal breaches of contract.**— Every such municipal corporation, authority, or company, shall cause to be posted up at the electrical works, gas works, or water-works, or railway stations, as the case may be, belonging to such corporation, authority or company, a printed copy of this and the preceding section in some conspicuous place, where the same may be conveniently read by the public; and, as often as such copy becomes defaced, obliterated or destroyed, shall cause it to be renewed with all reasonable despatch.

2. Every such municipal corporation, authority or company which makes default in complying with such duty is liable to a penalty not exceeding twenty dollars for every day during which such default continues.

3. Every person unlawfully injuring, defacing or covering up any such copy so posted up is liable, on summary conviction, to a penalty not exceeding ten dollars. R. S. C., c. 173, s. 19.

**523. Intimidation.**—Every one is guilty of an indictable offence and liable, on indictment, or on summary conviction before two justices of the peace, to a fine not exceeding one hundred dollars or to three months' imprisonment with or without hard labour, who, wrongfully and without lawful authority, with a view to compel any other person to abstain from doing anything which he has a lawful right to do, or to do anything from which he has a lawful right to abstain —

(*a*) uses violence to such other person, or his wife or children, or injures his property; or

(*b*) intimidates such other person, or his wife or children, by threats of using violence to him, her or any of them, or of injuring his property; or

(*c*) persistently follows such other person about from place to place; or

(*d*) hides any tools, clothes or other property owned or used by such other person, or deprives him of, or hinders him in, the use thereof; or

(*e*) with one or more other persons, follows such other person, in a disorderly manner, in or through any street or road; or

(*f*) besets or watches the house or other place where such other person resides or works, or carries on business or happens to be. R. S. C., c. 173, s. 12.

This section is to the same effect as section 7 of the Imperial *Conspiracy and Protection of Property Act*, (38-39 Vic., c. 86).

A threat made to a workman that his fellow workmen will strike, unless he joins a union, or a threat made to a master that the union men in his employ will strike if he continues to employ non-union men, was held not to be intimidation within the meaning of the English Act corresponding with the above section, 523; the ground of the decision apparently being, that, as strikes are now lawful, the mere threat to strike, — which is a lawful act, — cannot amount to intimidation. (12)

It will be seen, by clause (*f*) of the above section, that picketing (that is, besetting or watching a person's place with a view to compel him to abstain from doing what he has a right to do or to compel him to do what

(12) Connor v. Kent, Gibson v. Lawson, Curran v. Treleaven, [1891] 2 Q. B., 545; 61 L. J. (M. C.), 9; 17 Cox C. C., 354.

he has a right to abstain from), is expressly forbidden, as being an act of unlawful intimidation; and a written threat to picket has also been held to be intimidation, where it was shewn that the person against whom the threat was made was reasonably frightened by it. (13)

*Cave*, J., in an unreported case of R. v. McKeevit, Liverpool Assizes, 16 Dec. 1890, ruled that to constitute intimidation within the meaning of section 7 of the English Statute, *personal violence* must be threatened. It was not necessary to decide this point in Connor v. Kent, Gibson v. Lawson, and Curran v. Treleaven; but, the five judges who decided those cases expressed an opinion that there was much to be said for the view entertained by Cave, J.

The law allows simple watching or attending near a place, for the purpose of obtaining or of communicating information; and, although this was said to be the only exception, (14) the late Recorder of London, in his charge to the jury, at the Central Criminal Court, in the case of R. v. Hibbert, on the 5th of April 1875, went so far as to say, that, if the defendants merely watched the employer's premises for the purpose of informing all comers of the existence of a strike and of *endeavoring to persuade them to join the men on strike*, it would be lawful, so long as it was done peaceably and without anything being done to interfere with the perfect exercise of free-will on the part of those who were otherwise willing to work on the terms proposed by the employer. The Recorder mentioned, in support of this view, that the law had been previously so laid down by Lush, J., in some cases tried before him. (15)

Although it is not illegal for the officers of a trade union to withdraw a sub-manufacturer's workmen from his employ and by such means prevent the sub-manufacturer from working for a manufacturer, it is illegal for such officers to watch or beset the sub-manufacturer's premises for the purpose of persuading him from working for the manufacturer or for any purpose other than merely obtaining or communicating information. (16)

In the case of a conviction under the clause of the English Act, corresponding with sub-section (*e*) of the above section, 523, it was held upon *certiorari* proceedings against a conviction that the conviction was bad, because it omitted to set out the specific act with a view to the prevention of which the prisoner was charged with following the prosecutor about; in other words, it was held that, it was not sufficient to allege that the prisoner followed the prosecutor about with a view to compel him to abstain from doing something which he has a lawful right to do, but, that it should be expressly specified what that *something* is. (17)

Where two defendants were summarily convicted under the Imperial Act, of having, — as the commitments stated, — followed one T., "with a view to compel him to abstain from working as a shoe finisher, which he had a legal right to do," it was, upon proceedings for *habeas corpus*, argued on behalf of the defendants, that the words, "working as a shoe finisher" were too vague; but, it was held that, the commitments were good and sufficiently expressed the offence. (18)

It has been held that, there is nothing in the clause of the Imperial Act, (which clause corresponds with sub-section (*f*) of our section 523), def-

(13) Judge v. Bennett, 52 J. P., 247; 36 W. R., 103.
(14) R. v. Bauld, 13 Cox C. C., 282.
(15) Arch. Cr. Pl. & Ev., 21st Ed., 1013.
(16) Lyons v. Wilkins, 67 L. J., Ch., 383. (Allen v. Flood, 67 L. J., Q. B., 119, [1898] A. C., 1, considered and applied.)
(17) R. v. Mackenzie et al, 17 Cox C. C., 542; 61 L. J., M. C., 224; [1892] 2 Q. B., 519. See, also, Metcalf v. Wiseman, 52 J. P., 439.
(18) R. v. Wilkins et al, 18 Cox C. C., 161; 64 L. J., M. C., 221.

ining the duration of the "watching and besetting," but that it may be for a short time and yet be an offence, and that there is nothing limiting the operation of the clause to places habitually frequented by workmen, the word "place" meaning any place (including public places, such as railway stations, landing stages, etc.), where a workman happens to be, however casually. (19)

A federation of shipowners, — not qualified, under the *Merchants Shipping Act, 1894*, by license or otherwise, to engage or supply seamen to be entered on any ship in the United Kingdom, — provided a depot ship for men intending to serve in ships belonging to members of the federation. Certain men were on board the depot ship and entered into engagements with the federation to remain on board until engaged to serve as seamen on ships of members of the federation, receiving, in the meantime, certain daily wages and rations from the federation. The respondents, with a view to prevent these men from remaining on the depot ship and from fulfilling their engagements, wrongfully and without legal authority, beset the depot ship and the approach thereto. An information having been laid against the respondents under clause 4 of section 7, of the English *Conspiracy and Protection of Property Act*, it was held that, they ought to be convicted, inasmuch as, — *first*, although the engagements might not be acts which the men had a legal right to do, their remaining on board the depot ship and receiving the wages and rations were such acts; and, *secondly*, it was immaterial for the purposes of the sub-section, that the relationship of master and servant did not exist between the federation and the men. (20)

**524. Intimidating persons working at any trade, etc.** — Every one is guilty of an indictable offence and liable to two years' imprisonment who, in pursuance of any unlawful combination or conspiracy to raise the rate of wages, or of any unlawful combination or conspiracy respecting any trade, business or manufacture, or respecting any person concerned or employed therein, unlawfully assaults any person, or, in pursuance of any such combination or conspiracy, uses any violence or threat of violence to any person, with a view to hinder him from working or being employed at such trade, business or manufacture. R. S. C., c. 173, s. 9.

**525. Intimidation of dealers, seamen and others.** — Every one is guilty of an indictable offence and liable, on indictment or on summary conviction before two justices of the peace, to a fine not exceeding one hundred dollars, or to three months' imprisonment with or without hard labour, who —

(*a*) beats or uses any violence or threat of violence to any person with intent to deter or hinder him from buying, selling or otherwise disposing of any wheat or other grain, flour, meal, malt or potatoes or other produce or goods, in any market or other place; or

(*b*) beats or uses any such violence or threat to any person having the charge or care of any wheat or other grain, flour, meal,

(19) Charnock v. Court, 68 L. J., Ch., 550; [1899] 2 Ch., 35.
(20) Farmer v. Wilson, 69 L. J., Q. B., 496.

malt or potatoes, while on the way to or from any city, market, town or other place with intent to stop the conveyance of the same; or

(*c*) by force or threats of violence, or by any form of intimidation whatsoever, hinders or prevents or attempts to hinder or prevent any seaman, stevedore, ship carpenter, ship labourer or other person employed to work at or on board any ship or vessel, or to do any work connected with the loading or unloading thereof, from working at or exercising any lawful trade, business, calling or occupation in or for which he is so employed; or with intent so to hinder or prevent, besets or watches such ship, vessel or employee; or

(*d*) beats or uses any violence to, or makes any threat of violence against, any such person, with intent to hinder or prevent him from working at or exercising the same, or on account of his having worked at or exercised the same. R. S. C., c. 173, s. 10; 50-51 V., c. 94.

**526. Intimidating bidders at sales of public lands.** — Every person is guilty of an indictable offence and liable to a fine not exceeding four hundred dollars, or to two years' imprisonment, or to both, who, before or at the time of the public sale of any Indian lands, or public lands of Canada, or of any province of Canada, by intimidation, or illegal combination, hinders or prevents, or attempts to hinder or prevent, any person from bidding upon or purchasing any lands so offered for sale. R. S. C., c. 173, s. 14.

## ALIEN LABOR LAW.

The Canadian *Alien Labor Act*, is the 60-61 Vic., c. 10, section 1 of which makes it unlawful for any person, company, partnership or corporation in any manner to prepay the transportation or in any way to assist or encourage the importation or immigration of any alien or foreigner into Canada, under contract to perform labor or service of any kind in Canada: and, by section 3, it is provided that any person, partnership, company or corporation who violates any provision of section 1, by knowingly assisting encouraging or soliciting the immigration or importation of any alien or foreigner, into Canada, to perform labor or service of any kind, under contract, express or implied, parole or special, with such alien or foreigner, before he has become a resident or citizen of Canada, shall forfeit $1000, which may be sued for by the Attorney-General of Canada, or the person duly authorized by him, as debts of like amount are recovered in any competent Court in Canada, and that separate suits may be brought for each alien who is a party to such contract.

Section 4 of the Act makes it an indictable offence for the master of any vessel to knowingly bring into Canada, on his vessel, and to land or permit to be landed from any foreign port or place, any alien laborer, mechanic or artisan, who previous to embarkation on such vessel had entered into contract to perform labor or service in Canada, and imposes, therefor, a fine not exceeding $500 for each alien laborer, mechanic or artisan so brought or landed, and imprisonment for a term not exceeding six months.

See section 5 of the Act as to certain exceptions from its operation.

Section 9 limits the application of the Act to such foreign countries as have enacted and retained in force or as enact and retain in force laws of a similar character applying to Canada.

## PART XL.

## ATTEMPTS—CONSPIRACIES—ACCESSORIES.

**527. Conspiring to commit an indictable offence.** — Every one is guilty of an indictable offence and liable to seven years' imprisonment, who, in any case not hereinbefore provided for, conspires with any person to commit any indictable offence.

A conspiracy to commit an indictable offence is not triable in a Court of General or Quarter Sessions, unless the indictable offence, which forms the subject-matter of the conspiracy, is so triable. (See section 540, *post.*)

For the definition of conspiracy, and for comments on conspiracy, in general, and on conspiracy to defraud, in particular, see comments under section 394, at pp. 430-434, *ante.*

Treasonable conspiracies are dealt with by sections 66 and 69, *ante;* and section 70, *ante,* deals with conspiracies to intimidate a Legislature.

As to seditious conspiracies, see sections 123 and 124, *ante;* as to conspiracies to bring false accusations, see section 152, *ante;* as to conspiracies to defile women, see section 188, *ante,* as to conspiracies to murder, see section 234, *ante,* and as to conspiracies and combinations in restraint of trade, see sections 516 and 520, *ante.*

Where railway officials had conspired to defraud the railway company by stealing and selling uncancelled but used tickets, it was held that, persons to whom the railway officials had sold these tickets could be indicted together in the same count with the railway officials, and that where several persons are charged with having conspired together, a finding, that some, but not all, did so conspire, is not, upon the face of it, bad, for repugnance. (1)

For forms of indictments for conspiracy, see Schedule of Forms at the end of this FIRST DIVISION, *post.*

**528. Attempts to commit indictable offences.** — Every one is guilty of an indictable offence and liable to seven years' imprisonment who attempts, in any case not hereinbefore provided for, to commit any indictable offence for which the punishment is imprisonment for life, or for fourteen years, or for any term longer than fourteen years.

529. Every one who attempts to commit any indictable offence for committing which the longest term to which the offender can be sentenced is less than fourteen years, and no express provision

(1) R. v. Quinn, 19 Cox C. C., 78.

is made by law for the punishment of such attempt, is guilty of an indictable offence and liable to imprisonment for a term equal to one-half of the longest term to which a person committing the indictable offence attempted to be committed may be sentenced.

As to what amounts to an *attempt* to commit a crime, see remarks and authorities under section 64, at pp. 70-73, *ante*.

See section 711, *post*, as to the right to find an accused guilty of an attempt, upon an indictment charging him with the complete commission of the crime; and see section 712, *post*, as to procedure when, upon a trial for an attempt, the evidence establishes the commission of the full offence. See, also, section 713, *post*.

An attempt to commit an indictable offence is not triable at Quarters Sessions, unless the indictable offence itself is so triable. (See section 540, *post*.)

**530. Attempts to commit certain statutory offences.** — Every one is guilty of an indictable offence and liable to one year's imprisonment who attempts to commit any offence under any statute for the time being in force and not inconsistent with this Act, or *incites* or *attempts to incite* any person to commit any such offence, and for the punishment of which no express provision is made by such statute.

A person who incites or advises another to commit a crime, which the other does *not* commit, is guilty of an *attempt* to commit it; (2) but, he, who incites another to commit a crime, which the other actually *does* commit, is guilty, as a principal offender, of the crime which he has incited.(3)

**531. Accessories after the fact to indictable offences.** — Every one is guilty of an indictable offence and liable to seven years' imprisonment who, in any case where no express provision is made by this Act for the punishment of an accessory, is accessory after the fact to any indictable offence for which the punishment is, on a first conviction, imprisonment for life, or for fourteen years, or for any term longer than fourteen years.

**532.** Every one who is accessory after the fact to any indictable offence for committing which the longest term to which the offender can be sentenced is less than fourteen years, and no express provision is made for the punishment of such accessory, is guilty of an indictable offence and liable to imprisonment for a term equal to one-half of the longest term to which a person committing the indictable offence to which he is accessory may be sentenced.

(2) R. v. Gregory, L. R., 1 C. C. R., 77; 10 Cox C. C., 459; and see comments under sections 62 and 64, at pp. 64 and 70, *ante*.

(3) See sections 61 and 62, *ante*, pp. 56, 57.

An accessory after the fact to an indictable offence cannot be tried before a Court of General or Quarter Sessions, unless the indictable offence itself, be one triable before such a court. (See section 540.)

For the definition of an accessory after the fact, see section 63, and comments thereunder at p. 65, *ante*.

An accessory after the fact may be indicted, as such, whether the principal offender has been indicted and convicted or not; and he may be indicted either alone, as for a substantive offence, or jointly with the principal offender. (See section 627, *post*.)

Upon an indictment of a person as a principal offender, only, he cannot be convicted of being an accessory after the fact. (4)

Where several persons are tried upon one indictment, some being charged as principals and others as accessories after the fact, and the principal offenders are, in accordance with section 713, found guilty, not of the offence actually charged, but of some other offence included therein,—as where the principals are charged with murder and found guilty of manslaughter only,—the persons so charged as accessories may be convicted as accessories to the offence of which the principals are so found guilty.(5)

The accused must be proved to have done some act to assist the principal offender in relation to the crime which he has committed. (6)

But, if a person employ another to harbor or relieve the principal offender, he will be equally guilty, as an accessory after the fact, as if he did the harboring and relieving personally. (7)

The accused must be proved to have known of the commission of the principal offence by the principal offender. This knowledge may be proved by the accused's own admissions, or it may be proved by evidence of circumstances from which the jury may fairly presume it. (8)

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(4) R. v. Fallon, L. & C., 217; 32 L. J. (M. C.), 66.
(5) R. v. Richards, 2 Q. B. D., 311; 46 L. J. (M. C.), 200.
(6) R. v. Chapple, 9 C. & P., 355.
(7) R. v. Jarvis, 2 M. & R., 40.
(8) R. v. Lee & Scott, 9 C. & P., 536.

# TABLE OF OFFENCES UNDER TITLE VI.

## INDICTABLE OFFENCES.

| No. | Sec. | Offence. | Punishment. | Tribunal. |
|---|---|---|---|---|
| 1 | 306<br>356 | Theft of things under seizure | Seven years; 2nd offence, ten years | Either Sup. Ct. Cr. Juris., or Genl. or Quar. Sess. |
| 2 | 307<br>331 | Killing cattle with intent to steal the carcase, etc | Fourteen years | do |
| 3 | 308<br>320 | Theft by agent | Fourteen years | do |
| 4 | 309<br>320 | Theft by holder of power of attorney | Fourteen years | do |
| 5 | 310<br>320 | Misappropriating money, etc., held under direction | Fourteen years | do |
| 6 | 312<br>354 | Fraudulent concealment of gold, etc., by mining partner | Two years | do |
| 7 | 314 | Receiving stolen property | Fourteen years | do |
| 8 | 315 | Receiving stolen post-letter, etc | Five years | do |
| 9 | 319 | Thefts by clerks, servants, Bank employees, Government and other officials | Fourteen years | do |
| 10 | 321 | Public servants refusing to deliver up books, etc | Fourteen years | do |
| 11 | 322 | Theft by tenant or lodger | Two years & four years | do |
| 12 | 323 | Stealing a will | Life | do |
| 12a | 324 | Stealing a document of title | Three years | do |
| 13 | 325 | Stealing judicial or official documents | Three years | do |
| 14 | 326 | Stealing post-letter bags, etc | Life | do |
| 15 | 327 | Stealing a post-letter, etc | Seven years | do |
| 16 | 328 | Stealing other mailable matter | Five years | do |
| 17 | (1) | Unlawfully opening a post-letter, etc | Five years | do |
| 18 | 329 | Stealing election documents | Fine, or 7 yrs, or both | do |
| 19 | 330 | Stealing railway, tramway, or steamer ticket | Two years | do |
| 20 | 331 | Stealing cattle (2) | Fourteen years | do |
| 20a | 331a | Cattle Frauds | Fourteen years | do |
| 21 | 334 | Stealing oysters or oyster brood | Seven years | do |
| 22 | 334 | Dredging in oyster beds | Three months | do |
| 23 | 335 | Stealing fixtures in buildings or lands | Seven years | do |
| 24 | 336 | Stealing trees, etc., worth $25 | Two years | do |
| 25 | 336 | Stealing trees, etc., worth $5, in a garden etc | Two years | do |
| 26 | 337 | Stealing a tree, etc., worth 25c. after two other convictions | Five years | do |
| 27 | 338 | Fraudulently taking, etc, drift timber, etc | Three years | do |
| 28 | 341 | Stealing plants, etc., in a garden after one other conviction | Three years | do |
| 29 | 343 | Stealing ores of metals, etc | Two years | do |
| 30 | 344 | Stealing from the person | Fourteen years | do |
| 31 | 345 | Stealing in a dwelling-house | Fourteen years | do |
| 32 | 346 | Stealing by picklocks, etc | Fourteen years | do |
| 33 | 347 | Stealing goods in process of manufacture | Five years | do |
| 34 | 348 | Fraudulent disposal of goods entrusted to manufacture | Two years | do |
| 35 | 349 | Stealing from ships, wharves, etc | Fourteen years | do |
| 36 | 350 | Stealing wreck | Seven years | do |
| 37 | 351 | Stealing from a railway station, or engine, etc | Fourteen years | do |
| 38 | 353<br>323 | Fraudulently destroying a will | Life | do |

(1) See section 89 (which is unrepealed) of R. S. C., c. 35, set out at p. 384, *ante*.
(2) This means live cattle. The stealing of a dead cow, etc., is punishable under sec. 356, by seven years.

INDICTABLE OFFENCES. *(Continued).*

| No. | Sec. | Offence. | Punishment. | Tribunal. |
|---|---|---|---|---|
| 39 | 353 | Fraudulently destroying other documents | Three years | Either Sup. Ct. Cr. Juris., or Genl. or Quar. Sess. |
| 40 | 354 | Fraudulent concealment of property | Two years | do |
| 41 | 355 | Bringing stolen property into Canada | Seven years | do |
| 42 | 356 | Stealing in cases not otherwise provided for | Seven y. 2d offence 10 y. | do |
| 43 | 359 | Obtaining by false pretences | Three years | do |
| 44 | 360 | Obtaining execution of valuable security by false pretence | Three years | do |
| 45 | 361 | Falsely pretending to send money, etc., in a post-letter | Three years | do |
| 46 | 362 | Obtaining passage by false ticket | Six months | do |
| 47 | 363 | Criminal breach of trust | Seven years | do |
| 48 | 364 | False accounting by a director or official of a corporate body | Seven years | do |
| 49 | (3) | Fraudulent preference by a bank president, director, etc | Two years | do |
| 50 | (3) | False bank returns, etc., by bank officials | Five years | do |
| 51 | (4) | Unlawfully using the title of "Bank," etc | Fine $1000 or five years | do |
| 52 | 365 | Making false Prospectus or statement, by promoter or director, etc., of Company | Five years | do |
| 53 | 366 | False accounting by clerk or servant | Seven years | do |
| 54 | 367 | False statement by public officer | Five years | do |
| 55 | 368 | Fraudulent transfer by a debtor | Fine $800 and one year | do |
| 56 | 369 | Fraudulant falsification of books by a debtor | Ten years | do |
| 57 | 370 | Concealing encumbrances, etc | Fine or 2 years, or both | do |
| 58 | 371 | Frauds in respect of registration of titles | Three years | do |
| 59 | 372 | Fraudulent sales of real property | One year | do |
| 60 | 373 | Fraudulent hypothecation of real property | One year and $100 fine | do |
| 61 | 374 | Fraudulent seizures of land, in Quebec | One year | do |
| 62 | 375 | Fraudulent dealings in mined Gold or silver | Two years | do |
| 63 | 376 | Giving or using false warehouse receipt | Three years | do |
| 64 | 377 | Disposal of merchandise in fraud of consignees | Three years | do |
| 65 | 378 | Making false receipts for grain, etc | Three years | do |
| 66 | 380 | Unlawfully selling wreck | Seven years | do |
| 67 | 381 | Secreting wreck, or receiving or keeping it, etc (5) | Two years | do |
| 68 | 382 | Buying marine stores from persons under sixteen, (after two other convictions) | Five years | do |
| 69 | 385 | Unlawfully applying marks to public stores | Two years | do |
| 70 | 386 | Taking marks from public stores | Two years | do |
| 71 | 387 | Unlawfully possessing public stores (6) | One year | do |
| 72 | 390 | Receiving Regimental necessaries. (7) | Five years | do |
| 73 | 391 | Receiving necessaries from marines, or deserters. (8) | Five years | do |
| 74 | 392 | Receiving a seaman's property, by purchase, exchange, or pawn. (9) | Five years | do |
| 75 | 394 | Conspiring to defraud | Seven years | do |
| 76 | 395 | Cheating at play | Three years | do |
| 77 | 396 | Fortune-Telling, witchcraft, etc | One year | do |

(3) See sections 97 and 99 (unrepealed) of the *Bank Act*, 53 Vic., c. 31, set out at p. 420, *ante*.
(4) See sections 100 and 101 (unrepealed) of the *Bank Act*, set out at p. 420, *ante*.
(5) This may also be dealt with summarily, and in that case the penalty is $400 or six months imprisonment.
(6) When the value of the stores is less than $25, the offence is punishable summarily by a fine of $100 or six months imprisonment.
(7) This may be also dealt with summarily, the penalty in that case being $40 or six months.
(8) This may be also dealt with summarily; penalty $120 or six months.
(9) On summary conviction, the penalty is $100.

## INDICTABLE OFFENCES. *(Continued).*

| No. | Sec. | Offence. | Punishment. | Tribunal. |
|---|---|---|---|---|
| 78 | 398 | Robbery, with wounding, etc., or by a person armed | Life and whipping | Either Sup. Ct. Cr. Juris., or Genl. or Quar. Sess. |
| 79 | 399 | Robbery | Fourteen years | do |
| 80 | 400 | Assault, with int nt to rob | Three years | do |
| 81 | 401 | Stopping mail with intent to rob | Life | do |
| 82 | 402 | Compelling execution of documents | Life | do |
| 83 | 403 | Sending threatening Letter demanding money, etc | Fourteen years | do |
| 84 | 404 | Demanding with intent to steal | Two years | do |
| 85 | 405 | Extortion by threats to accuse of capital or infamous offences | Fourteen years | do |
| 86 | 406 | Extortion by threats to accuse of other offences | Seven years | do |
| 87 | 408 | Breaking a church, etc., and committing indictable offence | Fourteen years | do |
| 88 | 409 | Breaking a church, etc., with intent | Seven years, 2d offence fourteen years | do |
| 89 | 410 | Burglary | Life. (If offender is armed whipping is added) | do |
| 90 | 411 | House breaking | Fourteen years | do |
| 91 | 412 | House breaking with intent | Seven years | do |
| 92 | 413 | Breaking shop, etc | Fourteen years | do |
| 93 | 414 | Breaking shop with intent | Seven years | do |
| 93*a* | 415 | Entering or being found in a dwelling-house, at night | Seven years, 2d offence fourteen years | do |
| 93*b* | 416 | Being found armed with intent to break into a dwelling-house | Seven years, 2d offence fourteen years | do |
| 93*c* | 417 | Being disguised or having burglars' tools | Five years, 2nd offence fourteen years | do |
| | 423 A | FORGERY:— | | |
| 94 | (*a*) (*b*) | Of public document, (Imperial, Colonial, Dominion or Provincial) | Life | do |
| 95 | (*c*) (*g*) | Of document of title to land | Life | do |
| 96 | (*d*) | Of registers of title to lands | Life | do |
| 97 | (*e*) (*f*) | Of land registration documents | Life | do |
| 98 | (*h*) | Of Notarial Acts, etc | Life | do |
| 99 | (*i*) | Of register of births, etc | Life | do |
| 100 | (*j*) | Of copy of Register of births, etc | Life | do |
| 101 | (*k*) | Of wills or probate, etc | Life | do |
| 102 | (*l*) | Of transfer of public funds, etc | Life | do |
| 103 | (*m*) | Of transfers of stocks, etc | Life | do |
| 104 | (*n*) | Of transfers of share in crown lands | Life | do |
| 105 | (*o*) | Of power of attorney for transfer of crown lands | Life | do |
| 106 | (*p*) | Of entry in book of shares or stock, etc | Life | do |
| 107 | (*q*) | Of Exchequer Bills | Life | do |
| 108 | (*r*) | Of bank notes, bills of exchange, etc | Life | do |
| 109 | (*s*) | Of scrip in lieu of land | Life | do |
| 110 | (*t*) | Of document of title to any public debt | Life | do |
| 111 | (*u*) | Of deed, bond, order, etc | Life | do |
| 112 | (*v*) | Of Accountable Receipt | Life | do |
| 113 | (*w*) | Of bill of lading, Insurance Policy, etc. | Life | do |
| 114 | (*x*) | Of Warehouse Receipt, Dock Warrant, etc | Life | do |
| | B | | | |
| 115 | (*a*) | Of any document relating to registry of personal property | Fourteen years | do |
| 116 | (*b*) | Of any public register, not above mentioned | Fourteen years | do |
| | C | | | |
| 117 | (*a*) (*b*) (*c*) | Of Court Records, Judicial Documents, etc | Seven years | do |
| 118 | (*d*) (*e*) | Of Magistrates' Documents, registers, etc | Seven years | do |

## INDICTABLE OFFENCES. *(Continued).*

| No. | Sec. | Offence. | Punishment. | Tribunal. |
|---|---|---|---|---|
| 119 | (*f*) | Of Copy Letters Patent, etc. | Seven years | Either Sup. Ct. Cr. Juris., or Genl. or Quar. Sess. |
| 120 | (*g*) | Of Marriage Licenses or certificates | Seven years | do |
| 121 | (*h*) | Of contracts | Seven years | do |
| 122 | (*i*) | Of powers or letters of attorney | Seven years | do |
| 123 | (*j*) | Of request for money or goods, etc | Seven years | do |
| 124 | (*k*) | Of acquittances, vouchers, etc | Seven years | do |
| 125 | (*l*) | Documents to be given in evidence in judicial proceedings | Seven years | do |
| 126 | (*m*) | Of railway, tramway or steamer tickets | Seven years | do |
| 127 | (*n*) | Of any other document | Seven years | do |
| 127*a* | | Uttering of forgeries | (9*a*) | |
| 128 | 425 | Counterfeiting public seals, etc | Life | do |
| 129 | 426 | Counterfeiting seals of Courts, Registries, etc | Fourteen years | do |
| 130 | 427 | Unlawfully printing proclamations, etc | Seven years | do |
| 131 | 428 | Sending fraudulent telegrams in a false name | (10) | do |
| 132 | 429 | Sending a false telegram or letter with intent to alarm, etc | Two years | do |
| 133 | 430 | Receiving or having forged bank-notes | Fourteen years | do |
| 134 | 431 | Fraudulently making a document without authority | (11) | do |
| 135 | 432 | Using a forged will or other instrument, or a probate, etc., obtained thereon | Fourteen years | do |
| 136 | 434 | Making, having, or using, etc., instruments of forgery | Fourteen years | do |
| 137 | 435 | Counterfeiting stamps, etc | Fourteen years | do |
| 138 | 436 | Falsifying registers | Fourteen years | do |
| 139 | 437 | Falsifying extracts from registers | Ten years | do |
| 140 | 438 | Falsely certifying entries in or extracts from registers | Seven years | do |
| 141 | 439 | Forging certificates, certifying false copies, etc | Two years | do |
| 142 | 440 | Making false entries in books relating to public funds, etc | Fourteen years | do |
| 143 | 441 | Issuing false dividend warrants | Seven years | do |
| 144 | 447 / 450 | Forging a trade-mark; or applying a forged trade mark (12) | Two yrs & forft of goods | do |
| 145 | 448 / 450 | Selling goods falsely marked (12) | Two yrs & forft of goods | do |
| 149 | 449 / 450 | Selling marked bottles without assent of proprietor of trade-mark (12) | Two yrs & forft of goods | do |
| 150 | 456 / 458 | Fraudulent personation | Fourteen years | do |
| 150*a* | 457 | Personation at Examination | One year, or $100, fine | do |
| 151 | 459 | Acknowledging an instrument in false name | Seven years | do |
| 151*a* | (13) | Forgery of ballot papers, etc | Fine & imprisonment. | Sup. Ct. Cr. Jur. |
| 151*b* | (13) | Personation at Elections | Fine & imprisonment. | do |
| | 462 | Counterfeiting, [etc.], current gold or silver coin | Life | Either Sup. Ct. Cr. Juris., or Genl. or Quar. Sess. |
| 153 | 463 | Dealing in or importing counterfeit gold and silver coin | Life | do |
| 154 | *465 | Exporting counterfeit coin | Two years, 2nd offence seven years | do |

(9*a*) The Uttering of a forgery is subject to the same punishment as the forgery itself. (See sec. 424.)

(10) Same punishment as for forgery of a document to the same effect as the telegram. (Sec. 428.)

(11) Same punishment as for forgery of the document so fraudulently made without authority. (Sec. 431.)

(12) These may be dealt with summarily, in which case the punishment is 4 months imprisonment and $100 fine, as well as forfeiture. (See sec. 456 at p. 512, *ante*.

(13) See *Dominion Elections Act*, sections 79, 104, 106, 108, 114, 116 and 117, set out at pp. 508-521, *ante*.

## INDICTABLE OFFENCES. *(Continued).*

| No. | Sec. | Offence. | Punishment. | Tribunal. |
|---|---|---|---|---|
| 155 | 466 | Making, buying, or having counterfeiting instruments | Life | Either Sup. Ct. Cr. Juris., or Genl. or Quar. Sess. |
| 156 | 467 | Bringing coining instruments into Canada | Life | do |
| 157 | 468 | Clipping current gold or silver coin | Fourteen years | do |
| 158 | 469 | Defacing current coin and afterwards tendering same | One year, 2nd offence seven years | do |
| 159 | 470 | Possessing clippings of current gold or silver coin | Seven years, 2nd offence fourteen years, | do |
| 160 | 471 | Possessing any counterfeit gold or silver coin, with intent to utter same | Three years, 2nd offence seven years | do |
| 161 | 471 | Possessing three or more counterfeit copper coins | Three years, 2nd offence seven years | do |
| 162 | 472 | Counterfeiting current copper coin, or dealing in same, etc | Three years, 2nd offence seven years | do |
| 163 | 473 | Counterfeiting foreign coins or uttering same, etc | Three years, 2nd offence seven years | do |
| 164 | 474 | Uttering counterfeit gold or silver coin | Fourteen years, 2nd offence life | do |
| 165 | 475 | Uttering light coins, medals, base copper coins, etc | Three years, 2nd offence seven years | do |
| 166 | 480 | Advertizing counterfeit money, etc | Five years | do |
| 167 | 482 | Arson | Life | do |
| 168 | 483 | Attempt to commit Arson | Fourteen years | do |
| 169 | 484 | Setting fire to crops, etc | Fourteen years | do |
| 170 | 485 | Attempt to fire crops, etc | Seven years | do |
| 171 | 486 | Recklessly setting fire to forest, etc., on Crown domain (14) | Two years | do |
| 172 | 487 | Sending letter threatening to burn buildings, etc | Ten years | do |
| 173 | 488 | Attempt to damage any building, etc., by explosives | Fourteen years | do |
| 174 | 489 | Obstructing a railway in a manner likely to endanger property | Five years | do |
| 175 | 489 | Obstructing a railway *with intent* to endanger property | Life | do |
| 176 | 490 | Obstructing construction or free use of railway | Two years | do |
| 177 | 492 | Destroying, damaging, or obstructing telegraphs, telephones, electric lights, fire alarms, etc | Two years | do |
| 178 | 493 | Wrecking | Life | do |
| 179 | 494 | Attempting to wreck | Fourteen years | do |
| 180 | 495 | Wilfully altering, removing or concealing marine signals, buoys, etc | Seven years | do |
| 181 | 496 | Wilfully preventing the saving of a wrecked vessel | Seven years | do |
| 182 | 496 | Wilfully preventing the saving of wreck (15) | Two years | do |
| 183 | 497 | Injuring rafts, booms, piers, etc | Two years | do |
| 184 | 498 | Mischief to mines | Seven years | do |
| | 499 A | MISCHIEF. | | |
| 185 | *(a)* | Wilfully damaging a ship, house, etc., *and causing danger to life* | Life | do |
| 186 | *(b)* | Wilfully damaging a river or sea bank dyke, etc., *and causing danger of inundation* | Life | do |
| 187 | *(c)* | Damaging bridges, viaducts, aqueducts, etc., and *rendering same* or highway or railway, etc., *dangerous or impassable* | Life | do |
| 188 | *(d)* | Damaging railway *with intent to render it impassable* | Life | do |

(14) This may also be dealt with summarily, and, in that case, punished by fine ($50) or 6 months imprisonment. (Sec. 486, sub. sec. 2.)
(15) This is punishable summarily by fine ($400) or 6 months imprisonment.

## INDICTABLE OFFENCES. *(Continued).*

| No. | Sec. | Offence. | Punishment. | Tribunal. |
|---|---|---|---|---|
| | B | | | |
| 189 | (*a*) | Wilfully damaging a ship in distress, etc | Fourteen years | Either Sup. Ct. Cr. Juris., or Genl. or Quar. Sess. |
| 190 | (*b*) | Wilfully destroying or injuring cattle by killing, maiming, etc | Fourteen years | do |
| | C | | | |
| 191 | (*a*) | Wilfully damaging ship with intent to render it useless | Seven years | do |
| 192 | (*b*) | Wilfully damaging navigation signals, etc | Seven years | do |
| 193 | (*c*) | Wilfully damaging a river or sea bank, etc | Seven years | do |
| 194 | (*d*), (*e*), (*f*), (*g*) | Wilfully damaging river or canal, private water, etc | Seven years | do |
| 195 | (*h*) | Mischief to goods in process of manufacture | Seven years | do |
| 196 | (*i*) | Mischief to machinery, etc | Seven years | do |
| 197 | (*j*) | Mischief to hop-binds, etc | Seven years | do |
| | D | | | |
| 198 | (*a*) | Mischief to garden trees, etc | Five years | do |
| 199 | (*b*), (*c*), (*d*) | Mischief to post-letters, letter-boxes, post parcels, etc | Five years | do |
| 200 | (*e*) | Mischief (by night) to any property worth $20 | Five years | do |
| | E | | | |
| 201 | (*a*) | Mischief to any property, worth $20 by day | Two years | do |
| 201a | 500 | Attempt to maim or kill cattle | Two years | do |
| 202 | 501 | Killing, maiming or injuring other animals after another conviction | Fine or imprisonment, or both | do |
| 203 | 502 | Written threats to injure cattle | Two years | do |
| 204 | 503 | Injuring poll-books, voters' lists and other election documents | Seven years | do |
| 205 | 504 | Injuries to building by tenants | Five years | do |
| 206 | 505 | Injuring Provincial, Municipal, etc., boundary marks | Seven years | do |
| 207 | 506 | Injuries to other land-marks | Five years | do |
| 208 | 508 | Injuring trees to the amount of twenty five cents, after two other convictions | Two years | do |
| 209 | 509 | Injuring vegetable productions in gardens, etc., after another conviction | Two years | do |
| 210 | 520 | Combination in restraint of trade (the offenders being persons) | Fine $4000 or 2 years | Sup. Ct. of Cr. Juris. |
| 211 | 520 | Combination in restraint of trade (the offender being a corporation) | Fine $10,000 | do |
| 212 | 521 | Criminal breaches of contract, by persons (16) | Fine $100 or 3 months | Either Sup. Ct. Cr. Juris., or Genl. or Quar. Sess. |
| 213 | 521 | Criminal breaches of contract by Municipal Corporations, etc | Penalty $1000 | do |
| 214 | 521 | Criminal breaches of contract by railway companies | Penalty $100 | do |
| 215 | 523 | Intimidation by violence threats of violence, picketting, etc. (17) | Fine $100 or 3 months | do |
| 216 | 524 | Intimidation by assaults, or violence or threats of violence used in pursuance of unlawful combination | Two years | do |
| 217 | 525 | Intimidation of Wheat Dealers, seamen, etc. (17) | Fine $100 or 3 months | do |
| 218 | 526 | Intimidation of bidders for public lands | Fine $400 or two years or both | do |
| 219 | 527 | Conspiracies (*not hereinbefore provided for*) to commit indictable offence (18) | Seven years | do |

(16) This offence may be prosecuted either by indictment or summarily.
(17) These may be dealt with summarily as well as by indictment.
(18) A conspiracy to commit an indictable offence is not triable in a Court of General or Quarter Sessions unless the indictable offence is so triable. (Sec. 540, *post.*)

## INDICTABLE OFFENCES. *(Continued).*

| No. | Sec. | Offence. | Punishment. | Tribunal. |
|---|---|---|---|---|
| 220 | 528, 529 | Attempts (*not herein before provided for*) to commit indictable offences.. | (19)..... ..... | Either Sup. Ct. Cr. Juris., or Genl. or Quar. Sess. |
| 221 | 531, 532 | Accessory after the fact to an indictable offence (*in cases not otherwise provided for*)..... | (19)..... ..... | do |

(19) In cases (*not otherwise provid'd for*) of attempts to commit, or of accessories after the fact to an indictable offence the punishment will be seven years, when the indictable offence itself is punishable by fourteen years or more, (See sections 528 and 531), or one half of the longest term of imprisonment for the indictable offence itself, when such longest term is less than fourteen years (See sections 529 and 532.)

Cases of attempt to commit or of being accessory after the fact to an indictable offence are not triable in a Court of General or Quarter Sessions, unless the offence itself is so triable. (Sec. 540, *post.*)

With the exception of Nos. 210, 211 (Combinations in Restraint of Trade), over which the Superior Courts of Criminal Jurisdiction have exclusive jurisdiction, all the indictable offences dealt with in Title VI, and mentioned in the foregoing table, are triable by a Court of General or Quarter Sessions, which has, over them, concurrent jurisdiction with the Superior Courts of criminal jurisdiction. (See section 540, *post.*)

Cases of Bribery, etc., under the *Dominion Elections Act*, are also within the exclusive jurisdiction of a Superior Court of Criminal Jurisdiction. (See Amendment made by the *Criminal Code Amendment Act, 1900*, to section 540, *post.*)

See comments at the end of the List of Indictable Offences under Title II, *ante*, p. 126, as to Summary Trials of Indictable Offences, Fines, Sureties, Suspension of Sentence, Restitution, Compensation and Costs.

## NON-INDICTABLE OFFENCES.

| No. | Sec. | Offence. | Punishment. | Tribunal. |
|---|---|---|---|---|
| 1 | 387, 332 | Killing Dogs, Birds, etc., with intent to steal the skin, plumage, etc..... | Penalty $20 or 1 month with h. l. (1) 2*d offence*; 3 months with h. l. | Summary. |
| 2 | 316 | Receiving anything unlawfully obtained the stealing of which is punishable summarily .... ..... | Same punishment as for stealing it..... | do |
| 3 | 333 | Killing or taking pigeons..... .. | Penalty $10 (1)... | do |
| 4 | 337 | Stealing trees, etc., worth 25c at least. | Penalty $25 (1) 2*nd offence*; 3 months, h. l. | do |
| 5 | 339 | Stealing fences, gates, etc..... | Penalty $20 (1) 2*nd offence*, 3 months, h. l. | do |
| 6 | 340 | Failing to satisfy justice of lawful possession of tree, etc ..... | Penalty $10 (1)..... | do |
| 7 | 341 | Stealing garden plants, fruits, etc. (2) | Penalty $20 or 1 month | do |
| 8 | 342 | Stealing cultivated roots, etc., in land not being a garden, etc ..... ..... | Penalty $5 or 1 month, h. l. 2*nd offence*, 3 months, h. l.... | do |
| 9 | 352 | Stealing or injuring things in Indian Graves ..... ..... | Penalty $100 or 3 months 2*nd offence* $100 and 3 months, h. l..... | do |

(1) This is in addition to the value of the animal, bird, or article in question.
(2) This offence, when committed after a previous conviction, is indictable. (See p. 391, *ante.*)

## NON-INDICTABLE OFFENCES. *(Continued).*

| No. | Sec. | Offence. | Punishment. | Tribunal. |
|---|---|---|---|---|
| 10 | 381 | Secreting wreck, or receiving, or keeping it | Penalty $400 or 6 mnths | Summary [Two Justices. |
| 11 | 382 | Buying marine stores from persons under sixteen | Penalty $4, *2d offence* $6 | Summary. |
| 12 | 382 | Receiving marine stores before sunrise or after sunset | Penalty $5, *2d offence* $7 | do |
| 13 | 387 | Unlawfully possessing public stores of a value not exceeding $25 (2) | Fine, $100 or 6 months | Summary [Two Justices.] |
| 14 | 388 | Not satisfying justices of lawful possession of public stores | Fine, $25 | do do |
| 15 | 389 | Unlawful dredging for stores | Fine, $25 or 3 months. | do do |
| 16 | 390 | Receiving regimental necessaries (3) | Penalty $40 or 6 mnths | do do |
| 17 | 391 | Receiving necessaries from Marine or Deserter | Penalty $120 or 6 mnths | do do |
| 18 | 392 | Receiving a seaman's property by purchase, exchange or pawn | Penalty $100, *2d offence* $100 or 6 months | Summary. |
| 19 | 393 | Not satisfying Justice of lawful possession of seaman's property | Fine $25 | do |
| 20 | 442 | Printing or using circulars, business cards, etc., in the likeness of banknotes, etc | Fine $100 or 3 months, or both | Summary [Two Justices.] |
| 21 | 450 | Offences against provisions of Part XXXIII, as to Trade Marks (4) | Four months or $100 fine; *2nd offence* 6 months or $250 fine | Summary. |
| 22 | 451 | Falsely representing goods as manufactured for Her Majesty or any Government | Penalty $100 | do |
| 23 | 452 | Unlawfully importing goods liable to forfeiture under Part XXXIII | Penalty $500 | do |
| 24 | 457 | Personation at any Qualifying or Competitive Examination (5) | One year, or $100 fine. | do |
| 25 | 464 | Manufacturing or importing uncurrent copper coin (6) | Penalty $20 for every pound weight of the coin and forfeiture | do |
| 26 | 476 | Uttering defaced coin (6) | Penalty $10 | Summary [Two Justices.] |
| 27 | 477 | Uttering uncurrent copper coin (6) | Penalty, double the nominal value of the coin, indefault, 8 days | Summary. |
| 28 | 486 | Recklessly setting fire to forest, etc., on Crown domain (7) | Fine $5. In default 6 months | Summary. |
| 29 | 491 | Wilfully injuring goods, etc., in railway station, etc., with intent to steal | Penalty $20 (above value of injury) or one month | do |
| 30 | 495 | Fastening any vessel, etc., to a buoy, etc | Penalty, $10 or one month | do |
| 31 | 496 | Preventing saving of wreck (8) | Fine $400 or 6 months | Summary [Two Justices.] |
| 32 | 501 | Injuries to animals, (not being cattle), (9) | Penalty, $100 or 3 months | Summary. |
| 33 | 507 | Injuries to fences, etc | Penalty $20 (10) 2nd offence 3 months | do |
| 34 | 507A | Injuries to Harbour Bars | Penalty $50 | do |

(2) When the value is over $25, this offence is indictable. (See p. 428, *ante.*)
(3) This is also indictable. (See p. 429, *ante.*)
(4) This is also indictable. (See p 513, *ante.*)
(5) This also is an indictable offence. (See p. 518, *ante.*)
(6) As to cutting or bending suspected base coin, and as to seizure, and forfeiture, etc., of unlawfully manufactured or imported coin, see sections 26, 29-31, and 34 of R.S.C., c. 167, set out at p. 527 and 528, *ante.*
(7) This is an indictable offence, but may be dealt with by the Magistrate summarily, when the consequences have not been serious.
(8) This is indictable also.
(9) This offence is indictable when committed after a previous conviction. See p. 553, *ante.*
(10) This is in addition to the amount of the injury done.

NON-INDICTABLE OFFENCES. *(Continued).*

| No. | Sec. | Offence. | Punishment. | Tribunal. |
|---|---|---|---|---|
| 35 | 508 | Injuries to trees, etc., wheresoever growing (12) | Penalty $25 (11) or 2 months; 2nd offence $50 (11) or 4 months. | Summary. |
| 36 | 509 | Injuries to vegetable productions in gardens, etc. (12) | Penalty $20 (11) | do |
| 37 | 510 | Injuries to cultivated roots, etc | Penalty $5 (11) or one month, 2nd offence 3 months | do |
| 38 | 511 | Injuries not otherwise provided for | Penalty $20 (11) | do |
| 39 | 512 | Cruelty to animals | Penalty $50 or 3 m'nths or both | Summary [Two Justices.] |
| 40 | 513 | Keeping cockpit | Penalty $50 or 3 m'nths (besides forfeiture) | do do |
| 41 | 514 | Violating provisions as to conveyance of cattle | Penalty $100 | Summary. |
| 42 | 515 | Refusing Peace officer admission to cattle car, etc | Penalty $20 or 30 days | do |
| 43 | 521 | Criminal Breaches of contract by persons (13) | Fine $100 or 3 months | Summary [Two Justices.] |
| 44 | 521 | Criminal breach of contract by a municipal corporation, etc. (13) | Penalty $1000 | do do |
| 45 | 521 | Criminal breach of contract by a Railway Company (13) | Penalty $100 | do do |
| 46 | 522 | Municipal corporation or company failing to post up the provisions of Sec. 521 | Penalty $20 per day | Summary. |
| 47 | 522 | Injuring copy provisions, so posted up. | Penalty $10 | do |
| 48 | 523 | Intimidation by violence, ¡picketting, etc. (13) | Fine $100 or 3 months. | Summary [Two Justices.] |
| 49 | 525 | Intimidation of wheat dealers, seamen, etc | Fine $100 or 3 months. | do do |

(11) This is in addition to the amount of the injury done.
(12) This offence is indictable if committed after two previous convictions and is then punishable by two years imprisonment. (See p. 555, *ante.*)
(13) This may be prosecuted either by indictment or summarily.

## LIMITATIONS OF TIME FOR PROSECUTING OFFENCES AGAINST THE CODE.

| | | | |
|---|---|---|---|
| Sec. 65. | Treason,—except (*a*) and (*b*): (1) | 3 years. | (See sec. 551*a*). |
| " 69. | Treasonable offence: (1) | 3 years. | do |
| " 83. | Opposing reading of Riot Act: | 1 year. | (See sec. 551*c*). |
| " 87. } " 88. } | Unlawful drilling: | 6 months. | (See. sec. 551*d*). |
| " 102. | Having arms: | 6 months. | do |
| " 103. } " 105. " 106. " 107. " 108. " 109. " 110. " 111. } | Improper use of offensive weapons: | 1 month. | (See sec. 551 *c*). |

(1) See the special provisions of sub-section 2 of section 551, *post*, as to the urgency of proceedings for ANY OVERT ACT OF TREASON, expressed by open and advised speaking.

| | | | |
|---|---|---|---|
| Sec. 113. | Refusing to deliver weapon to a justice: | 1 year. | (See sec. 551*c*). |
| " 114. | Coming armed near meeting: | 1 year. | do |
| " 115. | Lying in wait near meeting: | 1 year. | do |
| " 133. | Frauds upon the Government: | 2 years. | (See sec. 551*b*). |
| " 136. | Corruption in Municipal affairs: | 2 years. | do |
| " 157*d*. | Newspaper proprietor publishing advertisement offering reward for stolen property: | 6 months. | (See sec. 551*d*). |
| " 181. | Seduction of a girl under sixteen: | 1 year. | (See sec. 551*c*). |
| " 182. | Seduction under promise of marriage: | 1 year. | do |
| " 183. | Seduction of a ward, mill girl, &c: | 1 year. | do |
| " 185. | Unlawfully defiling women: | 1 year. | do |
| " 186. | Parent or guardian procuring defilement of a girl: | 1 year. | do |
| " 187. | Householders permiting defilement of girls on their premises: | 1 year. | do |
| " 279. | Unlawfully solemnizing marriage: | 2 years. | (See sec. 551*b*). |
| " 447, " 448, " 449, " 450, " 451, " 452. | Forgery of trade marks and offences relating to the fraudulent marking of merchandise: | 3 years. | (See sec. 551*a*). |
| " 512. | Cruelty to animals: | 3 months. | (See sec. 551*c*). |
| " 513. | Keeping cockpit: | 3 months. | do |
| " 514. | Violating provisions as to conveyance of cattle: | 3 months. | do |
| " 515. | Refusing Peace officer admission to cattle car, etc.: | 3 months. | do |

By section 142 of the *Dominion Elections Act*, it is provided that every prosecution for an indictable offence under that Act and every action for any pecuniary penalty given by that Act shall be commenced within one year after the commission of the act. (See pp. 523 and 524, *ante*.)

Section 841, *post*, (in all cases not otherwise limited), limits the time for the commencement of the prosecution of any offence punishable on summary conviction, to six months from the time when the matter of complaint or information arose, except in the North West Territories, where the limitation (in such cases when not otherwise provided for) is *twelve* months.

Section 930 prescribes, by two years, all actions, suits or informations (not otherwise expressly limited), when the same are for the recovery of the penalties or forfeitures referred to in section 929, *post*.

See comments and authorities under section 551, *post*, as to what is the *commencement of a prosecution*.

# SCHEDULE OF FORMS

## FORMS OF INDICTMENT

HEADING OF INDICTMENT. (1)

In the *(Name of the Court in which the indictment is found.)*

The Jurors for our Lord the King present that *(Here insert statement of offence.)*

*(Where there are more counts than one, add at the beginning of each count):*

" The said jurors further present that

## STATEMENTS OF OFFENCES (2)

STATEMENTS OF OFFENCES AGAINST PUBLIC ORDER (3).

TREASON.

On at within His Majesty's Dominions, A, with divers other false traitors to the Jurors aforesaid unknown, and armed arrayed and assembled together in warlike manner, did levy and make war against our Lord the King, with intent thereby to depose His Majesty from the style honor and royal name of the Imperial Crown of the United Kingdom of Great Britain and Ireland and of His other Dominions.

ASSAULT ON THE KING.

A, on at a certain pistol which he the said A in his right hand then had and held, wilfully did point aim and present at ("at or near to") the person of our Lord the King, with intent thereby then and there to alarm our said Lord the King.

---

(1) This is Form EE of Schedule One of the Criminal Code, *post*. As to requisites of indictments. (See sections 608 to 619, *post*.)

(2) The authority for these Statements of Offences is form FF of Schedule One, *post*, which form gives a few examples of the manner of stating offences.

(3) See Title II, pp. 74-125.

### INCITING TO MUTINY.

A. on at for a traitorous and mutinous purpose did endeavour to seduce one B. he the said B then being a person serving in His Majesty's forces on land, from his duty and allegiance to His Majesty.

### RIOT.

On at A, B, and C, with divers other persons to the Jurors aforesaid unknown, unlawfully riotously and in a manner causing reasonable fear of a tumultuous disturbance of the peace, did assemble together, and being so assembled together did then and there make a great noise, and thereby began and continued for sometime to disturb the peace tumultuously.

### RIOTOUS DESTRUCTION OF BUILDINGS.

A. on at , with two other persons at least, did unlawfully, riotously and tumultuously assemble together to the disturbance of the public peace, and with force did unlawfully demolish and pull down (*or* begin to demolish, etc.) a certain building of B.

### RIOTOUS DAMAGE TO BUILDINGS.

A. on at ; with two other persons at least, did unlawfully, riotously and tumultuously assemble together to the disturbance of the public peace, and with force did unlawfully injure and damage certain machinery (*or* "a certain building") of B.

### FORCIBLE ENTRY.

A, B, C and D, on at did, in a manner likely to cause a breach of the peace, (*or* "in a manner likely to cause reasonable apprehension of a breach of the peace"), enter on land (*or* "into a certain dwelling-house"), situate and being at and then in the actual and peaceable possession of E.

### MAKING OR POSSESSING AN EXPLOSIVE SUBSTANCE.

A. on at did make (*or* "knowingly have in his possession," *or* "knowingly have under his control"), not for a lawful object, a certain explosive substance, to wit, a certain machine (*or* "a certain lead bolt," *or* "fuse," *or* "brass bolt and screw," *or* "brass casting" "forming part of a machine"), adapted for causing an explosion with an explosive substance, under such circumstances as to give rise to a reasonable suspicion, that he did not make (*or* "did not possess" *or* "did not control"), the said explosive substance for a lawful object.

### SMUGGLER CARRYING AN OFFENSIVE WEAPON.

A. on at was found with certain goods, to wit, liable to seizure (*or* "forfeiture"), under the *Inland Revenue Act*, (*or* "Customs Act," etc.), he the said A, then, well knowing such goods to be so liable to seizure (*or* "forfeiture"), and he, the said A. was then and there carrying an offensive weapon, to wit, (*describe the weapon*).

### ADMINISTERING AN UNLAWFUL OATH.

A. on at did administer and cause to be administered to B a certain oath and engagement purporting to bind the said B not to inform or give evidence against any associate confederate or other

person of or belonging to a certain unlawful association and confederacy, and which said oath and engagement was then and there taken by the said B.

TAKING AN UNLAWFUL OATH.

[*Commence as above*] ——— did take a certain oath and engagement purporting, etc., (*as in the last form*).

PIRACY.

A, B and C, on with force of arms upon the high seas, to wit, in and on board a certain ship called the Alabama, in a certain place upon the high seas distant about ten leagues from Baltimore in the United States of America, then being, did in and upon certain mariners to the Jurors aforesaid unknown, then and there being, piratically and violently make an assault and them the said mariners put in bodily fear and danger of their lives.

## STATEMENTS OF OFFENCES AGAINST THE ADMINISTRATION OF LAW AND JUSTICE (4).

NEGLECT TO SUPPRESS RIOT.

On at the City of within the jurisdiction of A, then being the Mayor of and present in the said City of there was a riot, and the said A, then having notice thereof, without any reasonable excuse, did then and there omit to do his duty as such Mayor in suppressing the said riot.

OMITTING TO AID PEACE OFFICER IN SUPPRESSING RIOT.

On at the City of there was a riot, and that A, B and C, then and there present, being called upon and requested by D a peace officer in the exercise of his duty in that behalf to render him their assistance in suppressing the said riot, did, without any reasonable excuse, then and there refuse and omit to do so.

PERJURY. (5)

A committed perjury with intent to procure the conviction of B for an offence punishable with imprisonment for more than seven years, namely robbery, by swearing on the trial of B for the robbery of C at the Court of Quarter Sessions for the county of on the day of 18 ; first, that he, A, saw B at on the day of ; secondly, that B asked A to lend B money on a watch belonging to C; thirdly, etc.

PERJURY.

A committed perjury on the trial of B at a Court of Quarter Sessions, held at on for an assault alleged to have been committed by the said B on C, at Toronto, on the day of by

(4) See Title III, pp. 128-154, *ante*.
(5) See paragraphs (*d*) and (*e*) of Form FF in SCHEDULE ONE, *post*.

swearing to the effect that the said B could not have been at Toronto at the time of the alleged assault, inasmuch as the said A had seen him at that time in Port Arthur.

### SUBORNATION OF PERJURY.

*Same as last form to the end, and then proceed:—*

And the jurors aforesaid further present, that before the committing of the said perjury by the said A to wit, on the day of at , C unlawfully, did counsel and procure the said A to do and commit the said perjury.

### TAKING REWARD FOR HELPING TO RECOVER STOLEN PROPERTY.

On at A did unlawfully and corruptly take and receive dollars as a reward for and under pretence and on account of helping to recover a certain piano, (*or* twenty dollars in money, *or* a promissory note, *or* a horse), belonging to and theretofore stolen from the said B, (*or as the case may be*), the said A not having used all due diligence to bring to trial for such theft the person who committed it.

### BREAKING PRISON.

On the day of at A being then a prisoner confined in the common gaol or prison in and for the county of on a criminal charge, did unlawfully, by force and violence, break the said gaol or prison, by then and there cutting and sawing two iron bars of the said gaol or prison and by also then and there breaking, cutting and removing a quantity of stone, parcel of the wall of the gaol or prison aforesaid, with intent thereby, then and there, to set himself, the said A, at liberty.

## STATEMENTS OF OFFENCES AGAINST RELIGION, MORALS AND PUBLIC CONVENIENCE (6).

### BLASPHEMOUS LIBEL.

On at A did publish a certain blasphemous, indecent and profane libel of and concerning the Holy Scriptures and the Christian religion, in one part of which said libel there were and are contained amongst other things certain blasphemous, indecent and profane matters and things, of and concerning the Holy Scriptures and the Christian religion, of the tenor following, that is to say, [*here set out the libellous passage, and if there be another such passage in another part of the publication introduce it thus:* "and in another part whereof there were and are contained, amongst other things, certain other blasphemous, indecent and profane matters and things, of and concerning the Holy Scriptures and of the Christian religion, of the tenor following, that is to say," etc., etc., *and conclude the count thus*]; to the high displeasure of Almighty God, and to the great scandal and reproach of the Christian religion.

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(6) See Title IV, pp. 155-215.

### OBSTRUCTING OFFICIATING CLERGYMAN.

A, on at unlawfully did by force (*threats or force*) obstruct and prevent B, a clergyman from celebrating divine service in the parish church of the parish of C, [*or* "in the performance of his duty in the lawful burial of the dead in the church yard of the parish church of the parish of C,"].

### STRIKING OR ARRESTING OFFICIATING CLERGYMAN.

A, on at did arrest B, a clergyman upon a certain civil process [*or* "did strike" *or* "did offer violence to B, a clergyman"], whilst he the said B, as such clergyman, was going to perform divine service, he the said A, then well knowing that the said B was a clergyman and was so going to perform divine service.

### DISTURBING A RELIGIOUS MEETING.

A, on at did wilfully disturb (*or* "interrupt" *or* "disquiet"), an assemblage of persons, met for religious worship, (*or* for a "moral" *or* "social" *or* "benevolent" "purpose"), by profane discourse (*or* "rude or indecent behaviour" *or* "making a noise"), within the place of such meeting, (*or* "so near to the place of such meeting as to disturb the order or solemnity of it").

### SODOMY.

A, on at did assault, and then and there, unlawfully wickedly, and against the order of nature have a venereal affair with and carnally know B, and then and there wickedly and against the order of nature with the said B, did commit and perpetrate that detestable and abominable crime of buggery.

### BESTIALITY.

A, on at , with a certain mare, ("*any other living creature*"), wickedly, and against the order of nature, did have a venereal affair, and, then and there, unlawfully, wickedly, and against the order of nature, with the said mare, did commit and perpetrate that detestable and abominable crime of buggery.

### ATTEMPT TO COMMIT SODOMY.

A, on at , did assault B, and then and there did attempt to wickedly, and against the order of nature, have a venereal affair with and to carnally know and commit and perpetrate with the said B that detestable and abominable crime of buggery.

### INCEST.

On at , A and B, then and there being and knowing themselves to be brother and sister did commit incest (*or* "did cohabit" *or* "have sexual intercourse") with each other.

### ACT OF GROSS INDECENCY.

On at , A, a male person, in public (*or* "in private") did commit an act of gross indecency with B, another male person.

OR,

On at , A, a male person was a party to the commission of (*or* "did procure the commission of" *or* "did attempt to procure the commission of") an act of gross indecency, in public, (*or* "in private") by B, also a male person, with C, another male person.

SELLING OR PUBLICLY EXPOSING AN OBSCENE PICTURE, ETC.

A, on at , knowingly and without lawful justification or excuse did manufacture (*or* "sell" *or* "expose for sale," *or* "expose to public view," *or* "distribute" *or* "circulate") a certain obscene book, (*or* "picture," *or* "photograph," *or* "model"), representing a naked man and a naked woman in a lewd, indecent and obscene posture, (or *as the case may be*), and having a tendency to corrupt morals.

SEDUCTION OF GIRL BETWEEN FOURTEEN AND SIXTEEN.

On at A, did seduce [*or* "did have illicit connection with"] B, a girl, of previously chaste character, then being of (*or* "above") the age of fourteen years and under the age of sixteen years.

SEDUCTION UNDER PROMISE OF MARRIAGE.

On at A, being then above the age of twenty one years did, then and there, under promise of marriage, seduce and have illicit connection with B, then being an unmarried female of previously chaste character, and under twenty one years of age.

SEDUCTION BY GUARDIAN OF WARD.

On at A, then being the guardian of B, then and there did seduce (*or* "did have illicit connection with") the said B, his ward.

SEDUCTION OF FEMALE EMPLOYEE.

On at A, did seduce (*or* "did have illicit connection with") B, a woman of previously chaste character, and then being under the age of twenty one years, to wit, of the age of years, and then also being in the employment of the said A in the said A's factory (*or* "mill," *or* "workshop," *or* "shop," *or* "store").

PROCURING DEFILEMENT OF A WOMAN UNDER AGE.

On at A, did procure (*or* "did attempt to procure") B, a girl, (*or* "woman"), then under the age of twenty one years, to wit, of the age of years, and not being a prostitute nor of known immoral character, to have unlawful carnal connection with another person (*or* "other persons").

ENTICING A WOMAN UNDER AGE TO PROSTITUTION.

On at A, did inveigle, (*or* "entice"), B, a girl, (*or* "woman"), then under the age of twenty one years, to wit, of the age of years, and not being a prostitute nor of known immoral character, to a house of ill-fame, (*or* "assignation"), for the purpose of illicit intercourse (*or* "prostitution").

PROCURING A WOMAN TO BECOME A PROSTITUTE.

On at A, did procure (*or* "attempt to procure"), B, a woman (*or* "girl"), to become, within Canada, (*or* "out of Canada"), a common prostitute.

PROCURING A WOMAN TO LEAVE CANADA FOR PROSTITUTION ELSEWHERE.

On at A, did procure (*or* "attempt to procure"), B, a woman (*or* "girl"), to leave Canada with intent that she should become an inmate of a brothel elsewhere.

PROCURING A WOMAN TO COME TO CANADA FOR PROSTITUTION.

On at A, did procure (*or* "attempt to procure"), B, a woman (*or* "girl") to come to Canada from abroad with intent that she should become an inmate of a brothel in Canada.

PROCURING A WOMAN'S DEFILEMENT BY THREATS.

On at A, by threats (*or* "intimidation") did procure (*or* "attempt to procure") B, a woman (*or* "girl") to have unlawful carnal connection within Canada (*or* "out of Canada").

PROCURING A WOMAN'S DEFILEMENT BY FALSE PRETENCES.

On at A, by false pretences (*or* "false representations"), did procure B, a woman, (*or* "girl"), not being a prostitute nor of known immoral character, to have unlawful carnal connection within Canada (*or* "out of Canada").

DEFILING BY MEANS OF DRUGS.

On at A, did apply (*or* "administer") to and cause to be taken by B, a woman, (*or* "girl"), a certain drug to wit, (*or* "some intoxicating liquor," *or* some other matter or thing, *as the case may be*), with intent to stupefy (*or* "overpower") her the said B, so as thereby to enable the said A (*or* "a certain man, to wit, C,") to have unlawful carnal connection with her the said B.

CONSPIRACY TO INDUCE A WOMAN TO COMMIT ADULTERY OR FORNICATION.

On at A, and B, did conspire, combine, confederate, and agree together, by false pretences, to induce C, a woman, to commit adultery (*or* "fornication") with D.

A COMMON NUISANCE ENDANGERING LIFE, Etc.

At on , and on and at divers other days and times, before and since that date, A, unlawfully and injuriously did and he does yet continue to (*set out the particular act or omission complained of*) and thereby did commit and does continue to commit a common nuisance endangering the lives (*or* "safety" *or* "health") of the public.

A COMMON NUISANCE OCCASIONING PERSONAL INJURY.

At on and on and at divers other days and times before and since that date, A, unlawfully, and injuriously did, and he does yet continue to (*set out the particular act or omission complained of*) and thereby did commit and does continue to commit a common nuisance by which the public were and are obstructed in the exercise or enjoyment of a right common to all His Majesty's subjects, to wit, (*set out the common right obstructed*) and which common nuisance did at aforesaid on the day of occasion actual injury to the person of B.

OR,

At on , and on and at divers other days and times before and since that date, A, unlawfully and injuriously did and he does yet continue to (*set out the particular act or omission complained of*) and thereby did commit and does continue to commit a common nuisance, endangering the property (*or* "comfort") of the public and which common nuisance did at aforesaid on the day of occasion actual injury to the person of B.

KEEPING A BAWDY-HOUSE.

At on , and on and at divers other days and times since that date, A, and B, the wife of the said A, did keep and maintain a disorderly house, to wit, a common bawdy-house by keeping and maintaining a certain house (*or* "room," *or* "set of rooms," etc.), situate and being , for purposes of prostitution.

KEEPING A COMMON GAMING-HOUSE.

At on , and on and at divers other days and times since that date, A, (*or* "A, B, and C") did keep and maintain a disorderly house, to wit, a common gaming house by keeping and maintaining for gain a certain house (*or* "room," etc.) situate and being to which persons did and do resort for the purpose of playing at games of chance, to wit, (or mixed games of chance and skill, to wit, )

OR,

(*Commence as above*) did keep and maintain a disorderly house to wit, a common gaming-house, by keeping (*or* "using") for gain, a certain house (*or* "room," etc.), situate and being for playing therein at games of chance and mixed games of chance and skill, and in which a bank was and is kept by one or more of the players exclusively of the others, (*or in which, in the games played therein, the chances are not alike favorable to all the players*).

## STATEMENTS OF OFFENCES AGAINST THE PERSON AND REPUTATION (7).

### OMISSION OF FATHER TO PROVIDE NECESSARIES FOR CHILD UNDER SIXTEEN.

At on , and on and at divers other days and times, before and since that date, A, being then and there the father of B, a child under sixteen years of age, who was then and there a member of the said A's household, and the said A, being, as such father, under a legal duty and bound by law to provide sufficient food, clothing and lodging and all other necessaries for the said B, his said child, did, in disregard of his duty in that behalf, then and there, refuse, neglect and omit, without lawful excuse, to provide necessaries for the said B, his said child by means whereof the life of the said B, has been and is endangered; (*or* "the health of the said B, is now and is likely to be permanently injured").

### OMISSION OF HUSBAND TO PROVIDE NECESSARIES FOR WIFE.

(*Commence as above*) A, the husband of B, being then and there, as such husband, under a legal duty and bound by law to provide sufficient food, clothing and lodging and all other necessaries for A, his said wife, did, in disregard of his duty in that behalf, then and there, refuse, neglect and omit, without lawful excuse, to provide necessaries for her the said B, by means whereof the life of the said B, has been and is endangered, (*or*, "the health of the said B, is now and is likely to be permanently injured").

### OMISSION OF MASTER TO PROVIDE NECESSARIES FOR SERVANT OR APPRENTICE.

(*Commence as above*) A, being then and there the master of B, a servant, (*or* "an apprentice"), under the age of sixteen years, and being then and there under contract and legally bound to provide necessary food, clothing and lodging for the said B, as his said servant, (*or* "apprentice"), did in disregard of such contract and of the legal duty imposed upon him by law, in that behalf, then and there refuse, neglect and omit, without lawful excuse, to provide necessary food, clothing and lodging for the said B, by means whereof the life of the said B has been and is endangered; (*or* "the health of the said B has been and is likely to be permanently injured").

### ABANDONING CHILD UNDER TWO YEARS OF AGE.

On at A, unlawfully did abandon and expose B, a child then under the age of two years, whereby the life of the said B was and is endangered; (*or* "the health of the said B has been and is permanently injured").

### CAUSING BODILY HARM TO SERVANT OR APPRENTICE.

On at A, being then and there the master of B, a servant, (*or* "an apprentice"), and being legally liable to provide for the said B, as his said servant (*or* "apprentice"),

(7) See Title V, pp. 216-334.

then and there unlawfully did do and cause to be done bodily harm to the said B, whereby the life of the said B was and is endangered; (*or* "the health of the said B has been and is likely to be permanently injured").

MURDER.

A murdered B at on . (8)

OR,

At on A did commit murder.

ATTEMPT TO MURDER BY POISONING.

At on A did administer (*or* "cause to be administered") to B certain poison (*or* "a certain destructive thing") to wit, with intent, thereby, then and there, to murder the said B (*or* "with intent, thereby, then and there, to commit murder").

ATTEMPT TO MURDER BY WOUNDING, Etc.

At on , A did wound (*or* "cause grievous bodily harm") to B with intent, thereby, then and there, to murder the said B (*or* "with intent, thereby, then and there, to commit murder").

ATTEMPT TO MURDER, BY SHOOTING.

At on , A did, with a certain loaded gun (*or* "pistol," *or* "revolver") shoot (*or* attempt to discharge a loaded arm") at B, with intent, thereby, then and there, to murder the said B (*or* "with intent, thereby, then and there, to commit murder").

ATTEMPT TO MURDER, BY DROWNING, Etc.

At on , A, did attempt to drown (*or* "suffocate," *or* "strangle") B, with intent, thereby, then and there, to murder the said B, (*or* "with intent, thereby, then and there, to commit murder").

ATTEMPT TO MURDER, BY EXPLOSION

At on , A, did by the explosion of a certain explosive substance, to wit, [*describe the explosive*], destroy (*or* "damage") a certain building situate and being in street, in aforesaid, with intent, thereby, then and there, to murder B, (*or* "with intent, thereby, then and there, to commit murder").

ATTEMPT TO MURDER, BY ANY MEANS.

At on , A, by then and there, cutting the rope of a certain hoist (*or* "breaking the chain of a certain elevator") in a certain building situate and being in street in aforesaid, (or, *otherwise describe the actual deed*) did attempt to murder B (*or* "to commit murder").

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(8) This is example (*a*) given in Form FF of SCHEDULE ONE, *post*.

THREATENING, BY LETTER, TO KILL OR MURDER.

At on A. did send (*or* "deliver"), to (*or* "cause to be received by") B, a certain letter (*or* "writing") threatening to kill (*or* "murder") the said B, he the said A, then knowing the contents of the said letter (*or* "writing").

OR,

At on , A, did utter a certain writing, (*or* "letter"), threatening to kill (*or* "murder") B, he the said A, then knowing the contents of the said writing (*or* "letter").

CONSPIRACY TO MURDER.

At on , A, B and C did conspire and agree together to murder D, (*or* "to cause D. to be murdered").

COUNSELLING MURDER.

At on , A, did unlawfully counsel (*or* "attempt to procure") B, to murder C.

MANSLAUGHTER.

A unlawfully did kill and slay B, at on

OR,

At on A, did commit manslaughter.

AIDING AND ABETTING SUICIDE.

At on , and on divers other days before that date, A, did counsel and procure B, to commit suicide, in consequence of which counselling and procurement by the said A, the said B, then and there, actually did commit suicide.

ATTEMPT TO COMMIT SUICIDE.

A, at on did attempt to commit suicide by then and there endeavoring to kill himself.

NEGLECT TO OBTAIN ASSISTANCE IN CHILD-BIRTH.

At on , A, being then and there, with child and about to be delivered of such child, did, then and there, with intent that her said child should not live, neglect to provide reasonable assistance in her delivery, whereby and in consequence of which neglect her said child was and is permanently injured, (*or* "died during or shortly after birth").

CONCEALMENT OF BIRTH.

On at , A, was delivered of a child, and that subsequently on at aforesaid, the said child being dead, the said A, (*or* "B") did dispose of the dead body of the said child, by secretly burying it, (*or state the actual means used*), with intent to conceal the fact that the said A, had been delivered of such child.

WOUNDING WITH INTENT TO MAIM, Etc. (9)

On at A, with intent to maim (*or* "disfigure," *or* "disable" *or* "do grievous bodily harm to") B, did wound (*or* "cause grievous bodily harm to") the said B.

OR,

On at , A with intent to resist the lawful apprehension (*or* "detainer") of him the said A (*or* "of B") did wound (*or* "cause grievous bodily harm to") C.

OR,

On at , A with intent to resist the lawful apprehension (*or* "detainer") of him the said A (*or* "of B") did, with a certain loaded gun (*or* "pistol" *or* "revolver") shoot (*or* "attempt to discharge a loaded arm") at C.

WOUNDING, WITHOUT INTENT.

On at , A unlawfully did wound (*or* "inflict grievous bodily harm upon") B.

WOUNDING A PUBLIC OFFICER.

At on , A wilfully did maim (*or* "wound") B, a public officer engaged in the execution of his duty, (*or* "a person acting in aid of C, a public officer engaged in the execution of his duty").

CHOKING OR DISABLING WITH INTENT TO COMMIT AN INDICTABLE OFFENCE.

At on , A, with intent thereby to enable him the said A (*or* "one B") to rob C. did attempt to choke (*or* "suffocate," *or* "strangle") the said C.

OR,

At on , A, with intent thereby to enable him the said A, (*or* "one B") to rob (*or* "to commit a rape upon") C, did attempt to render the said C insensible, (*or* "unconscious," *or* "incapable of resistance") by gagging (*or* "garotting," *or* "sandbagging") *or* [*mention the actual means used*], the said C, in a manner calculated to choke, *or* "suffocate," *or* "strangle") the said C.
culated to choke, (*or* "suffocate," *or* "strangle") the said C.

DRUGGING WITH INTENT TO COMMIT AN INDICTABLE OFFENCE.

At on , A, with intent, thereby, to enable him, the said A, (*or* "one B") to rob (*or* "to commit a rape upon") C, did apply and administer (*or* "attempt to apply and administer") to (*or* "cause to be taken by") the said C, certain chlorofirm (*or* "laudanum"), (*or mention the stupefying or over powering drug, matter or thing used*).

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(9) See example (*f*) of Form FF in SCHEDULE ONE, *post*.

ADMINISTERING POISON AND THEREBY ENDANGERING LIFE.

On at , A unlawfully did administer (*or* "cause to be administered") to (*or* "cause to be taken by") B, certain poison (*or* "a certain destructive and noxious thing"), to wit, , and did thereby endanger the life of (*or* "inflict grievous bodily harm upon") the said B.

ADMINISTERING POISON WITH INTENT TO INJURE.

On at , A, with intent, thereby, to injure, (*or* "aggrieve," *or* "annoy") B unlawfully did administer (*or* "cause to be administered") to (*or* "cause to be taken by") the said B, certain poison (*or* "a certain destructive and noxious thing"), to wit, [*describe the drug or other noxious thing, and mention the quantity used*].

CAUSING BODILY INJURY, BY EXPLOSION.

On at , A, by the explosion of a certain explosive substance to wit, , unlawfully did burn, (*or* "maim," *or* "disfigure," *or* "disable," *or* "do grievous bodily harm") to B.

CAUSING EXPLOSION, WITH INTENT TO INJURE.

At on , A, with intent thereby to burn (*or* "maim," *or* "disfigure," *or* "disable," *or* "do grievous bodily harm to") B (*or* "any person") unlawfully did cause a certain explosive substance to wit, , to explode.

SENDING AN EXPLOSIVE SUBSTANCE WITH INTENT TO INJURE.

At on , A, with intent thereby to burn (*or* "maim," *or* "disfigure," *or* "disable," *or* "do grievous bodily harm to") B, unlawfully did send (*or* "deliver") to (*or* "cause to be taken into the possession of" *or* "to be received by") the said B, a certain explosive substance to wit,

PLACING DESTRUCTIVE FLUIDS, Etc., WITH INTENT TO INJURE.

At on , A, with intent thereby to burn (*or* "maim," *or* "disfigure," *or* "disable," *or* "do grievous bodily harm to") B, unlawfully did put and lay, in a certain place, to wit, [*describe the place*] a certain fluid (*or* "destructive" *or* "explosive substance" to wit, [*describe the fluid or substance*].

CASTING DESTRUCTIVE FLUIDS, Etc., WITH INTENT TO INJURE.

At on , A, with intent thereby to burn (*or* "maim," *or* "disfigure," *or* "disable," *or* "do grievous bodily harm to") B, unlawfully did cast and throw at and upon the said B, a certain corrosive fluid (*or* "destructive" *or* "explosive substance") to wit, [*describe the fluid or substance used*].

SETTING SPRING-GUNS, Etc.

On at , A, did set and place (*or* "cause to be set and placed") in a certain [*describe where set*] a certain spring-gun, (*or* "man-trap"), calculated to destroy human life (*or*

"inflict grievous bodily harm"), with intent that the same (*or* "whereby the same") might destroy (*or* "inflict grievous bodily harm upon") any trespasser, or other person coming in contact therewith.

INTENTIONALLY ENDANGERING RAILWAY PASSENGERS.

On at , A, with intent to injure or endanger the safety of persons on the Canadian Pacific Railway, did an act calculated to interfere with an engine, a tender, and certain carriages on the said railway on at by (*describe with so much detail as is sufficient to give the accused reasonable information as to the acts or omissions relied on against him, and to identify the transaction*). (10)

OR,

On at , A, upon and across a certain railway there called , a certain piece of wood (*or* "stone," etc.) did put (*or* "throw"), with intent thereby to injure or endanger the safety of persons travelling, (*or* "being") upon the said railway.

OR,

On at , A, from a certain railway, there called , a certain rail (*or* "railway switch," etc.) there being upon and belonging to such railway, did take up, (*or* "remove," *or* "displace"), with intent thereby to injure or endanger the safety of persons travelling, (*or* "being") upon the said railway.

OR,

On at , A, a certain point (*or other machinery*) then being upon and belonging to a certain railway called , did turn (*or* "move," *or* "divert"), with intent thereby to injure or endanger the safety of persons travelling (*or* "being") upon the said railway.

OR,

On at , A, did make (*or* "show," *or* "hide," *or* "remove"), a certain signal (*or* "light") upon (*or* "near to") a certain railway called with intent, thereby, to injure or endanger the safety of persons travelling (*or* "being") upon the said railway.

OR,

On at , A, a certain piece of wood (*or* "stone," etc.), did throw (*or* "cause to fall" *or* "strike") at, (*or* "against," *or* "into" *or* "upon") a certain engine, (*or* "tender," *or* "carriage," *or* "truck"), then being used and in motion upon a certain railway there called , with intent, thereby, to injure or endanger the safety of B, then and there being upon the said engine (*or* "tender" *or* "carriage," *or* "truck" *or* "engine," etc., of the train of which the said first mentioned engine, etc., then formed part").

NEGLIGENTLY ENDANGERING THE SAFETY OF RAILWAY PASSENGERS.

On at , A, by wilfully omitting and neglecting to do his duty, that is to say, by wilfully omitting and neglecting to (*set out the particular act omitted to be done*) which it was

(10) This is Example (*g*) of Form FF in SCHEDULE ONE, *post*.

then the duty of him the said A to do, did endanger (*or* "cause to be endangered") the safety of persons then conveyed (*or* "being") in and upon a certain railway there called

DOING INJURY BY FURIOUS DRIVING.

On at , A, being in charge of a certain vehicle, to wit, a four-wheeled cab, did then and there by his wanton and furious driving, of (*or* "racing") with the said vehicle do (*or* "cause to be done") bodily harm to B.

PREVENTING THE SAVING OF A SHIPWRECKED PERSON.

On at , A, did prevent and impede (*or* "endeavor to prevent and impede") B, a shipwrecked person, in his endeavor to save his life.

INDECENT ASSAULT ON A FEMALE.

On at , A, indecently did assault B, a female.

INDECENT ASSAULT ON A MALE.

On at , A, a male person indecently did assault B, another male person.

ASSAULT CAUSING ACTUAL BODILY HARM.

On at , A, did make an assault upon and beat and occasion actual bodily harm to B.

AGGRAVATED ASSAULT.

On at , A, in and upon B, did make an assault, with intent then and there to commit an indictable offence, namely, [*describe the indictable offence intended*].

OR,

On at , A, did assault B, a public officer (*or* "a peace officer") then and there engaged in the execution of his duty.

OR,

On at , A, did assault B, with intent then and there to resist (*or* "prevent") the lawful apprehension (*or* "detainer") of him the said A, (*or* "one C") for a certain offence, to wit, [*state the offence*].

OR,

On at , A, did assault B, who was then and there, in his quality of a duly appointed Bailiff of , engaged in the lawful execution of a certain process against (*or* "in the making of a lawful seizure of") lands (*or* "goods").

OR,

At on , a day whereon a poll for the election of municipal councillors, for the municipality of was being proceeded with, A, being then and there, within two miles from the place where such poll was being held, did unlawfully make an assault upon and beat B.

KIDNAPPING.

On at , A, without lawful authority, did kidnap B, with intent to cause the said B to be secretly confined or imprisoned in *Canada*, (*or* "to be unlawfully sent out of Canada," *or* "to be sold or captured as a slave, or in any way held to service"), against his will.

UNLAWFUL IMPRISONMENT.

On at , A, without lawful authority, forcibly seized and confined, (*or* "imprisoned") B, within Canada.

COMMON ASSAULT.

On at , A, assaulted and beat B.

RAPE.

On at , A, did assault B, a woman, who was not his wife, and did then and there have carnal knowledge of her without her consent.

ATTEMPT TO COMMIT RAPE.

On at , A, did assault B, a woman, who was not his wife, with intent then and there to have carnal knowledge of her the said B, without her consent.

CARNALLY KNOWING A GIRL UNDER FOURTEEN.

On at , A, did have carnal knowledge of B, a girl under the age of fourteen years, not being his wife.

ATTEMPT TO CARNALLY KNOW A GIRL UNDER FOURTEEN.

On at , A, did attempt to have carnal knowledge of B, a girl under the age of fourteen years, not being his wife.

ABORTION.

On at , A, with intent thereby to procure the miscarriage of a certain woman to wit, one B, did unlawfully administer to (*or* "cause to be taken by") her the said B, a certain drug (*or* "a certain noxious thing") to wit, [*describe the drug or noxious thing used, and mention the quantity*].

OR,

On at , A, with intent thereby to procure the miscarriage of a certain woman, to wit, one B, did unlawfully use upon the person of the said B, a certain instrument, to wit, [*describe the instrument used*].

OR,

On at , A, a woman, did, with intent thereby to procure her own miscarriage, unlawfully administer (*or* "permit to be administered") to herself a certain drug (*or* "a certain noxious thing") to wit, [*describe the drug or noxious thing, and mention the quantity used*].

OR,

On at , A, unlawfully did supply (*or* "procure") a certain drug (*or* "a certain noxious thing") to wit, [*describe and mention the quantity of it*] he the said A, then knowing that the same was intended to be unlawfully used or employed with intent to procure the miscarriage of a certain woman, to wit, one B.

OR,

On at , A, unlawfully did supply (*or* "procure") a certain instrument to wit, [*describe the instrument*], he the said A, then knowing that the same was intended to be unlawfully used or employed with intent to procure the miscarriage of a certain woman, to wit, one B.

BIGAMY.

On at , A, being already theretofore, married to one B, did marry and go through a form of marriage with another woman, (*or* "man"), to wit, C, and, to her (*or* "him") the said C, was then and there married, the said B, his, the said A's, said first wife (*or* "her, the said A's, said first husband") being still alive.

PROCURING A FEIGNED MARRIAGE.

At on , A, did procure a feigned and pretended marriage between himself, the said A, and a certain woman, to wit, B.

OR,

At on , A, did knowingly aid and assist B, in procuring a feigned and pretended marriage between him, the said B, and a certain woman, to wit, C.

POLYGAMY.

At on , and on and at divers other days and times before and since that date, A, a male person, and B, C and D, three females, did practice, (*or* "agree and consent to practice") polygamy together.

OR,

At on , A, a male person, and B, C and D, three females, did enter into a conjugal union (*or* "spiritual or plural marriage," etc.) together, by means of a contract (*or* "the rites" *or* "rules," etc., "of a certain denomination," (*or* "sect" *or* "society" called Mormons), (*or* "called," etc.).

SOLEMNIZING MARRIAGE, WITHOUT AUTHORITY.

On at , A, without lawful authority, did solemnize (*or* "pretend to solemnize") a marriage between B and C.

OR,

On at , A, then knowing that B was not lawfully authorized to solemnize a marriage between C and D, did procure the said B to solemnize a marriage between the said C and D.

SOLEMNIZING A MARRIAGE CONTRARY TO LAW.

At on , A, a clergyman of , having lawful authority to solemnize marriages, did, then and there, knowingly and wilfully solemnize a marriage between B and C, in violation of the laws of the province of , in which the said marriage was so solemnized, to wit, by solemnizing the same without any previous publication of banns, and without any license in that behalf, *or*, [*set out particular violation complained of*].

ABDUCTION.

On at , A, did take away (*or* "detain") against her will, a certain woman, to wit, B, with intent to marry (*or* "carnally know") the said B,

OR,

On at , A, did take away (*or* "detain"), against her will, a certain woman, to wit, B, with intent to marry (*or* "carnally know") her the said B, (*or* "with intent to cause her the said B. to be married to (*or* "carnally known by") (").

ABDUCTION OF AN HEIRESS.

On at , A, from motives of lucre, did take away (*or* "detain," *or* "take away and detain") against her will, a certain woman, to wit, B, she then having a certain legal (*or* "equitable") present absolute, (*or* "future absolute" *or* "future conditional" *or* "contingent") interest in certain real (*or* "personal") estate, to wit, (*describe the estate or property*) with intent to marry (*or* "carnally know") the said B, (*or* with intent to cause her, the said B, to be married to), (*or* "carnally known by")

ALLUREMENT OR ABDUCTION OF A WOMAN UNDER TWENTY ONE.

On at , A, with intent to marry (*or* "carnally know") a certain woman, to wit, B, then being under the age of twenty one years, did fraudulently allure (*or* "take away" *or* "detain") the said B, out of the possession and against the will of C, her father, (*or* "mother," etc.).

ABDUCTION OF A GIRL UNDER SIXTEEN.

On at , A, unlawfully did take (*or* "cause to be taken") a certain unmarried girl, to wit, B, then under the age of sixteen years, out of the possession and against the will of C, her father, (*or* "mother" *or* "a person having the lawful care and charge of her the said B").

STEALING CHILDREN UNDER FOURTEEN.

On at , A, unlawfully did take (*or* "entice") away (*or* "detain" one B, a child under the age of fourteen years, to wit, of the age of years, with intent, thereby, then and there, to deprive C, the father (*or* "mother," *or* "guardian," etc.), of the said B, of the possession of the said B, *or* ("with intent, thereby, then and there, to steal a certain article (*or* "certain articles), to wit, (*mention the article or articles*) then being on or about the person of the said B."

OR,

On at , A. unlawfully did receive (*or* "harbor") one B, a child under the age of fourteen years, to wit, of the age of years, then and there knowing the said B to have been then and there, and theretofore, taken (*or* "enticed") away, with intent to deprive C, the father (*or* "mother," *or* "guardian," etc.) of the said B, of the possession of the said B.

### EXTORTION BY DEFAMATORY LIBEL.

On at A did publish (*or* "threaten to publish," *or* "offer to abstain from or prevent the publishing of") a defamatory libel of and concerning B, with intent thereby, then and there, to induce the said B, (*or* "one C"), to confer upon, (*or* "procure for") the said A, (*or* "one D") a certain appointment (*or* "office") of profit (*or* "trust"), to wit, [*mention the appointment or office in question*].

OR,

On at A. did publish (*or* "threaten to publish") a defamatory libel of and concerning B, in consequence of the said A having been refused money theretofore demanded by him the said A of and from the said B (*or* "in consequence of the said A having been refused a certain appointment, etc., theretofore sought by him the said A, of or from or at the hands or by the influence of the said B").

### PUBLISHING A LIBEL KNOWING IT TO BE FALSE.

On at A did publish in a certain newspaper called the a defamatory libel, on, of and concerning B, he the said A well knowing the same to be false, which libel was contained in the said newspaper in an article therein headed (*or* "commencing with") the following words, to wit, [*set out the heading, or the commencing, and, if necessary, the concluding, words of the libel, or otherwise give so much detail as is sufficient to furnish the accused with reasonable information as to the part of the publication to be relied on against him*], and which libel was written in the sense of imputing that the said B was [*as the case may be*], and which libel was published without legal justification or excuse, and was likely to injure and did injure the reputation of the said B, by exposing him to hatred, (*or* "contempt," *or* "ridicule").

### PUBLISHING A LIBEL.

On at A did publish on, and of and concerning B, a defamatory libel in a certain letter directed to C, which libel was in the words following that is to say, [*set out the part of the letter complained of as libellous*], and which libel was written in the sense of imputing that the said B was [*as the case may be*], and was designed to insult the said B.

## SPECIAL PLEADINGS IN LIBEL CASES.

### SPECIAL PLEA

And, without waiver of his plea of not guilty, the said A, for a further plea in this behalf, says that Our Lord the King ought not further to prosecute the said indictment against him, because he says it is true that

[*and so on, stating facts showing the truth of every matter charged in the alleged libel*]; and so the said A says that the said alleged libel is true in substance and in fact. And the said A, further says that the said alleged libel was and is matter of public interest and concern and that before and at the time of publishing the said alleged libel, it was for the public benefit that the matters contained therein should be published, to the extent that the same were published by him the said A, because [*set out the facts showing that the publication was for the public benefit*]. And this he the said A is ready to verify, etc.

### REPLICATION.

And as the second plea of the said A, the said J. N. (*the Clerk of the Crown*) who prosecutes for Our said Lord the King in this behalf, says that Our said Lord the King ought not, by reason of anything in the said second plea alleged, to be barred or precluded from prosecuting the said indictment against the said A, because the said J. N. says that he denies the said several matters in the said second plea alleged, and says that the same are not, nor are, nor is any or either of them, true, etc. And this he the said J. N. prays may be enquired of by the country, etc.

## CRIMINAL INFORMATIONS.

### CRIMINAL INFORMATION, EX OFFICIO.

Be it remembered that J. T., Attorney-General of Our present Sovereign Lord the King, who, for Our said Lord the King, in this behalf, prosecutes in his proper person, comes here into the Court of at , And, for Our said Lord the King, gives the Court to understand and be informed that at on A, unlawfully, and wickedly, intending devising and contriving to raise, create and cause a tumult, disturbance and serious riot among His Majesty's subjects, did unlawfully and wickedly publish a defamatory libel, of a violent and inflamatory nature of and against certain of His Majesty's subjects to wit: (*mention the persons or class of persons libelled, and set out the libel complained of, as in an indictment*). Whereupon the said Attorney-General for Our said Lord the King prays the consideration of the Court here in the premises and that due process of law may be awarded against him the said A, in this behalf, to make him answer to Our said Lord the King touching and concerning the premises aforesaid.

### CRIMINAL INFORMATION BY CLERK OF THE CROWN.

Be it remembered that J. N., Clerk of the Crown of Our Sovereign Lord the King in the Court of who for Our said Lord the King, prosecutes in this behalf, comes here into the said Court at on the : And for Our said Lord the King gives the Court here to understand and be informed that A at on did unlawfully (etc.). [*State the offence and proceed as in an indictment*]. Whereupon the said Clerk of the Crown for Our said Lord the King prays the consideration of the Court here in the premises, and that due process of law may be awarded against him the said A in this behalf to make him answer to Our said Lord the King touching and concerning the premises aforesaid.

### PLEAS TO CRIMINAL INFORMATION.

And the said A, appears here in Court by his attorney and the said information is read to him which being by him heard he says he

is not guilty of the said supposed offence in the said information alleged, etc.

And for a further plea the said A, saith that before the publishing of the said alleged libel [*set out facts showing the truth of the matters charged in the libel*].

And so the said A, says that the said alleged libel consists of allegations true in substance and in fact and of fair and reasonable comments thereon. And the said A, further saith that at the time of publishing the said alleged libel it was for the public benefit that the matters therein contained should be published; because [*set out the facts showing why the publication was for the public benefit*]. And so the said A, says that he published the said alleged libel, as he lawfully might, for the causes aforesaid, and this he the said A, is ready to verify. Wherefore he prays judgment, etc.

### REPLICATION.

The said J. N., Clerk of the Crown of Our said Lord the King in the said Court of , who prosecutes for Our said Lord the King, as to the first plea pleaded, puts himself upon the country; and, as to the plea secondly pleaded by the said A, says that the said A, of his own wrong and without the cause in the said plea alleged, published the said libel as in the said information alleged, etc.

## STATEMENTS OF OFFENCES AGAINST RIGHTS OF PROPERTY, ETC. (11)

### THEFT OF THINGS UNDER SEIZURE.

At on , A, without lawful authority, did take and carry away, one horse of the value of belonging to the said A, (*or* "one B"), and then and there being under lawful seizure and detention by a peace officer (*or* "public officer") in his official capacity.

### KILLING AN ANIMAL, WITH INTENT TO STEAL THE CARCASE, Etc.

At on , A, did kill one sheep, belonging to B, with intent to steal the carcase (*or* "a part of the carcase, to wit, the inward fat") of the said sheep.

### FRAUDULENT CONVERSION BY A PERSON ENTRUSTED WITH MONEY.

At on , A, — having theretofore received from B, the sum of one hundred dollars, on terms requiring him, the said A, to pay over the same to C, — did fraudulently convert to his own use and thereby steal the said sum of money.

### THEFT BY HOLDER OF A POWER OF ATTORNEY.

At on , A, having been theretofore entrusted, by B, with a power of attorney for the sale of a certain lot of land and the buildings thereon, to wit, (*describe the property*), did

(11) See Title VI, pp. 337-576.

sell the same fraudulently, to wit, for a sum of money which was $500 less than the value thereof under a fraudulent arrangement for the division of the said surplus value of $500 between the said A and one C.

OR,

At on , A, having been theretofore entrusted, by B, with a power of attorney for the sale of a certain lot of land and the buildings thereon, to wit, (*describe the property*), and having theretofore sold the said land and buildings, did, then and there, fraudulently convert the proceeds of the said sale, to wit, the sum of two thousand dollars, to a purpose other than that for which he was entrusted with the said power of attorney, by then and there applying and converting the said money to his own use.

THEFT BY MISAPPROPRIATING MONEY HELD UNDER DIRECTION.

At on , A, having theretofore received from B, the sum of one hundred dollars, with a direction from him the said B, to the said A, that the said money should be paid to C, did, then and there, in violation of good faith and contrary to the terms of the said direction, fraudulently convert to his own use and thereby steal the said sum of money.

THEFT BY A PARTNER.

At on , A stole one car load of coals of the value of the property of a co-partnership composed of the said A and one B.

RECEIVING PROPERTY STOLEN, OR OBTAINED BY ANY INDICTABLE OFFENCE.

At on , A did receive and have one piano, belonging to B, and theretofore stolen (*or* "obtained by an indictable offence, to wit, by false pretences"), *or* [*describe the offence by which the piano was obtained*], he the said A, then well knowing the said piano to have been so stolen, (*or* "obtained by the said indictable offence").

OR,

At on , A stole one piano belonging to B . *And the jurors aforesaid do further present*, that, afterwards, at on , C, the said piano so stolen as aforesaid, did receive and have, he, the said C, then well knowing the said piano to have been stolen.

THEFT BY A CLERK OR SERVANT.

At on A, being then and there, a clerk, (*or* "employed for the purpose and in the capacity of a clerk") to B, his master, (*or* "employer"), did steal certain money, to the amount of one hundred dollars, certain goods, to wit, one gold watch and one gold chain, and a certain valuable security, to wit, one promissory note for the payment of twenty dollars, of and belongings to (*or* "in the possession of") the said B, his master, (*or* "employer").

THEFT BY A BANK OFFICIAL.

At on A, being then and there a cashier (*or* "assistant cashier," *or* "manager" *or* "clerk," etc.),

of the Bank, (*or* "Savings Bank"), did steal certain money to the amount of five thousand dollars, (*or* "bonds," *or* "obligations," etc.), [*describe them*], of and belonging to, (*or* "lodged," *or* "deposited") in the said Bank, (*or* "Savings Bank").

THEFT BY GOVERNMENT EMPLOYEE.

At on A, being then and there employed in the service of His Majesty, (*or* "the Government of Canada," *or* "the Government of the Province of Ontario," *or* "Quebec" *or* "the Municipality of "), and being, then and there, by virtue of his said employment, in possession of certain moneys to the amount of ten thousand dollars, (*or* "certain valuable securities, to wit"), [*describe them*], did unlawfully steal the said moneys, (*or* "the said valuable securities").

GOVERNMENT EMPLOYEES REFUSING TO DELIVER UP BOOKS, Etc.

At on A, being then and there employed in the service of His Majesty, (*or* "the Government of Canada," *or* "the Government of the Province of Ontario," *or* "Quebec," *or* "the Municipality of "), and being, then and there, entrusted, by virtue of his employment, with the keeping (*or* "receipt," *or* "custody," *or* "management," *or* "control") of certain monies, to the amount of ten thousand dollars, (*or* "certain chattels, to wit," [*describe them*], *or* "certain valuable securities, to wit," [*describe them*], *or* "certain books, papers, accounts, and documents, to wit"), [*describe them*], did refuse (*or* "fail") to deliver up the same, to B, who was, then and there, duly authorized to demand them.

THEFT BY TENANT.

At on A, being then and there a tenant, (*or* "lodger") of or in a certain house (*or* "lodging"), to wit, [*describe the premises*], did steal a certain chattel, (*or* "fixture"), to wit, [*describe the chattel or fixture*], belonging to B, and let to be used by him the said A, in or with the said house, (*or* "lodging").

THEFT OF A WILL.

At on A, did steal a certain testamentary instrument, to wit, the last will and testament (*or* "a codicil to the last will and testament") of B.

THEFT OF A DOCUMENT OF TITLE.

At on , A, did steal a certain document of title to goods, to wit, one bill of lading, [*describe the document and the goods to which it relates*], (*or* "one dock warrant," *or* "warehouse keeper's receipt," etc.), the property of B.

OR,

At on , A, did steal, a certain document of title to lands, to wit, one deed, (*or* "map," *or* "paper," etc.), containing evidence of the title, (*or* "a part of the title") of B, to certain real property, to wit, [*describe the property*], belonging to the said B (*or* "in which the said B has an interest").

THEFT OF JUDICIAL DOCUMENTS, Etc.

At on , A, did steal, a certain record of and belonging to the Superior Court of Lower Canada for the District of Montreal in a certain cause, [*describe the cause, matter or proceeding*] then (*or* "theretofore"), depending in the said Court.

OR,

At on , A, did steal, a certain writ, (*or* "*petition*," etc.), forming part of a certain record of and belonging to the Superior Court of Lower Canada, for the District of Montreal, in a certain cause [*describe the cause, matter, or proceeding*], then (*or* "theretofore") depending in the said Court.

STEALING A POST-LETTER BAG.

At on , A, did steal, one post-letter bag, the property of the Post-Master General.

STEALING A POST-LETTER FROM A POST-LETTER BAG, Etc.

At on , A, did steal, one post-letter, the property of the Post-Master General, from a post-letter bag, (*or* "from a post-office" *or* "from an officer employed in the post-office of Canada").

STEALING A POST-LETTER WITH MONEY IN IT.

At on , A, did steal, one post-letter, the property of the Post-Master General, which post-letter contained a certain chattel, to wit, [*describe it*], (*or* "certain money to the amount of ," *or* "a certain valuable security, to wit"), [*describe it*].

STEALING MONEY, Etc., OUT OF A POST-LETTER.

At on , A, did steal, a certain chattel, to wit, [*describe it*], (*or* "certain money to the amount of ," *or* "a certain valuable security, to wit"), [*describe it*], from and out of a post-letter, the property of the Post-Master General.

STEALING A POST-LETTER, Etc.

At on , A, did steal one post-letter, the property of the Post-Master General.

STEALING CATTLE.

At on , A, did steal one horse the property of B.

STEALING OYSTERS.

At on , A, did steal from a certain oyster-bed, called , the property of B, one hundred oysters.

### DREDGING FOR OYSTERS.

At on , A, within the limits of a certain oyster-bed, called , the property of B, and sufficiently marked out and known as the property of the said B, unlawfully and wilfully did use a certain dredge (*or* "net," *or* "instrument," *or* "engine"), for the purpose of then and there taking oysters, (*or* "oyster-brood").

### DRAGGING ON THE GROUND OF AN OYSTER FISHERY.

At on , A, unlawfully and wilfully did drag, with a certain net, (*or* "instrument," *or* "engine"), upon the ground of a certain oyster fishery called , the property of B, and sufficiently marked out and known as the property of the said B.

### STEALING THINGS FIXED TO BUILDINGS.

At on , A, did steal sixty pounds weight of lead, the property of B, then being fixed in a certain dwelling-house belonging to the said B, and situated in aforesaid.

### STEALING TREES WORTH MORE THAN $25.

At on , A, did steal one ash tree of the value of twenty six dollars, the property of B, then growing in a certain field belonging to the said B, and situated in aforesaid.

### STEALING A TREE, (WORTH $5), IN A PARK, Etc.

At on , A, did steal one apple tree, of the value of six dollars, the property of B, growing in a certain orchard of the said B, situated at aforesaid.

### STEALING TREES AFTER TWO PREVIOUS CONVICTIONS.

At on , A, did steal one shrub of the value of fifty cents, the property of B, then growing in a certain plot of land situate and being in aforesaid; and the said jurors say, that heretofore, to wit, at on , (before the committing of the hereinbefore mentioned offence), the said A was duly convicted, before C, one of His Majesty's Justices of the Peace for the District of of having at on , [*set out the offence forming the basis of the first conviction*], and was adjudged, for his said offence, to pay, [etc.], and, in default of payment, [etc.], to be imprisoned, [etc.]. And the said jurors further say that heretofore, to wit, at on , (before the committing of the firstly hereinbefore mentioned offence, but after the next hereinbefore mentioned conviction), the said A was again duly convicted before D, one of His Majesty's Justices of the Peace for the District of of having at on , [*set out the second conviction*]. And so the jurors aforesaid say that, on the day and year first aforesaid the said A, did steal the said shrub of the value of fifty cents, after having been twice convicted of the offence of stealing a shrub, (*or* "tree," [etc.], of the value of at least twenty five cents.

STEALING FRUIT, Etc., GROWING IN A GARDEN, Etc., AFTER A PREVIOUS CONVICTION.

At on , A, did steal, forty pounds weight of pears the property of B, then growing in a certain orchard of the said B, situated in aforesaid; And the said jurors say that, heretofore, to wit, at on (before the committing of the hereinbefore mentioned offence), the said A was duly convicted before C, one of His Majesty's Justices of the Peace for the district of of having at on , [*set out the offence forming the basis of the first conviction*], and was adjudged, for his said offence, to pay, [etc.], and in default of payment [etc.], to be imprisoned, [etc.]. And so the jurors aforesaid say that, on the day and year first aforesaid, A did steal the said forty pounds weight of pears, after having been previously convicted of the offence of stealing fruit in an orchard (*or* "garden"), [etc.].

STEALING FROM A SHIP.

A stole a sack of flour from a ship called the at on . (12)

STEALING METAL ORE, Etc., FROM A MINE.

At on , A, did steal five tons weight of iron ore, (*or* "coal"), the property of B, from a certain iron (*or* "coal") mine of the said B, situated in aforesaid.

STEALING FROM THE PRISON.

At on , A, did steal one gold watch, and one silver watch-chain from the person of B.

STEALING IN A DWELLING-HOUSE.

At on , A, did steal twelve silver spoons, of the total value of twenty five dollars, of the goods and chattels of B, in the dwelling-house of the said B, situated in aforesaid.

OR,

At on , A, did steal twelve silver forks of the goods and chattels of B, in the dwelling-house of the said B situated in aforesaid; there being, then and there, in the said dwelling-house, one C, who was then and there put in bodily fear by the menaces and threats of the said A.

STEALING BY PICKLOCKS.

At on , A, by means of a pick-lock, (*or* "false key," etc.), did steal the sum of twenty five dollars, the property of B, from a locked and secured receptacle for property.

STEALING GOODS IN MANUFACTORIES.

At on , A, did steal forty yards of calico of the value of five dollars, belonging to B, in a certain

(12) This is example (*b*) given in Form FF, *post*.

weaving shed of the said B, situated in aforesaid, whilst the same was exposed upon the looms of the said B, in the said weaving shed, during a certain stage, process or progress of the manufacture thereof.

FRAUDULENTLY DISPOSING OF GOODS ENTRUSTED FOR MANUFACTURE.

At on , A, did fraudulently dispose of a certain quantity, to wit, one hundred yards, of tweed cloth, the property of B, which the said A had been theretofore entrusted with for the purpose of manufacture.

STEALING IN A SHIP ON A NAVIGABLE RIVER.

At on , A, did steal, in a certain ship called the "Nepigon" twelve bars of iron of the goods and merchandise of B, then being in the said ship, upon the navigable river St. Lawrence, (*or* "in a certain port of discharge, to wit, the port of Montreal").

STEALING FROM A DOCK.

At on , A, did steal from a certain dock, (*or* "wharf"), adjacent to the navigable river St. Lawrence, one sack of flour of the goods and merchandise of B, then being upon the said dock.

STEALING WRECK.

At on , A, did steal one coil of rope, and one compass, being portions of the tackle of a certain ship, called the "*Hawk*," the property of B, and other persons to the jurors unknown, which ship was then and there lying stranded and wrecked.

OR,

At on , A, did steal a gold watch, the property of B, a shipwrecked person belonging to a certain ship called the "*Highflyer*," which then and there lay stranded and wrecked.

STEALING IN OR FROM RAILWAY STATIONS, Etc.

At on , A, did steal one umbrella and one rug of the goods and chattels of B, in (*or* "from"), a certain railway station, to wit, a station belonging to the Grand Trunk Railway Company (*or* "the Canadian Pacific Railway Company"), and situated at aforesaid.

DESTROYING DOCUMENT OF TITLE TO GOODS.

At on , A, for a fraudulent purpose, did destroy, (*or* "cancel," *or* "conceal," *or* "obliterate"), a certain document of title to goods, to wit, one bill of lading, [*describe it*].

FRAUDULENT CONCEALMENT, Etc.

At on , A, for a fraudulent purpose, did take (*or* "obtain," *or* "remove," *or* "conceal"), one horse and one express wagon, the property of B, of the value of one hundred dollars.

BRINGING STOLEN PROPERTY INTO CANADA.

On at , A, did bring into Canada, to wit, into the City of Montreal, in the province of Quebec, twelve gold watches and five diamond rings, of the total value of two thousand dollars, theretofore stolen by him the said A, outside of Canada, to wit, in the City of New York in the State of New York, one of the United States of America.

OBTAINING BY FALSE PRETENCES.

At on , A, by false pretences, did obtain from B, five barrels of flour of the value of with intent to defraud.

OR,

A obtained by false pretences from B, a horse, a cart and the harness of a horse at on . (13)

OBTAINING EXECUTION OF VALUABLE SECURITY BY FALSE PRETENCES.

At on , A, by false pretences, did cause and induce B, to execute (*or* "make," *or* "accept," *or* "endorse," *or* "destroy"), a certain valuable security, to wit, a promissory note for one hundred dollars with intent thereby then and there to defraud and injure the said B.

OBTAINING PASSAGE BY FALSE TICKET.

At on , A, fraudulently unlawfully, and by means of a false ticket, (*or* "order"), did obtain (*or* "attempt to obtain") a passage on a carriage or car of the Montreal Street Railway Company.

CRIMINAL BREACH OF TRUST.

At on , A, then being, — under and by virtue of the Will of B, — a trustee of certain property, to wit, [*describe it*], for the use and benefit of C, D, E and F, did, with intent to defraud, and in violation of his trust, convert the same to a use not authorized by the said trust.

FRAUD BY OFFICIAL.

At on , A, then being a director (*or* "manager"), [etc.], of a certain body corporate called did destroy (*or* "alter," *or* "mutilate," *or* "falsify"), a certain book (*or* "paper," *or* "writing," *or* "valuable security"), to wit, [*describe the book*, etc.], belonging to the said body corporate, with intent to defraud.

OR,

At on , A, then being a director, [etc.], of a certain body corporate called did with intent to defraud make (*or* "concur in making") in a certain book of account to wit, [*describe it*], of the said body corporate, a certain false entry, by then and there falsely entering in such book, [*describe the false entry*].

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(13) This is example (*c*) of Form FF in SCHEDULE ONE, *post*.

FALSE STATEMENT BY A PROMOTOR, DIRECTOR, PUBLIC OFFICER OR MANAGER OF A PUBLIC COMPANY.

At on , A, being then a promoter, (*or* "director," *or* "public officer," *or* "manager"), of a certain body corporate (*or* "public company"), then intended to be formed and to be called , (*or* "then actually existing and called "), did, make, circulate, and publish (*or* "concur in making, circulating, and publishing) a certain prospectus (*or* "account" *or* "statement"), well knowing the same to be false in certain material particulars, to wit, [*state them*], with intent to induce certain persons to the jurors aforesaid unknown, to become shareholders or partners (*or* "with intent to deceive and defraud the members, shareholders and creditors"), of the said body corporate (*or* "public company").

FALSE ACCOUNTING BY CLERK.

At on , A, then being a clerk in the employ of B, did, with intent to defraud, destroy (*or* "alter," *or* "mutilate," *or* "falsify") a certain book (*or* "paper," *or* "writing," *or* "valuable security"), to wit, [*describe the book*, etc.], belonging to (*or* "in the possession of," *or* "received by the said A, for and on behalf of") the said B.

FRAUDULENT ASSIGNMENT BY A DEBTOR.

At on , A, with intent to defraud his creditors did make (*or* "cause to be made") a gift, (*or* "conveyance," *or* "assignment," *or* "sale," *or* "transfer," *or* "delivery"), of his property, to B.

OR,

At on , A, did remove, (*or* "conceal," *or* "dispose of") his property, with intent to defraud his creditors.

FRAUDULENTLY RECEIVING A DEBTOR'S PROPERTY.

At on , A, with intent that B should defraud his creditors, did receive, the property of the said B, then and there given, (*or* "conveyed," *or* "assigned," *or* "sold," *or* "transferred," *or* "delivered," *or* "removed," *or* "concealed," *or* "disposed of") by the said B, with intent to defraud his creditors.

GIVING A FALSE WAREHOUSE RECEIPT.

At on , A, then being the keeper of a warehouse, [etc.], for storing timber, [etc.], knowingly, wilfully and with intent to mislead (*or* "injure," *or* "defraud"), did give to B a certain writing purporting to be a receipt for, (*or* "acknowledgement of"), certain goods, to wit, [*describe them*], as having been received into his the said A's warehouse, [etc.], before the said goods had been received by him the said A, as aforesaid.

FALSE RECEIPT FOR GRAIN, Etc.

At on , A, in a certain receipt (*or* "certificate," *or* "acknowledgement"), for grain (*or* "timber," etc.), to be used for one of the purposes of *The Bank Act*, to wit, for the purpose, [*mention the purpose*], wilfully did make a false statement, to wit, [*set out the statement and shew in what respect it was false*].

UNLAWFULLY APPLYING MARKS TO PUBLIC STORES.

At on , A, without lawful authority, did apply, in and on certain stores, to wit, fifty yards of canvas, and twenty yards of fearnought, a certain mark, to wit, a blue line in a serpentine form.

OR,

At on , A, without lawful authority, did apply in and on certain stores, to wit, fifty yards of bunting, a certain mark, to wit, a double tape in the warp of the said bunting.

UNLAWFUL POSSESSION, Etc., OF PUBLIC STORES.

At on , A, without lawful authority did receive (*or* "possess," *or* "keep," *or* "sell," *or* "deliver"), certain public stores, to wit, twenty five pounds of candles, bearing a certain mark, to wit, blue threads in each wick, to denote His Majesty's property therein.

RECEIVING REGIMENTAL NECESSARIES.

At on , A, did buy from a certain soldier to wit, B, certain arms (*or* "clothing") to wit, [*describe them*], belonging to His Majesty.

CONSPIRACY TO DEFRAUD.

At on , A, B and C, did, conspire together to defraud the public, (*or* "D"), by deceit, (*or* "falsehood," *or* "by the fraudulent means following to wit, [*set out the fraudulent means agreed upon*].

CHEATING AT PLAY, Etc.

At on , A, with intent to defraud B did cheat in playing at a game with cards (*or* "dice").

ROBBERY, WITH WOUNDING, Etc.

At on , A, with and by means of violence (*or* "threats of violence") then and there used by him to and against the person (*or* "property") of B, to prevent (*or* "overcome") resistance, did violently steal from the person (*or* "in the presence") of the said B, and against the said B's will, one gold watch, of the goods and chattels of the said B; and that at the time (*or* "immediately before," *or* "immediately after") he so robbed the said B, as aforesaid, he the said A did wound (*or* "beat," *or* "strike," *or* "use personal violence to") the said B.

ROBBERY BY A PERSON ACCOMPANIED BY OTHERS.

At on , A, then being together with other persons to the jurors aforesaid unknown, did with and by means of violence, (*or* "threats of violence") then and there used by him to and against the person (*or* "property") of B, to prevent (*or* "overcome") resistance, violently steal from the person (*or* "in the presence") of the said B, and against the said B's will, moneys of the said B, to the amount of one hundred dollars.

ROBBERY BY A PERSON ARMED WITH AN OFFENSIVE WEAPON.

At on , A, then being armed with a certain offensive weapon, to wit, a brass knuckle-duster (*or* "lead-

loaded cane," *or* "sand-bag," *or* "pistol," *or* "knife"), did, with and by means of violence, (*or* "threats of violence"), then and there used by him to and against the person (*or* "property") of B, to prevent (*or* "overcome") resistance, violently steal from the person (*or* "in the presence") of the said B, and against the said B's will, one diamond ring of the goods and chattels of the said B.

ASSAULT BY AN ARMED PERSON, WITH INTENT TO ROB.

At on , A, then being armed with a certain offensive weapon to wit, a heavy bludgeon, did, in and upon B, make an assault, with intent the moneys, goods and chattels of the said B, then and there violently to steal from the person and against the will of the said B.

ROBBERY.

At on , A, with and by means of violence (*or* "threats of violence") then and there used by him to and against the person (*or* "property") of B, to prevent (*or* "overcome") resistance, did violently steal from the person (*or* "in the presence"), of the said B, and against the said B's will, moneys of him the said B, amounting to fifty dollars.

ASSAULT WITH INTENT TO ROB.

At on , A, assaulted B with intent the moneys, goods, and chattels of the said B, then and there, violently to steal from the person and against the will of the said B.

STOPPING THE MAIL.

At on , A, did stop a certain mail, to wit, the mail for the conveyance of letters between and with intent to rob (*or* "search") the same.

COMPELLING EXECUTION OF A DOCUMENT BY FORCE.

At on , A, by means of unlawful violence to (*or* "restraint of") the person of B, did unlawfully compel the said B, to execute (*or* "sign" *or* "destroy") a certain deed, to wit, [*describe it*], with intent to defraud, (*or* "injure").

OR,

At on , A, by means of a threat that he would employ unlawful violence to (*or* "restraint of") the person of B, did unlawfully compel the said B to sign (*or* "accept," *or* "endorse," *or* "destroy," *or* "alter") a certain promissory note (*or* "bill of exchange") to wit, [*describe it*], with intent to defraud (*or* "injure").

SENDING THREATENING LETTER.

At on , A, did send to (*or* "cause to be received by") B a certain letter (*or* "writing") demanding of the said B, with menaces, a certain sum of money, to wit, one thousand dollars, the said demand being without reasonable or probable cause, and he the said A then well knowing the contents of the said letter (*or* "writing"), which is as follows: [*set out the letter*].

DEMANDING WITH INTENT TO STEAL.

At on , A, with menaces, did demand of B, a certain sum of money, to wit, One hundred dollars, with intent then and there to steal the same from the said B.

EXTORTION BY THREATS TO ACCUSE OF CERTAIN SERIOUS CRIMES.

At on , A, did accuse (*or* "threaten to accuse") B, of having committed an offence punishable by law with death (*or* "imprisonment for seven years or more") to wit, murder, (*or* "forgery," *or* burglary," *or* "bigamy"), [etc.], with intent thereby then and there to extort and gain money from the said B.

OR,

At on , A, did accuse (*or* "threaten to accuse") B, of having committed an assault with intent to commit a rape, (*or* "attempted or endeavored to commit a rape"), with intent thereby then and there to extort and gain money from the said B.

OR,

At on , A, did accuse (*or* "threaten to accuse") B, of having committed an infamous offence, to wit, the abominable crime of buggery, with intent thereby then and there to extort and gain money from the said B.

OR,

At on , A, with intent to extort and gain money from B, did cause the said B, to receive a certain document accusing (*or* "threatening to accuse") the said B, of having counselled and procured one C, to commit an infamous offence, to wit, the abominable crime of buggery, he the said A then well knowing the contents of the said document, which is as follows: [*set out the document*].

EXTORTION BY THREATS TO ACCUSE OF OTHER CRIMES.

At on , A, did accuse (*or* "threaten to accuse") B, of having committed the offence of polygamy (*or* "libel" *or* "aggravated assault," *or* "gaming in stocks," *or* "frequenting bucket shops," *or* "corrupting jurors," *or* "obtaining money by false pretences," *or* "defrauding creditors"), [etc.], with intent, thereby, then and there to extort and gain money from the said B.

BREAKING A PLACE OF PUBLIC WORSHIP.

At on , A, did break and enter a certain place of public worship, to wit, [*describe the church, chapel, or other place of public worship*], and there, in the said church, (*or* "chapel"), [etc.], did steal, one silver candlestick of the goods and chattels of

BURGLARY.

At on , about the hour of twelve at night, A, burglariously did break and enter the dwelling-house of B, there situated, with intent burglariously to steal the goods and chattels of the said B, then and there being found in the said dwelling-house, (*or* "with intent to commit, in the said dwelling-house, an indictable offence, to wit"). [*describe the offence*].

OR,

At on , about the hour of twelve at night, A, burglariously did break and enter the dwelling-house of B, there situated, with intent burglariously to steal the goods and chattels of the said B, then and there being found in the said dwelling-house; and he the said A, having so broken and entered and then being in the said dwelling-house did burglariously steal twelve silver forks and twelve silver spoons of the value of forty dollars, of the goods and chattels of the said B, in the said dwelling-house then being found.

OR,

At on , A, then being in the dwelling-house of B, did steal twelve silver forks and twelve silver spoons of the value of forty dollars of the goods and chattels of the said B in the said dwelling-house, and the said A, being so as aforesaid in the said dwelling-house and having committed the theft aforesaid, did afterwards, to wit, on the day and year aforesaid, about the hour of twelve at night, burglariously break out of the said dwelling-house.

HOUSE BREAKING.

At on , A, did break and enter by day the dwelling-house of B, there situated, and, twelve silver forks of the value of twenty dollars, the property of the said B, then and there being found therein, did then and there steal.

OR,

At on , A, did break and enter, by day, the dwelling-house of B, there situated, with intent to commit an indictable offence therein, to wit, to steal the goods then and there being in the said dwelling-house.

BREAKING SHOP, Etc.

At on , A, did break and enter the shop of B, there situated, and five boxes of cigars of the value of twenty dollars, the property of the said B, then and there being found therein, did, then and there, steal.

OR,

At on , A, did break and enter a certain building, there situated, and being within the curtilage of and occupied with the dwelling-house of B, but not connected with or forming part of the said dwelling-house either immediately or by means of any covered or enclosed passage, and one horse of the value of seventy five dollars the property of the said B, then and there being found in the said building, did then and there steal.

OR,

At on , A, did break and enter the shop of B, there situated, with intent to commit an indictable offence therein, to wit, to steal the goods and chattels of the said B, then and there being in the said shop.

OR,

At on , A, did break and enter a certain building there situated and being within the curtilage of and occupied with the dwelling-house of B, but not connected with or forming

part of the said dwelling-house either immediately or by means of any covered or enclosed passage, with intent then and there the goods and chattels of the said B, then being in the said building, to steal.

BEING FOUND IN A DWELLING-HOUSE BY NIGHT.

At on , about the hour of twelve at night, A unlawfully did enter (*or* "was in") the dwelling-house of B, there situated, with intent the goods and chattels of the said B, to steal.

BEING FOUND ARMED WITH INTENT TO BREAK AND ENTER.

At on , A, was found, by day, armed with a certain dangerous and offensive weapon (*or* "instrument") to wit, [*describe it*], with intent to break and enter the dwelling-house of B there situated, and to commit therein an indictable offence to wit, to steal the goods and chattels of the said B then being in the said dwelling-house.

OR,

At on , A, was found, by night, armed with a certain dangerous and offensive weapon (*or* "instrument") to wit, [*describe it*], with intent to break and enter a certain building of B there situated, and to commit therein an indictable offence, to wit, to steal the goods and chattels of the said B then being in the said building.

HAVING POSSESSION, BY NIGHT, OF HOUSE-BREAKING INSTRUMENTS.

At on , A, was found, about the hour of twelve at night, without lawful excuse, in possession of certain house-breaking instruments, to wit, [*describe them*].

BEING FOUND DISGUISED BY NIGHT.

At on , A, was found, by night, without lawful excuse, with his face masked (*or* "blackened").

BEING FOUND DISGUISED, BY DAY, WITH INTENT.

At on , A, was found, by day without lawful excuse, in a certain disguise, to wit, [*describe the disguise*], with intent then and there to commit an indictable offence, to wit, [*mention the offence*].

FORGERY.

At on , A, knowingly did forge a certain document, to wit, [*describe the document by its usual name*, or, *set forth a copy of it*].

UTTERING A FORGERY.

At on , A, knowing a certain document, to wit, [*describe it*], to be forged, did utter (*or* "use," *or* "deal with," *or* "act upon," *or* "attempt to use," etc.), the said forged document, as if it were genuine.

COUNTERFEITING SEALS.

At on , A, did make and counterfeit a certain public seal, to wit, the public seal of the Dominion of Canada.

UTTERING COUNTERFEIT SEALS.

At on , A, knowing a certain seal, to wit, a seal purporting to be the public seal of the Dominion of Canada, to be counterfeited, did use the said counterfeited seal.

UNLAWFULLY PRINTING PROCLAMATION.

At on , A, did print a certain proclamation, to wit, [*describe it*], and did then and there unlawfully cause the same to falsely purport to have been printed by the King's Printer for Canada.

SENDING A FALSE TELEGRAM.

At on , A, with intent to defraud, did cause and procure a certain telegram in the words and figures following, [*set out the telegram*], to be sent, (*or* "delivered"), to B, as being sent by the authority of C, knowing that it was not sent by such authority, with intent that the said telegram should be acted on as being sent by the said C.

SENDING FALSE TELEGRAMS, OR LETTERS, WITH INTENT TO INJURE OR ALARM.

At on , A, with intent to injure (*or* "alarm") B, did send (*or* "cause," *or* "procure to be sent"), to the said B, a certain telegram (*or* "letter,") containing matter which he the said A. knew to be false, to wit, a telegram (*or* "letter,") in the words and figures following, [*set out the telegram or letter*].

COUNTERFEITING REVENUE STAMPS.

At on , A, fraudulently did counterfeit a certain revenue stamp, to wit, [*describe it*].

SELLING COUNTERFEITED REVENUE STAMPS.

At on , A, knowingly, did sell (*or* "expose for sale," *or* "utter," *or* "use,") a certain counterfeited revenue stamp, to wit, [*describe it*].

FALSIFYING REGISTERS.

At on , A, did destroy (*or* "deface," *or* "injure,") a certain register then and there lawfully kept as the register (*or* "baptisms," *or* "marriages," *or* "deaths," *or* "burials,") of the parish of

OR,

At on , A, did insert in a certain register then and there lawfully kept as the register of births, [etc.], of the parish of a certain entry, known by him, the said A, to be false, and relating to the birth (*or* "marriage"), [etc.], of

FALSELY CERTIFYING EXTRACTS FROM REGISTERS.

At on , A, being a person authorized and required by law to give certified copies of entries in a certain

register then and there lawfully kept as the register of births (*or* "marriages"), [etc.], of the parish of did certify a certain writing to be a true copy of (*or* "extract from") a certain entry in the said register, to wit, an entry of the birth (*or* "marriage"), [etc.], of

FALSE ENTRIES IN BOOKS RELATING TO PUBLIC FUNDS.

At on , A, in a certain book of account kept by the Bank, in which said book were then kept and entered the accounts of the owners of certain transferable stock, [*annuity or other public fund*], wilfully, with intent to defraud, did make a certain false entry, to wit, [*describe the false entry*].

FRAUDULENT TRANSFER OF STOCK.

At on , A, a transfer of a certain share and interest of and in certain stock, [*annuity or other public fund*], transferable at the Bank, to wit, the share and interest of B, of and in [*mention the amount and description of the stock, etc.*], did with intent to defraud, make, in the name of C, he the said C not being then the true and lawful owner of the said stock, [etc.], or any part thereof.

MAKING FALSE DIVIDEND WARRANTS.

At on , A, being a clerk in the employ of the Bank, with intent to defraud, did make out and deliver to one B, a certain dividend warrant for five hundred dollars being a greater amount than the said B was then entitled to, the amount to which the said B was then entitled being only three hundred dollars.

FORGERY OF A TRADE MARK.

At on , A, did forge (*or* "cause to be forged"), a certain trade-mark, to wit, [*describe it*].

FALSELY APPLYING A TRADE-MARK.

At on , A, did falsely apply (*or* "cause to be applied") to certain goods, to wit, [*describe them*], a certain trade-mark, to wit, [*describe it*], (*or* "a mark so nearly resembling a certain trade-mark, to wit," [*describe it*], "as to be calculated to deceive").

PERSONATION.

At on , A, did personate B, (*or* "the administrator," *or* "widow," *or* "next of kin of the late C," *or* "the wife of D"), with intent then and there and thereby fraudulently to obtain, [*describe the money or property intended to be obtained*].

PERSONATION AT AN EXAMINATION.

At on , A, falsely and with intent to gain an advantage for himself, (*or* "one B"), did personate C, a candidate at a competitive (*or* "qualifying") examination held under authority of law, (*or* "in connection with the McGill College University, of Montreal").

PERSONATING AN OWNER OF STOCK.

At on , A, falsely and deceitfully did personate B, the owner of a certain share and interest in certain stock, [*annuity or other public fund*], to wit, [*give the amount and description of the said stock, etc.*], then transferable at the Bank, and did, thereby, and by means of such personation, then and there transfer (*or* "endeavor to transfer"), the said share and interest of the said B, in the said stock, [etc.], as if he the said A were the lawful owner thereof.

ACKNOWLEDGING AN INSTRUMENT IN A FALSE NAME.

At on , A, did, before the Court of King's Bench for the province of Quebec, sitting in and for the District of Montreal, (*or* "the Honorable Mr. Justice —"), [etc.], without lawful authority or excuse, acknowledge in the name of B, a certain recognizance of bail, (*or* "*cognovit actionem*"), [*etc.*], to wit, [*describe the instrument and the cause, action, or proceeding to which it relates*].

COUNTERFEITING CURRENT SILVER COINS.

At on , A, did unlawfully make (*or* "begin to make") and counterfeit twenty pieces of false and counterfeit coin resembling (*or* "apparently intended to resemble and pass for") current silver dollars (*or* "half dollars," *or* "ten cent pieces").

BUYING, SELLING, OR DEALING IN COUNTERFEIT COIN.

At on , A, did unlawfully and without lawful authority or excuse, buy (*or* "sell," *or* "receive," *or* "pay," *or* "put off") twenty pieces of false and counterfeit coin, resembling (*or* "apparently intended to resemble and pass for") current silver dollars, at and for a lower rate and value than the same imported (*or* "were apparently intended to import).

IMPORTING COUNTERFEIT COIN.

At on , A, did unlawfully and without lawful authority or excuse, import and receive into Canada twelve pieces of false and counterfeit coin resembling (*or* "apparently intended to resemble and pass for") current silver dollars, he the said A then and there well knowing the same to be counterfeit.

EXPORTING COUNTERFEIT COIN.

At on , A, did unlawfully and without lawful authority or excuse, export from Canada, twelve pieces of false and counterfeit coin resembling (*or* "apparently intended to resemble and pass for") current silver dollars, he the said A then and there well knowing the same to be counterfeit.

BRINGING COINING INSTRUMENTS INTO CANADA.

At on , A, unlawfully, knowingly and without lawful authority or excuse, did convey out of His Majesty's Mints into Canada, one puncheon (*or* "counter-puncheon," *or* "matrix"), [etc.], used or employed in or about the coining of coin.

CLIPPING CURRENT COIN.

At on , A, did unlawfully impair (*or* "diminish," *or* "lighten"), twelve pieces of current silver coin called dollars, with intent that each of the said twelve pieces so impaired, (*or* "diminished," *or* "lightened"), might pass for a current silver dollar.

DEFACING, AND TENDERING CURRENT COIN, SO DEFACED.

At on , A, did deface one piece of current silver coin, called a dollar, by then and there stamping theron certain names (*or* "words"), to wit, , and did afterwards unlawfully tender the said current silver coin, so defaced as aforesaid.

POSSESSING COUNTERFEIT COIN, WITH INTENT.

At on , A, had in his custody and possession twelve pieces of counterfeit coin resembling (*or* "apparently intended to resemble, and pass for") current silver dollars, with intent to utter the same, he the said A then well knowing the same to be counterfeit.

COUNTERFEITING FOREIGN COIN.

At on , A, did make (*or* "begin to make") and counterfeit coin resembling (*or* "apparently intended to resemble and pass for") the silver coin of a foreign country, to wit, the silver coin of the United States of America, called a dollar.

UTTERING COUNTERFEIT COIN.

At on , A, did utter to B, one piece of counterfeit coin resembling (*or* "apparently intended to resemble and pass for"), the current silver coin called a dollar, he the said A then well knowing the same to be counterfeit.

UTTERING LIGHT COIN.

At on , A, did utter as being current a certain silver coin, to wit, a silver dollar of less than its lawful weight, he the said A then well knowing the said coin to have been impaired, (*or* diminished," *or* "lightened"), otherwise than by lawful wear.

UTTERING UNCURRENT COIN.

At on , A, with intent to defraud, did utter, as being a current silver dollar, a certain silver coin, not being a current silver coin but resembling in size, figure and color a current silver dollar, and being of less value than a current silver dollar.

ARSON.

At on , A, wilfully, without legal justification or excuse, and without color of right, did set fire to a certain building, to wit, a dwelling-house belonging to B, and situated in aforesaid.

OR,

At on , A, wilfully, without legal justification or excuse, without color of right, and with intent to defraud, did set fire to a certain building, to wit, a store situated in aforesaid and belonging to him the said A.

OR,

At on , A, wilfully, without legal justification or excuse, and without color of right, did set fire to a certain stack of vegetable produce (*or* "of mineral," *or* "vegetable fuel"), to wit, [*describe the stack*], belonging to B.

ATTEMPT TO COMMIT ARSON.

At on , A, wilfully, without legal justification or excuse, and without color of right, did attempt to set fire to a certain building, to wit, a dwelling-house belonging to B, and situated in aforesaid.

WILFULLY SETTING FIRE TO CROPS, Etc.

At on , A, wilfully, without legal justification or excuse, and without color of right, did set fire to a certain crop (*or* "wood," *or* "forest," *or* "coppice," *or* "plantation," *or* "heath," *or* "gorse," *or* "furze," *or* "fern"), to wit, (*describe the crop*), [etc.], the property of B.

NEGLIGENTLY SETTING FIRE TO FOREST, Etc.

At on , A, negligently, recklessly, and with wanton disregard of consequences, (*or* "in violation of a certain provincial law, to wit, "), did unlawfully set fire to a certain forest (*or* "tree," *or* "manufactured lumber," etc.), situated (*or* "being") on the Crown domain (*or* "land leased or lawfully held for the purpose of cutting timber," etc.), so that the said forest, [etc.], was injured (*or* "destroyed").

PLACING OR THROWING EXPLOSIVES WITH INTENT TO DESTROY A BUILDING, Etc.

At on , A, wilfully, without legal justification or excuse, and without color of right, did place near (*or* "throw into") a certain building (*or* "ship"), to wit, [*describe the building or ship*], a certain explosive substance, to wit, five pounds of gunpowder, with intent, thereby, then and there, to destroy (*or* "damage") the said building (*or* "ship").

MISCHIEF ON RAILWAYS.

At on , A, in a manner likely to cause danger to valuable property, to wit, to a certain engine and certain cars of the Canadian Pacific Railway, on their railway at aforesaid, did displace a rail (*or* "sleeper," etc.), on and belonging to the said railway.

OR,

At on , A, did make a false signal on (*or* "near") the railway of the Grand Trunk Railway Company at aforesaid, in a manner likely to cause danger to valuable property, to wit, to a certain engine and certain cars of the said Grand Trunk Railway Company, on their said railway.

### MISCHIEF ON RAILWAYS WITH INTENT.

At on , A, did break and injure a rail (*or* "sleeper") on and belonging to the railway of the Grand Trunk Railway Company, at aforesaid, with intent, thereby, then and there, to cause danger to a certain engine and certain cars of the said Grand Trunk Railway Company, on their said railway.

### WILFULLY REMOVING MARINE SIGNALS.

At on , A, wilfully, without legal justification or excuse, and without color of right, did alter, (*or* "remove," *or* "conceal"), a certain signal (*or* "buoy") used upon the river St. Lawrence, for the purpose of navigation.

### MISCHIEF TO MINES.

At on , A, did cause a quantity of water (*or* "earth," *or* "rubbish,") to be conveyed into a certain mine (*or* "well of oil"), to wit, [*describe it*], the property of B, with intent, thereby, then and there, to injure (*or* "obstruct the working of") the said mine (*or* "well of oil").

### WILFULLY DESTROYING A HOUSE, ETC., AND ENDANGERING LIFE.

At on , A, wilfully, without legal justification or excuse, and without color of right, did by means of an explosion destroy (*or* "damage") a certain dwelling-house (*or* "ship," *or* "boat"), to wit, [*describe it*], the property of B, there being certain persons to wit, C, and D, then in the said dwelling-house, [etc.], and the said destruction (*or* "damage") did, then and there, cause actual danger to life.

### WILFULLY DESTROYING A RIVER BANK, ETC., AND CAUSING DANGER OF INUNDATION.

At on , A, wilfully without legal justification or excuse, and without color of right, did destroy, (*or* "damage") the bank (*or* "dyke") of a certain river called the river St. Lawrence, whereby and by means whereof there was actual danger of inundation.

### WILFULLY DESTROYING BRIDGES.

At on , A, wilfully, without legal justification or excuse, and without color of right, did destroy (*or* "damage") a certain bridge (*or* "viaduct," *or* "aqueduct") situated in aforesaid, and over (*or* "under") which a certain highway (*or* "railway," *or* "canal"), to wit, [*describe it*], passes, and the said destruction (*or* "damage") was so done by the said A, with intent and so as to render the said bridge (*or* "viaduct," *or* "aqueduct," *or* "highway," *or* "railway," *or* "canal") dangerous and impassable.

### WILFULLY DESTROYING OR DAMAGING A RAILWAY.

At on , A, wilfully, without legal justification or excuse, and without color of right, did destroy (*or* "damage") a certain railway, to wit, [*describe it*], with intent to render and so as to render the same dangerous and impassable.

### WILFULLY DESTROYING CATTLE, ETC.

At on , A, wilfully, without legal justification or excuse and without color of right, did destroy (*or* "damage") one cow, the property of B, by then and there killing (*or* "maiming," *or* "poisoning," *or* "wounding") the said cow.

### WILFULLY DAMAGING A SHIP WITH INTENT TO DESTROY OR RENDER IT USELESS.

At on , A, wilfully, without legal justification or excuse, and without color of right, did damage a certain ship, to wit, [*describe it*], with intent to destroy (*or* "render useless") the said ship.

### WILFULLY DAMAGING A CANAL, ETC.

At on , A wilfully, without legal justification or excuse, and without color of right, did damage a certain canal (*or* "navigable river"), to wit, [*describe it*], by then and there interfering with and breaking down the flood-gates (*or* "sluices") thereof, with intent and so as thereby, then and there, to obstruct the navigation thereof.

### WILFULLY DAMAGING THE SLUICE OF A PRIVATE WATER.

At on , A, wilfully, without legal justification or excuse, and without color of right, did damage (*or* "destroy") the flood-gate (*or* "sluice") of a certain private water, to wit, the fish pond of B, situated in aforesaid, with intent to take (*or* "destroy"), (*or* "so as to cause the loss or destruction of") the fish therein.

### DAMAGING A PRIVATE FISHERY.

At on , A, wilfully, without legal justification or excuse, and without color of right, did damage a certain private fishery (*or* "salmon river"), by putting into it a large quantity of lime, with intent, thereby, then and there to destroy the fish then and there being therein.

### WILFULLY DESTROYING GOODS IN PROCESS OF MANUFACTURE.

At on , A, wilfully, without legal justification or excuse, and without color of right, did destroy (*or* "damage") certain goods, to wit, [*describe them*], the property of B, and then being in process of manufacture, with intent, thereby, then and there to render the same useless.

### WILFULLY DAMAGING MANUFACTURING MACHINES.

At on , A, wilfully, without legal justification or excuse, and without color of right, did damage (*or* "destroy") certain agricultural (*or* "manufacturing") machines, to wit, [*describe them*], the property of B, with intent, thereby, then and there to render the same useless.

WILFULLY DAMAGING OR DESTROYING TREES IN A PARK, Etc.

At on , A, wilfully, without legal justification, and without color of right, did damage, (*or* "destroy") two fir trees the property of B, then growing in a certain park, (*or* "pleasure ground," *or* "garden," *or* "land adjoining and belonging to the dwelling-house") of the said B, thereby, then and there, injuring the said trees to an extent exceeding in value the sum of five dollars.

WILFULLY DAMAGING A POST-LETTER BAG, ETC.

At on , A, wilfully, without legal justification or excuse, and without color of right, did damage (*or* "destroy") a certain post-letter bag (*or* "post-letter") the property of the Post-Master General.

WILFULLY DAMAGING BY NIGHT, PROPERTY TO AMOUNT OF TWENTY DOLLARS.

At on , A, wilfully, without legal justification or excuse, and without color of right, did damage (*or* "destroy"), by night, seven birch trees, the property of B, then growing in a plot of land belonging to the said B, thereby, then and there, injuring the said trees to the amount of twenty dollars.

OR,

At on , A, wilfully, without legal justification or excuse, and without color of right, did damage (*or* "destroy"), by night, thirty five patterns for the making of waterproof coats, the property of B, thereby, then and there, injuring the said patterns to the amount of twenty dollars.

WILFULLY DESTROYING, BY DAY, PROPERTY TO THE AMOUNT OF TWENTY DOLLARS.

At on , A, wilfully, without legal justification or excuse, and without color of right, did damage (*or* "destroy"), by day, one crate of crockery and glass ware, the property of B, thereby, then and there, injuring the said crockery and glass-ware to the amount of twenty dollars.

WILFUL INJURIES TO POLL-BOOKS, ETC.

At on , A, wilfully, without legal justification or excuse, and without color of right, did destroy, (*or* "injure," *or* "obliterate") a certain writ of election, (*or* "return to a writ of election," *or* "poll-book," *or* "voters' list," *or* "ballot"), [etc.], to wit, [*describe the election writ, etc.*], prepared and drawn out according to a certain law in regard to Dominion (*or* "provincial," *or* "municipal," *or* "civic"), elections, to wit, the Act [*Cite the Act applying to the case in hand*].

INJURIES TO BUILDINGS BY TENANTS.

At on , A, being then possessed of a certain dwelling-house situated in aforesaid, and then held by him the said A, as tenant thereof for an unexpired term of three years, did wilfully, without legal justification or excuse, without

color of right, and to the prejudice of B, the owner thereof, pull down and demolish the said dwelling-house.

### WILFULLY DESTROYING TREES AFTER TWO PREVIOUS CONVICTIONS.

At on , A, wilfully, without legal justification or excuse and without color of right did damage (*or* "destroy") one shrub, so that the injury done by such damage (*or* "destruction") amounted to the value of fifty cents, the said shrub being the property of B, and then growing in a certain plot of land situated and being in aforesaid: And the said jurors say, that, heretofore, to wit, at on , (before the committing of the hereinbefore mentioned offence), the said A was duly convicted, before C, one of His Majesty's Justices of the Peace for the District of of having at on , [*set out the offence forming the basis of the first conviction*], and was adjudged, for his said offence, to pay, [etc.], and, in default of payment, [etc.], to be imprisoned, [etc.]: And the said jurors further say, that heretofore, to wit, at on , (before the committing of the firstly hereinbefore mentioned offence, but after the next hereinbefore mentioned conviction), the said A was again duly convicted before D, one of His Majesty's Justices of the Peace for the District of of having at on , [*set out the second conviction*]: And so the jurors aforesaid say, that, on the day and year first aforesaid the said A, wilfully, without legal justification or excuse and without color of right, did damage (*or* "destroy") the said shrub, and did thereby do injury amounting to the value of fifty cents, after having been twice convicted of the like offence of wilfully damaging (*or* "destroying") a shrub, (*or* "tree"), [etc.], and doing injury amounting to the value of at least twenty five cents.

### WILFULLY DAMAGING OR DESTROYING VEGETABLE PRODUCDUCTIONS GROWING IN A GARDEN, ETC.

At on , A, wilfully, without legal justification or excuse, and without color of right, did damage (*or* "destroy") fifty cauliflowers, the property of B, then growing in a certain garden of the said B, situated in aforesaid: And the said jurors say, that, heretofore, to wit, at on (before the committing of the hereinbefore mentioned offence), the said A was duly convicted before C, one of His Majesty's Justices of the Peace, for the District of of having at on , [*set out the offence forming the basis of the first conviction*], and was adjudged, for his said offence, to pay, [etc.], and in default of payment, [etc.], to be imprisoned, [etc.]: And so the jurors aforesaid say, that on the day and year first aforesaid A did, wilfully, without legal justification or excuse, and without color of right, damage (*or* "destroy") the said fifty cauliflowers after having been previously convicted of the like offence of wilfully damaging (*or* "destroying") vegetable productions in a garden, [etc.].

### COMBINATION IN RESTRAINT OF TRADE.

At on , A, conspired, combined, agreed and arranged with B, C and D, and with the Company, to unduly limit the facilities for transporting, (*or* "producing," *or* "supplying," *or* "storing," *or* "dealing in," *or* "manufacturing"), cotton goods, [etc.], a subject of trade and commerce.

OR,

At on , A, conspired, combined, agreed, and arranged with B, C and D, and with the Company, to unduly prevent and lessen competition in the production (*or* "manufacture," *or* "purchase," *or* "Barter," *or* "sale," *or* "transportation," *or* "supply"), of woollen goods, [etc.], a subject of trade and commerce.

CRIMINAL BREACH OF CONTRACT.

At on , A, wilfully did break a certain contract, to wit, [*describe it*], theretofore made by him, well knowing (*or* "having reasonable cause to believe"), that the probable consequences of his so doing would be to endanger human life (*or* "cause serious bodily injury," *or* "expose valuable property to destruction," *or* "serious injury").

INTIMIDATION.

At on , A and B, wrongfully and without lawful authority, did use violence to (*or* "injure the property of") C, by [*describe the personal violence or the injury to property, (as the case may be)*], with a view to compel the said C to employ D, E and F, whom he the said C had a lawful right to refuse to employ (*or* "to compel the said C to discharge from and refuse to keep in his employ G, and H, whom he the said C had a lawful right to retain in his employ").

OR,

At on , A, B and C, being workmen in the employ of D, wrongfully and without lawful authority, did, by means of threats of using violence to (*or* "of injuring the property of") the said D, then and there intimidate the said D, with a view to compel the said D to raise and advance the wages of them the said A, B and C.

OR,

At on , A and B, wrongfully, and without lawful authority, did persistently follow C, from place to place, with a view to compel the said C, to cease working for D, he the said C, having a lawful right to continue to work for the said D.

INTIMIDATION, BY PICKETING.

At on , and on divers other days before and since that date, A and B, wrongfully, and without lawful authority, did beset and watch the building, workshop, and premises of C, where D was then working in the employ of the said C, with a view to compel the said D from working in the employ of the said C, he the said D having a lawful right to continue to work in the employ of the said C, (*or* "with a view to compel the said C to discharge and to discontinue employing the said D, he the said C having a lawful right to continue the said D in his employ").

INTIMIDATION, BY ASSAULTS OR THREATS, IN PURSUANCE OF AN UNLAWFUL COMBINATION.

At on , A, B and C, having, before then, conspired, combined, confederated and agreed together to raise the rate of wages, then usually payable to workmen, in a certain trade, bus-

iness and manufacture, to wit, the trade, business and manufacture of brass founding (*or* "calico printing," *or* "silk weaving," *or* "engine making," *or* "cigar making"), [etc.], did, then and there, in pursuance of the said conspiracy, assault (*or* "use violence," *or* "threats of violence to") B, with a view to hinder him from working (*or* "being employed") at such trade, business, and manufacture.

### CONSPIRACY TO COMMIT AN INDICTABLE OFFENCE.

At on , A, B and C, did conspire, combine, confederate and agree together to commit a certain indictable offence, to wit, the crime of arson,(*or* "burglary," *or* "rape," *or* "forgery"), [etc.], by then and there conspiring, combining, confederating, and agreeing together to set fire to (*or* "break and enter"), *or* [etc.], [*describe the crime agreed upon and mention the property or person, or both,(as the case may be), to be affected thereby*]. (A count may be added setting out the overt acts of the conspiracy.)

### CONSPIRACY TO BRING FALSE ACCUSATION OF CRIME.

At on , A, B and M, B, (his wife), C D, and E F, did conspire, combine, confederate and agree together to prosecute G H, for an alleged offence, to wit, upon a false charge and accusation falsely charging and accusing that he the said G H, had, then, lately before, assaulted, ravished and carnally known the said M B, without her consent, they the said A B, M B, C D, and E F, then well knowing the said G H, to be innocent of the said alleged offence.

And the said jurors further present, that, afterwards, at aforesaid, on the day and year aforesaid, the said A B, and M B, his wife, C D, and E F, in pursuance of their said conspiracy, did attend together before J N, Esquire, one of His Majesty's Justices of the Peace for the District of to whom they, the said A B, and M B, his wife, C D, and E F, did, then and there, make the said false charge and accusation, falsely charging and accusing the said G H, with and of the rape aforesaid; and, then and there, before the said J N, she the said M B, in the presence of and in company with the said A B, C D, and E F, and in further pursuance of the said conspiracy, did make her written and sworn information and complaint, falsely charging and accusing that the said G H, had, then, lately before, assaulted, ravished, and carnally known her, the said M B, without her consent.

And the said jurors further present, that, afterwards, to wit, in the Court of King's Bench [or (name the Court), *as the case may be*] of the province of, holden at in and for the district (*or* "county") of on , in the year aforesaid, they the said A B, and M B, his wife, C D, and E F, in further pursuance of their said conspiracy, did cause and procure to be falsely laid and exhibited, before the Grand Jury then and there sworn before the said Court, a bill of indictment falsely charging and accusing the said G H, with and of the rape aforesaid; which said bill of indictment was by the said Grand Jury, then and there, returned into the said Court, thus endorsed: — "No Bill."

### ATTEMPT TO COMMIT AN INDICTABLE OFFENCE.

At on , A, did attempt to steal one gold watch of the value of sixty five dollars of the goods and chattels of B.

OR,

At on , A, did attempt, by false pretences, to obtain from B, one horse of the value of seventy dollars, the property of the said B, with intent to defraud.

OR,

At on , A, did solicit and advise B to steal one piano of the goods and chattels of C, whereby he the said A, did attempt to commit the indictable offence of theft.

OR,

At on , A, did attempt to commit the indictable offence of bigamy (*or* "burglary"), [etc.], by then and there, [*set out the means used in making the attempt*].

ACCESSORY AFTER THE FACT INDICTED WITH THE PRINCIPAL OFFENDER.

*(After charging A, as the principal offender, with the principal offence, proceed thus) :—*

And the said jurors further present, that C, well knowing the said A to have done and committed the said offence, as aforesaid, did, after the same was so done and committed as aforesaid, to wit, on the day and year aforesaid, receive, comfort and assist him, the said A, in order to enable him to escape.

ACCESSORY AFTER THE FACT, INDICTED ALONE, THE PRINCIPAL OFFENDER HAVING BEEN CONVICTED.

*(After stating the principal offence and the principal offender's conviction, proceed thus) :—*

And the said jurors further present, that C, well knowing the said A to have done and committed the said offence, as aforesaid, did, after the same was so done and committed as aforesaid, to wit, on the day and year aforesaid, receive, comfort and assist him, the said A, in order to enable him to escape.

# SECOND DIVISION—CRIMINAL PROCEDURE

## TITLE VII.

## PROCEDURE TO CONVICTION.

### PART XLI.

### GENERAL PROVISIONS.

**533. Power to make rules.** — Every Superior Court of Criminal Jurisdiction may at any time, with the concurrence of a majority of the judges thereof present at any meeting held for the purpose, make rules of court, not inconsistent with any statute of Canada, which shall apply to all proceedings relating to any prosecution, proceeding or action instituted in relation to any matter of a criminal nature, or resulting from or incidental to any such matter, and in particular for all or any of the purposes following: —

(a) For regulating the sittings of the Court or of any division thereof, or of any judge of the court sitting in Chambers, except in so far as the same are already regulated by law.

(*b*) For regulating in criminal matters, the pleading, practice and procedure in the court, including the subjects of *mandamus certiorari*, *habeas corpus*, prohibition, *quo warranto*, bail and costs, and the proceedings under section nine hundred of this Act.

(c) Generally for regulating the duties of the officers of the Court and every other matter deemed expedient for better attaining the ends of justice and carrying the provisions of the law into effect.

2. Copies of all rules made under the authority of this section shall be laid before both Houses of Parliament at the session next after making thereof, and shall also be published in the *Canada Gazette*. 52 V., c. 40.

3. In the province of Ontario the authority for the making of such rules of court applicable to superior courts of criminal jurisdiction in the province is vested in the supreme court of judicature, and such rules may be made by the said court at any time with the concurrence of a majority of the judges thereof present at a meeting held for the purpose. (Added by the *Criminal Code Amendment Act 1900*).

**534. Civil remedy not suspended.** — After the commencement of this Act no civil remedy for any act or omission shall be suspended or affected by reason that such act or omission amounts to a criminal offence.

Before the enactment of the present Code, there were various English Statutes expressly declaring that, in connection with certain specified offences, a person's civil remedy should not be lessened or affected.

This section, 534, purports to extend the same principle to all criminal offences in Canada, and to thus remove all doubt from a question which was not altogether free from uncertainty in England. For, although in regard to section 430 of the English Draft Code, (which is identical with our section 534), the Royal Commissioners say that it seems to be the existing law, in England, as laid down in Wells v. Abrahams, and Osborn v. Gillett, (1) there are English cases in which the law does not appear to have been so laid down, but in which it was held that a person who suffered from a felony could not maintain his civil action against the felon, before discharging himself of his duty to the public, by prosecuting the felon for the public wrong, and that, when, in a civil suit, the facts amounted to felony, the case must be stopped or be suspended, in order that public justice might be first vindicated by the prosecution of the offender. (2)

In the province of Quebec, it has been doubted whether this section, 534, is constitutionally valid as to that province. (3)

**535. Distinction between felony and misdemeanor abolished.**— After the commencement of this Act the distinction between felony and misdemeanor shall be abolished, and proceedings in respect of all indictable offences (except so far as they are herein varied) shall be conducted in the same manner.

With reference to this subject, the English Commissioners have the following remarks, at p. 14 of their Report: —

"The distinction between felony and misdemeanor was, in early times, nearly, though not absolutely, identical with the distinction

(1) Wells v. Abrahams, L. R., 7 Q. B., 554; Osborn v. Gillett, L. R., 8 Ex., 88.

(2) Bullock v. Dodds, 2 B. & Ald., 258; Wellock v. Constantine, 2 H. & C., 146; Gimson v. Woodfull, 2 C. & P., 41; Ashby v. White, 1 Sm. L. C. 6th Ed., 255, 267; Peace v. McAloon, 1 Kerr, 111; Prosser v. Rowe, 2 C. & P., 421; Walsh v. Nattrass, 19 U. C. C. P., 453; Williams v. Robinson, 20 U. C. C. P., 255; Livingstone v. Massey, 23 U. C. Q. B., 156; White v. Spettigue, 13 M. & W., 603.

(3) Paquet v. Lavoie, Que. Jud. Rep., 7 Q. B., 277.

between crimes punishable with death and crimes not so punishable.

For a long time past, this has ceased to be the case. Most felonies are no longer punishable with death; and many misdemeanors are now punishable more severely than many felonies.

The great changes which have taken place in our criminal law have made the distinction nearly if not altogether unmeaning.

It is impossible to say on what principle embezzlement should be a felony, and the fraudulent appropriation of money by an agent, or the obtaining of goods by false pretences a misdemeanor: why bigamy should be a felony, and perjury a misdemeanor; why child stealing should be a felony, and abduction a misdemeanor.

The result of this arbitrary classification is that the right to be bailed, the liability to be arrested without warrant, and (to a certain extent) the right of the Court to order the payment of costs of prosecutions, vary in a manner equally arbitrary and unreasonable.

Moreover, the old distinction still regulates the question whether a person accused of an offence should be entitled or not to be bailed as of right, (4) and should be liable or not to summary arrest; (5) and it also regulates the mode of trial, including the right of peremptory challenge.

The jury in a case of felony, however trifling it may be, must be kept together till they give their verdict; in cases of misdemeanor, however serious, they may be allowed to separate.

As regards the right of challenging jurors we propose that the number of challenges to be allowed shall be proportioned to the possible severity of the punishment which might follow on conviction. (6). We have also provided for the jury being allowed to separate during the trial of all but capital cases." (7).

**536. Construction of Acts.** — Every Act shall be hereafter read and construed as if any offence for which the offender may be prosecuted by indictment (howsoever such offence may be therein described or referred to), were described or referred to as an "*indictable offence*"; and as if any offence punishable on summary conviction were described or referred to as an "*offence*"; and all provisions of this Act relating to "*indictable offences*" or "*offences*" (as the case may be) shall apply to every such offence.

2. Every commission, proclamation, warrant or other document

(4) See, as to bail, sections 601-604, *post*.
(5) As to arrest without warrant, see section 552, *post*.
(6) See, as to peremptory challenges, section 668, *post*.
(7) See section 673, *post*.

relating to criminal procedure, in which offences which are *indictable offences* or *offences* (as the case may be) as defined by this Act are described or referred to by any names whatsoever, shall be hereafter read and construed as if such offences were therein described and referred to as *indictable offences* or *offences* (as the case may be).

**537. Construction of reference to certain Acts.** — In any Act in which reference is made to *The Speedy Trials Acts* the same shall be construed, unless the context requires otherwise, as if such reference were to Part LIV, of this Act; any Act referring to *The Summary Trials Act* shall be construed, unless the context forbids it, as if such reference were to Part LV, of this Act ; and every Act referring to *The Summary Convictions Act* shall be construed, unless the context forbids it, as if such reference were to Part LVIII, of this Act.

## PART XLII.

## JURISDICTION.

**538. Superior Court.**— Every Superior Court of Criminal Jurisdiction and every judge of such court sitting as a court for the trial of criminal causes, and every Court of Oyer and Terminer and General Gaol Delivery has power to try any indictable offence.

"The expression 'Superior Court of Criminal Jurisdiction' means and includes the following Courts :

(i) In the province of Ontario, the three divisions of the High Court of Justice;

(ii) In the province of Quebec, the Court of Queen's Bench.

(iii) In the provinces of Nova-Scotia, New Brunswick and British Columbia, and in the North-West Territories, the Supreme Court;

(iv) In the province of Prince-Edward Island, the Supreme Court of Judicature; „

(v) In the province of Manitoba, the Court of Queen's Bench (Crown side)." (See sec. 3 *y. ante*).

**539. Other Courts.** — Every Court of General or Quarter Sessions of the Peace when presided over by a Superior Court judge, or a County or District Court judge, or, in the cities of Montreal and Quebec, by a recorder or judge of the Sessions of the Peace : and in the province of New Brunswick every County Court judge has power to try any indictable offence except as hereinafter provided. (*As amended by 56 V., c. 32*).

**540. Cases within the exclusive jurisdiction of Superior Courts of Criminal Jurisdiction.** (Amended by 57-58 Vic., c. 57). — No such court as mentioned in the next preceding section has power to try any offence under the following sections, that is to say :

PART IV.—Sections sixty-five, TREASON ; sixty-seven, ACCESSORIES AFTER THE FACT TO TREASON ; sixty-eight, sixty-nine and seventy, TREASONABLE OFFENCES ; seventy-one, ASSAULT ON THE QUEEN ; seventy-two, INCITING TO MUTINY ; seventy-seven, UNLAWFULLY OBTAINING AND COMMUNICATING OFFICIAL INFORMATION ; seventy-eight, COMMUNICATING INFORMATION ACQUIRED BY HOLDING OFFICE.

PART VII.—Sections one hundred and twenty, ADMINISTERING, TAKING OR PROCURING THE TAKING OF OATHS TO COMMIT CERTAIN CRIMES ; one hundred and twenty-one, ADMINISTERING, TAKING OR PROCURING THE TAKING OF OTHER UNLAWFUL OATHS ; one hundred and twenty-four, SEDITIOUS OFFENCES ; one hundred and twenty-five, LIBELS ON FOREIGN SOVEREIGNS ; one hundred and twenty-six, SPREADING FALSE NEWS.

PART VIII.—PIRACY ; any of the sections in this part.

PART IX.—Sections one hundred and thirty-one, JUDICIAL CORRUPTION ; one hundred and thirty-two, CORRUPTION OF OFFICERS EMPLOYED IN PROSECUTING OFFENDERS ; one hundred and thirty-three, FRAUDS UPON THE GOVERNMENT ; one hundred and thirty-five, BREACH OF TRUST BY A PUBLIC OFFICER ; one hundred and thirty-six, CORRUPT PRACTICES IN MUNICIPAL AFFAIRS ; one hundred and thirty-seven (*a*), SELLING AND PURCHASING OFFICES.

PART XVIII.—Sections two-hundred and thirty-one, MURDER ; two hundred and thirty-two, ATTEMPTS TO MURDER ; two hundred and thirty-three, THREATS TO MURDER ; two hundred and thirty-four, CONSPIRACY TO MURDER ; two hundred and thirty-five, ACCESSORY AFTER THE FACT TO MURDER.

PART XXI.—Sections two hundred and sixty-seven, RAPE ; two hundred and sixty-eight, ATTEMPT TO COMMIT RAPE.

PART XXIII.—DEFAMATORY LIBEL ; any of the sections in this part.

PART XXXIX.—Section five hundred and twenty, COMBINATIONS IN RESTRAINT OF TRADE.

PART XL.—CONSPIRING OR ATTEMPTING TO COMMIT, OR BEING ACCESSORY AFTER THE FACT to any of the foregoing offences.

Or any indictment for bribery or undue influence, personation or other corrupt practice under *The Dominion Elections Act*. (1) (Added by the *Criminal Code Amendment Act 1900*).

It has been doubted whether the provisions of this section, 540, so far as they relate to the jurisdiction of the County Courts of New Brunswick in criminal matters, are constitutional. (2)

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(1) See pp. 519-524, *ante*, for some of the clauses of the *Dominion Elections Act*.

(2) Ex parte Wright, 34 N. B. R., 127.

**541. Exercising the powers of two justices.** — The judge of the Sessions of the Peace for the city of Quebec, the judge of the Sessions of the Peace for the city of Montreal, and every recorder, police magistrate, district magistrate or stipendiary magistrate appointed for any territorial division, and every magistrate authorized, by the law of the province in which he acts, to perform acts usually required to be done by two or more justices of the peace, may do alone whatever is authorized by this Act to be done by any two or more justices of the peace, and the several forms in this Act contained may be varied so far as necessary to render them applicable to such case. R. S. C., c. 174, s. 7.

## PART XLIII.

## PROCEDURE IN PARTICULAR CASES.

**542. Prosecutions requiring consent of Governor-General.** — Proceedings for the trial and punishment of a person who is not a subject of Her Majesty, and who is charged with any offence commited within the jurisdiction of the Admiralty of England shall not be instituted in any court in Canada except with the leave of the Governor-General and on his certificate that it is expedient that such proceedings should be instituted.

The words "His Majesty" should be substituted for "Her Majesty" in this section. (See the *Interpretation Act*, section 7, at p. 9, *ante*.)

It is said, that, "the Criminal law of Canada extends to all offences committed by any person in Canada, or on such part of the sea adjacent to the coast of Canada as is within one marine league from ordinary low-water mark, or *is deemed by International law to be within the territorial sovereignty of His Majesty*, or committed by any person on board any British ship or boat on the great lakes, or on the high seas, or in any place where the Admiralty of England has jurisdiction, and to piracy by the Law of Nations wherever committed." (1)

A section to this effect was contained in the Code, when it was first introduced; but, in committee, it provoked a lengthy discussion, and the section was ultimately allowed to drop, although considered to be a correct statement of the law.

Mr. Mills, contended that, under the rule laid down in *Lowe v. Routledge*, (2), a criminal offence committed beyond the limits of Canada, on board a Canadian ship, would not come under Canadian Law, but, would be subject to the law of England; so, that if, for instance, a vessel were to sail from Canada, (even a vessel registered in Canada), to Liverpool, and a murder were committed on board of her in mid-ocean, it would not be the criminal law of Canada, but the criminal law of the United Kingdom that would apply; while Sir John Thompson remarked, that, if the offender in such a case were to come to Canada, he could be tried here; and he

(1) Burb. Dig. Cr. L., 9.
(2) Lowe v. Routledge, L. R., 3 H. L., 400.

repeatedly asserted that the words of the proposed section were a declaration of the criminal law of Canada by virtue of Canadian Statutes and of certain laws of the United Kingdom.

The above section, 542, is based upon the Imperial Statute, 41 and 42 Vict., c. 73. (*The Territorial Waters Jurisdiction Act, 1878.*)

Section 2 of that Act declares, that, "an offence committed by a person, —*whether he is or is not a subject of Her Majesty,*— on the open sea, within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may be committed on board or by means of a foreign ship; and the person who commits such offence may be arrested, tried and punished accordingly." And section 3 provides, that, "proceedings for the trial and punishment of a person who is not a subject of Her Majesty, and who is charged with any such offence as is declared by this Act to be within the jurisdiction of the Admiral, shall not be instituted * * * * * * in any of the dominions of Her Majesty, out of the United Kingdom, except with the leave of the Governor of the part of the dominions in which such proceedings are proposed to be instituted, and on his certificate that it is expedient that such proceedings should be instituted." By section 4, it is also enacted that, "on the trial of any person who is not a subject of Her Majesty for an offence declared by this Act to be within the jurisdiction of the Admiral, it shall not be necessary to aver, in any indictment on such trial, that such consent or certificate of the * * * Governor, as is required by this Act, has been given; and the fact of the same having been given shall be presumed, unless disputed by the defendant at the trial; and the production of a document purporting to be signed by * * * the Governor, and containing such consent and certificate shall be sufficient evidence, for all the purposes of this Act, of the consent or certificate required by this Act."

Section 7 of the same Act defines *the territorial waters of Her Majesty* as being "such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty's dominions, as is deemed, by International law, to be within the territorial sovereignty of Her Majesty," and declares, that, "for the purposes of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast, measured from low-water mark, shall be deemed to be open sea within the territorial waters of Her Majesty's dominions."

Section 18 of the Imperial Statute, 52 and 53 Vic., c. 63 (*The Interpretation Act, 1889*), declares that, the expression "Governor shall, as respects Canada, and India, mean the Governor-General, and include any person who, for the time being, has the powers of the Governor-General."

See sub-sections 7 and 8 of section 7 of the Canadian *Interpretation Act*, at p. 9, *ante*, for the meanings of the expressions "Governor of Canada," "Governor in Council," etc.

A foreigner who commits a criminal offence against another foreigner, or against a British subject, on board a foreign ship, on the high seas, outside of the territorial waters of His Majesty, is not triable in any part of His Majesty's Dominions. (3) This was held even in the case of a ship which (though foreign built) carried the British flag. The prisoner was one of the crew of a ship built in Holstein whence she sailed to London, England. All the officers and crew were foreigners. The registered sole owner, one R., was an alien born, though described in the register as "of London, Merchant." The ship sailed on a voyage from London, under the

(3) R. v. Lewis, Dears. & B., 182; 26 L. J. (M. C.), 104; R. v. De Mattos, 7 C. & P., 458; R. v. Kohn, 4 F. & F., 68; R. v. Depardo, 1 Taunt, 26; R. & R., 134.

British flag. While on the voyage, the prisoner killed the master, on board the vessel, when several thousand miles from England, and 200 miles from land. On the trial of the prisoner for murder, these facts were proved; and no evidence was given that R., the owner of the ship, had been naturalized, or had obtained letters of denization. Under these circumstances, it was held that there was no evidence that the ship was British, and that consequently the prisoner could not be convicted for the offence, in England. (4)

Formerly, British Courts had no jurisdiction over an offence committed by a foreigner on board of a foreign ship even if at the time of the crime being committed the ship was within British territorial waters. The question came up in the case of R. v. Keyn; in which the prisoner was a foreigner in command of a foreign ship, and while passing *within three miles* of the shore of England, on a voyage to a foreign port his ship ran into a British ship, and sank her, whereby a passenger on board the British ship was drowned. The facts of the case were such as, apart from the question of jurisdiction amounted to manslaughter, by English law. It was held, that the offence was not committed on board the British ship, and that there was no jurisdiction in the Courts of England to try the prisoner, a foreigner passing the English coast, on the high seas, in a foreign ship, though the occurrence took place within three miles of the English coast. (5)

It was the decision in Keyn's case that led to the passing of the *Territorial Waters Jurisdiction Act, 1878*, amending the law, as already shewn, so that a foreigner on board a foreign ship may be tried by the Courts of England or of any of His Majesty's Dominions for an offence committed on the open sea, provided the occurrence takes place within the territorial waters of His Majesty's Dominions, and subject to the consent, as to the United Kingdom, of one of His Majesty's Principal Secretaries of State, or, in cases arising in any part of His Majesty's Dominions outside of the United Kingdom,—with the consent of the Governor of that part.

The jurisdiction of the Admiralty extends over *British* ships not only on the high seas, but also in foreign rivers, below the bridges, where the tide ebbs and flows and where great ships go, although the municipal authorities of the foreign country may be entitled to concurrent jurisdiction. (6) So, that, a person, whether a British subject or a foreigner who is on board a British ship on the high seas or in foreign rivers below the bridges, where the tide ebbs and flows, and where great ships go, is subject to the laws of England, the same as if he were on British soil, such a ship being in law part of the territory of the United Kingdom. (7)

Thus, where a foreigner was convicted, in England, of manslaughter committed on board a British ship in the river *Garonne*, in France, about 35 miles from the sea, and about 300 yards from the nearest shore, within the ebb and flow of the tide, the conviction was upheld. (8)

So, also, where a person committed a larceny on board a British ship lying afloat in the open river at Rotterdam, moored to the quay in a place where large vessels usually lay, and 16 or 18 miles from the sea, between which and the ship there were no bridges, and within the ebb and flow of the tide, it was held that the larceny took place within the jurisdiction of

(4) R. v. Bjornsen, L. & C., 545; 34 L. J. (M. C.), 180.
(5) R. v. Keyn, L. R., 2 Ex. D., 63; 46 L. J. (M. C.), 17.
(6) R. v. Anderson, L. R., 1 C. C. R., 161; 38 L. J. (M. C.), 12.
(7) R. v. Lopez, R. v. Sattler, Dears. & B., 525; 27 L. J. (M. C.), 48; R. v. Lesley, Bell, 220; 29 L. J. (M. C.), 97.
(8) R. v. Anderson, *supra*.

the Admiralty, and, therefore, that a person who afterwards, in England, received the property so stolen could be tried at the Central Criminal Court, as the thief himself, even if he had been a foreigner, not one of the crew, might have been so tried. (9)

Upon an indictment for larceny out of a vessel lying in a river at Wampu, in China, the prosecutor gave no evidence as to the tide flowing; but the judges held that the Admiralty had jurisdiction, it being a place where great ships go. (10)

It has been held that, the liability of the defendant, when he is a foreigner, is not affected by the fact that he was, in the first instance, brought illegally and by force on board the ship, unless the offence committed by him was one committed merely for the purpose of freeing himself from such unlawful restraint. Therefore, where the defendant, a foreigner, having committed a crime in England, had fled to Hamburg, and was there arrested and forced on board an English ship, and while he was kept in custody on board such ship, on the high seas, killed the officer who had arrested him, not for the purpose of escaping, but of malice prepense, it was held that even assuming such arrest and detention to be illegal, he was guilty of murder. (11)

Where, on a trial for maliciously wounding, on the high seas, it was stated by three witnesses that the vessel on board of which the offence was alleged to have been committed was a British ship of Shields, sailing under the British flag, but no proof was given of the ownership or registration of the vessel, it was held that the Court had jurisdiction, as the evidence shewed that the vessel was British, and, that, that being so, the Court would have jurisdiction, even if there had been positive proof that the vessel was not registered. (12)

By section 267 of the Merchant Shipping Act, 17 and 18 Vic., c. 104, (Imp.), all offences against property or person committed in or at any place either ashore or afloat out of His Majesty's Dominions, by any master, seaman, or apprentice, who at the time when the offence is committed is, or, within three months previously, has been employed in any British ship, shall be deemed to be offences of the same nature respectively and be liable to the same punishments respectively, and be enquired of, heard, tried, determined, and adjudged in the same manner and by the same courts, and in the same places as if such offences had been committed within the jurisdiction of the Admiralty of England. (13)

A hulk retaining the general appointments of a ship, registered as a British ship and hoisting the British ensign, although only used as a floating warehouse is a British ship within the meaning of the above enactment. (14)

It is also enacted by section 21 of the 18 and 19 Vic., c. 91, that if any person being a British subject charged with having committed any crime or offence on board any British ship on the high seas, or in any foreign port, or harbor, or if any person not being a British subject charged with having committed any crime or offence on board any British ship on the high seas is *found*, (that is to say, is found to be at the time of his trial), (15), within the jurisdiction of any court of justice in His Majesty's

(9) R. v. Carr, 10 Q. B. D., 76; 52 L. J. (M. C.), 12.
(10) R. v. Allen, 1 Mood. C. C., 494.
(11) R. v. Sattler, *supra*.
(12) R. v. Seberg, L. R., 1 C. C. R., 264; R. v. Von Seberg, 39 L. J. (M. C.), 133, S. C.
(13) R. v. Dudley, 11 Q. B. D., 273; 54 L. J. (M. C.), 32.
(14) R. v. Armstrong, 13 Cox C. C., 184, Archibald, J.
(15) R. v. Lopez, Dears. & B., 525; 27 L. J. (M. C.), 48.

Dominions, which would have had cognizance of such crime or offence if committed within the limits of its ordinary jurisdiction, such court shall have jurisdiction to hear and try the case as if such crime or offence had been committed within such limits.

By section 11 of the 30 and 31 Vic., c. 124, if a British subject commits a crime on board a British ship or on board a foreign ship to which he does not belong, any Court in the British Dominions, which would have cognizance of such crime if committed on board a British ship within the limits of the ordinary jurisdiction of such Court, shall have jurisdiction to hear and determine the case, as if the said crime had been committed as last aforesaid. (16)

Under section 9 of 24 and 25 Vic., c. 100, a British subject who, in a foreign country, within the Dominion of a foreign power, murders a British subject or a foreigner, is triable in England. This, in fact, was the state of the law before the passing of 24 and 25 Vic., c. 100. (17)

## PROSECUTIONS REQUIRING CONSENT OF ATTORNEY GENERAL.

**543. Obtaining or communicating official information.** — No person shall be prosecuted for the offence of unlawfully obtaining and communicating official information, as defined in sections seventy-seven and seventy-eight, without the consent of the Attorney-General or of the Attorney-General of Canada. 53 V., c. 10, section 4.

**544. Judicial corruption.** — No one holding any judicial office shall be prosecuted for the offence of judicial corruption, as defined in section one hundred and thirty-one, without the leave of the Attorney-General of Canada.

**545. Making or having explosives.** — If any person is charged before a justice of the peace with the offence of making or having explosive substances, as defined in section one hundred, no further proceding shall be taken against such person without the consent of the Attorney-General except such as the justice of the peace thinks necessary, by remand or otherwise, to secure the safe custody of such person. R. S. C., c. 150, s. 5.

## PROSECUTIONS REQUIRING CONSENT OF MINISTER OF MARINE AND FISHERIES.

**546. Sending or taking an unseaworthy ship to sea.**—No person shall be prosecuted for any offence under section two hundred and fifty-six or two hundred and fifty-seven, without the consent of the Minister of Marine and Fisheries. (As amended by 56 Vic., c. 32).

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(16) See Arch. Cr. Pl. & Ev., 21st Ed., p. 36.
(17) See R. v. Azzopardi, 2 Mood. C. C., 288; 1 C. & K., 203; R. v. Sawyer, R. & R., 294.

## OTHER PROSECUTIONS REQUIRING THE ATTORNEY GENERAL'S CONSENT.

**547. Criminal Breach of Trust.** — No proceding or prosecution against a trustee for a criminal breach of trust, as defined in section three hundred and sixty-three, shall be commenced without the sanction of the Attorney-General. R. S. C., c. 164, s. 65.

**548. Concealing encumbrances.**— No prosecution for concealing deeds and encumbrances, as defined in section three hundred and seventy, shall be commenced without the consent of the Attorney-General, given after previous notice to the person intended to be prosecuted of the application to the Attorney-General for leave to prosecute. R. S. C., c. 164, s. 91.

**549. Uttering defaced coin.** — No proceding or prosecution for the offence of uttering defaced coin, as defined in section four hundred and seventy-six, shall be taken without the consent of the Attorney-General.

For meaning of "Attorney-General," see section 3, *ante*, p. 2.

It will be seen by section 613 (*h*), *post*, that it is not necessary to state in the indictment that the consent referred to in the above sections has been obtained.

**550. Young persons not to be tried publicly and not to be confined with older persons.** (As amended by 57-58 V., c. 58). — The trials of young persons apparently under the age of sixteen years, shall take place without publicity and separately and apart from the trials of other accused persons, and at suitable times to be designated and appointed for that purpose.

**2.** Young persons apparently under the age of sixteen years who are : —

(*a*) arrested upon any warrant; or

(*b*) committed to custody at any stage of a preliminary enquiry into a charge for an indictable offence; or

(*c*) committed to custody at any stage of a trial, either for an indictable offence or for an offence punishable on summary conviction; or

(*d*) committed to custody after such trial, but before imprisonment under sentence, —

shall be kept in custody separate from older persons charged with criminal offences and separate from all persons undergoing sentences of imprisonment, and shall not be confined in the lock-ups or police stations with older persons charged with criminal offences or with ordinary criminals.

**3. Dealing with convicted children in Ontario.** — If any child, appearing to the court or justice before whom the child is tried to be under the age of fourteen years, is convicted in the province of ONTARIO of any offence against the law of Canada, whether indictable or punishable on summary conviction, such court or justice, instead of sentencing the child to any imprisonment provided by law in such case, may order that the child shall be committed to the charge of any home for destitute and neglected children, or to the charge of any children's aid society duly organized and approved by the Lieutenant-Governor of Ontario in Council, or to any certified industrial school.

**4.** Whenever in the province of Ontario, an information or complaint is laid or made against any boy under the age of twelve years, or girl under the age of thirteen years, for the commission of any offence against the law of Canada, whether indictable or punishable on summary conviction, the court or justice seized thereof shall give notice thereof in writing to the executive officer of the children's aid society, if there be one in the county, and shall allow him opportunity to investigate the charges made, and may also notify the parents of the child, or either of them, or other person apparently interested in the welfare of the child.

2. The court or justice may advise and counsel with the said officer and with the parents or such other person, and may consider any report made by the said officer upon the charges.

3. If, after such consultation and advice, and upon consideration of any report so made, and after hearing the matter of information or complaint, the court or justice is of opinion that the public interest and the welfare of the child will be best served thereby, then, instead of committing the child for trial, or sentencing the child, as the case may be, the court or justice may, by order : —

(*a*) authorize the said officer to take the child and, under the provisions of the law of Ontario, bind the child out to some suitable person until the child has attained the age of 21 years, or any less age; or —

(*b*) place the child out in some approved foster-home; or, —

(*c*) impose a fine not exceeding ten dollars; or —

(*d*) suspend sentence for a definite period or for an indefinite period; or

(*e*) if the child has been found guilty of the offence charged or is shown to be wilfully wayward and unmanageable, commit the child to a certified industrial school, or to the provincial reformatory for boys, or to the refuge for girls, as the case may be, and in such cases, the report of the said officer shall be attached to the warrant of commitment.

**5.** Whenever an order has been made under either of the two sections next preceding, the child may thereafter be dealt with under the law of the province of Ontario, in the same manner, in all respects, as if such order had been lawfully made in respect of a proceeding instituted under authority of a statute of the province of Ontario.

**6.** No Protestant child dealt with under this Act, shall be committed to the care of any Roman Catholic children's aid society, or be placed in any Roman Catholic family as its foster-home; nor shall any Roman Catholic child dealt with under this Act, be committed to the care of any Protestant children's aid society or be placed in any Protestant family as its foster-home. But this section shall not apply to the care of children in a temporary home or shelter, established under the Act of Ontario, fifty-six Victoria, chapter forty-five, intituled *An Act for the Prevention of Cruelty to, and better Protection of Children*, in a municipality in which there is but one children's aid society.

The preamble to the amending Act, 57-58 Vic., c. 58, declares that, "it is desirable to make provision for the separation of youthful offenders from contact with older offenders and habitual criminals during their arrest and trial, and to make better provision than now exists for their commitment to places where they may be reformed and trained to useful lives, instead of their being imprisoned:"

Section 550, as it stood before being repealed and replaced, as above, by the 57-58 Vic., c. 58, was so worded that it merely provided for the trials of persons apparently under the age of sixteen, taking place without publicity and separately, and apart from the trials of other accused persons, *as far as it appeared expedient and practicable*. But, under the law as amended, there is no reserve as to *expediency* or *practicability*. It is imperatively enacted that the trials of persons under sixteen SHALL take place without publicity and separately, and apart from the trials of other accused persons.

**Children's Homes, Industrial Schools, Reformatories and Houses of Refuge in Ontario.** — It will be observed that sub-sections 3 to 5 of the above section, as enacted by the 57-58 Vic., c. 58, empowering the committal of children under fourteen to the care of children's homes or aid societies or to industrial schools, and providing for the apprenticing of male offenders under twelve, and of female offenders under thirteen, or for placing them in a foster home, or for imposing a nominal fine or suspending sentence, and for their commitment to industrial schools, etc., apply to Ontario, only; and there are some provisions, unrepealed, of the R. S. C., c. 183, (sections 25 to 48), also applicable to Ontario, which authorize the sentencing of convicted boys, under sixteen, to the Ontario Reformatory for Boys, and of convicted girls, under fourteen, to the Industrial Refuge for Girls of Ontario, and authorizing the sentencing of convicted females of any age to imprisonment in the Andrew Mercer Reformatory for Females.

**Ontario Houses of Refuge for Females.** — By the 57-58 Vic., c. 60, it is provided, moreover, that all females sentenced to or confined, from time to time, in any of the common gaols of the province of Ontario under sen-

tence of imprisonment by a police magistrate of any city, for any offence against any Act of the Parliament of Canada, may be committed to a House of Refuge, (that is, an institution for the care of young or adult females), or may be transferred, by order of the police magistrate, from the common gaol to a House of Refuge.

**Reformatory Schools and Female Reformatories in the Province of Quebec.** — Sections 49 to 58 of the R. S. C., c. 183, — which relate to the province of Quebec, — provide for the sentencing, in that province, of convicted persons, under sixteen, to a reformatory school, and for the sentencing of female offenders to imprisonment in the Female Reformatory Prison.

**Boys' Industrial Schools and Reformatories, in Nova Scotia.** — Sections 61 to 71 of the R. S. C., c. 183, relate to Nova Scotia, and make provision for sentencing convicted boys, under sixteen, who are Protestants, to the Halifax Industrial School, and for sentencing convicted boys, under sixteen, who are Roman Catholics, to any reformatory, orphanage, industrial school or home for Catholic boys, to be, thereafter, established in the county of Halifax.

**Female Refuges and Reformatories in Nova Scotia.** — It is provided by the 54-55 Vic., c. 55, (as amended by the 58-59 Vic., c. 43), that, in Nova Scotia, Roman Catholic female offenders, *under* sixteen, may be sentenced to detention in the Good Shepherd Industrial Refuge, and that Roman Catholic female offenders, *over* sixteen, may be sentenced to imprisonment in the Good Shepherd Reformatory.

**Industrial Schools and Reformatories for Boys in the provinces of Nova Scotia and Manitoba.** — Certain unrepealed sections of the 53 Vic., c. 37, (set out in the Appendix to the present Code, *post*), provide for the sentencing, in the provinces of Nova Scotia and Manitoba, of convicted boys, under sixteen, to detention in Industrial Schools and Reformatories.

**Reformatories for Juvenile Offenders in Prince Edward Island.** — Sections 72 to 77 of the R. S. C., c. 183, relating to the province of Prince Edward Island, provide for the sentencing of convicted persons, under sixteen, to a Reformatory for Juvenile Offenders.

**Industrial Homes for Boys in New Brunswick.** — With regard to the province of New Brunswick, provision is made by the 56 Vic., c. 33, — amended by 57-58 Vic., c. 59, — for sending convicted boys to Industrial Homes.

**General provision for imprisonment of Juvenile Offenders in Reformatories.** — Section 956, *post*, relates to the whole of Canada, and contains a general provision empowering the Court or person before whom any offender, under sixteen, is convicted, whether summarily or otherwise, to sentence such offender to imprisonment in a reformatory.

In an English case, a child under fourteen was charged with larceny, and, on the charge being dismissed, the magistrate, — purporting to act under the provisions of the Industrial Schools Act, and hearing from the boy's mother who was present, that the boy refused to go to school and associated with young thieves, — ordered the child to be sent to an industrial school. No other summons was issued against the child than that charging him with the larceny. *Held*, upon a rule for certiorari obtained by the boy's father, that there was jurisdiction to make the order without a fresh summons, the Industrial Schools Act being not a penal but a benevolent and protective Act for the benefit of children. (18)

(18) R. v. Jennings and others, 18 Cox C. C., 205.

**550a. Exclusion of public from place of trial in certain cases.**—At the trial of any person charged with an offence under any of the following sections, that is to say, 174, 175, 176, 177, 178, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 195, 198, 208 in so far as it relates to paragraphs (*i*) (*j*) and (*k*) of 207, 259, 260, 267, 268, 269, 270, 271, 272, 273, 274, 281, and 282, or with conspiracy or attempt to commit, or being an accessory after the fact to any such offence, the court or judge may order that the public be excluded from the room or place in which the court is held during such trial; and such order may be made in any other case also in which the court or judge or justice may be of opinion that the same will be in the interests of public morals.

2. Nothing in this section shall be construed by implication or otherwise as limiting any power heretofore possessed at common law by the presiding judge or other presiding officer of any court of excluding the general public from the court room in any case when such judge or officer deems such exclusion necessary or expedient. (Added by the *Criminal Code Amendment Act 1901*).

Sections 174 to 178, *ante*, relate to abominable offences, incest and acts of indecency. Sections 181 to 190, *ante*, relate to seduction and defilement of women and girls. Sections 195 and 198, *ante*, relate to bawdy-houses. Section 207 (*i*), (*j*), (*k*), relate to prostitutes, and to inmates and frequenters of bawdy-houses. Sections 259 and 260, *ante*, relate to indecent assaults. Sections 267 to 274, *ante*, relate to Rape, Defilement of Children and Abortion. And sections 281 and 282, *ante*, relate to Abduction.

**551. Limitations of time for commencing certain prosecutions.**—No prosecution for an offence against this Act, or action for penalties or forfeiture, shall be commenced —

(*a*) after the expiration of THREE YEARS from the time of its commission, if such offence be—

(i) TREASON, except treason by killing Her Majesty or where the overt act alleged is an attempt to injure the person of Her Majesty (Part IV., section sixty-five);

(ii) TREASONABLE OFEENCES (Part IV., section sixty-nine);

(iii) any offence against Part XXXIII., relating to the FRAUDULENT MARKING OF MERCHANDISE; nor

(*b*) after the expiration of TWO YEARS from its commission, if such offence be—

(i) A FRAUD UPON THE GOVERNMENT (Part IX., section one hundred and thirty-three);

(ii) A CORRUPT PRACTICE in municipal affairs (Part IX.,section one hundred and thirty-six);

(iii) UNLAWFULLY SOLEMNIZING MARRIAGE (Part XXII., section two hundred and seventy-nine;) nor

(*c*) after the expiration of ONE YEAR from its commission, if such offence be—

(i) OPPOSING READING OF RIOT ACT and assembling after proclamation (Part V., section eighty-three);

(ii) REFUSING TO DELIVER WEAPON TO JUSTICE (Part VI., section one hundred and thirteen);

(iii) COMING ARMED NEAR PUBLIC MEETING (section one hundred and fourteen;)

(iv) LYING IN WAIT NEAR PUBLIC MEETING (section one hundred and fifteen);

(v) SEDUCTION of girl under sixteen (Part XIII., section one hundred and eighty-one);

(vi) SEDUCTION under promise of marriage (section one hundred and eighty-two);

(vii) SEDUCTION of a ward, &c. (section one hundred and eighty-three);

(viii) UNLAWFULLY DEFILING WOMEN (section one hundred and eighty-five);

(ix) PARENT OR GUARDIAN PROCURING DEFILEMXNT OF GIRL (section one hundred and eighty-six);

(x) HOUSEHOLDERS PERMITTING DEFILEMENT OF GIRLS ON THEIR PREMISES (section one hundred and eighty-seven); (18a) nor

(*d*) after the expiration of SIX MONTHS from its commission, if the offence be—

(i) UNLAWFUL DRILLING (Part V., section eighty-seven);

(ii) BEING UNLAWFULLY DRILLED (section eighty-eight);

(iii) HAVING POSSESSION OF ARMS for purposes dangerous to the public peace (Part VI., section one hundred and two);

(iv) PROPRIETOR OF NEWSPAPER PUBLISHING advertisement offering REWARD for recovery of stolen property (Part X., section one hundred and fifty-seven, paragraph *d*); nor

(*e*) after the expiration of THREE MONTHS from its commission if the offence be cruelty to animals under sections five hundred and twelve and five hundred and thirteen, Part XXXVIII; nor

(ii) RAILWAYS VIOLATING PROVISIONS relating to conveyance of cattle (Part XXXIX., section five hundred and fourteen);

(iii) REFUSING PEACE OFFICER ADMISSION TO CAR, &c. (section five hundred and fifteen);

(*f*) after the expiration of ONE MONTH from its commission, if the offence be—

(i) improper use of OFFENSIVE WEAPONS (Part VI., sections one hundred and three, and one hundred and five to one hundred and eleven inclusive).

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(18*a*) Every prosecution for an indictable offence under the *Dominion Elections Act*, must be commenced within ONE YEAR next after the commission of the offence. (See pp. 523 and 524, *ante*.)

2. No person shall be prosecuted, under the provisions of section sixty-five or section sixty-nine of this Act, for any OVERT ACT OF TREASON expressed or declared by open and advised speaking, unless information of such overt act, and of the words by which the same was expressed or declared, is given upon oath to a justice within **six days** after the words are spoken, and a warrant for the apprehension of the offender is issued within **ten days** after such information is given.

Under the common law there is no limited time for the prosecution of proceedings at the suit of the Crown; and, therefore, the proceedings in all criminal cases, in relation to which the time is not limited by statute, may be prosecuted at any length of time after the commission of the offence.

As the limitations of time fixed by the above section, 551, relate to the commencement of the prosecution, the question arises, what is the commencement of a criminal prosecution?

In a case based upon the repealed statutes relating to coin, it was held that the information and proceedings before the Magistrate, *upon the defendant being taken*, was to be deemed the "commencement of the prosecution" within the meaning of those Acts. (19)

In another case, where the warrant of commitment for the offence was within the time limited, but the indictment not till afterwards, it was held sufficient. (20)

The mere *issuing* of a warrant to apprehend the defendant, in a case under the 9 Geo. 4, c. 69, sec. 4, was held not to be a commencement of the prosecution; (21) but, that it was necessary to shew, in addition to the *issuing* of the warrant, that it was *executed* within the time limited for the commencement of the prosecution. (22)

Proof of a *warrant* to apprehend the defendant was held not to be evidence of the commencement of a prosecution within the time limited by the 9 Geo. 4, c. 69, sec. 4, although the warrant was issued within the twelve months prescribed by that section and although it recited the laying of the information, but that the information itself should have been given in evidence. (23)

Verbal proof that a prisoner, charged with a treasonable offence respecting the coin, was apprehended, within three months after the offence was committed, was held to be insufficient, where the indictment was after the three months, and the warrant to apprehend or to commit was not produced. (24)

Where the prisoner was indicted in 1869, for night poaching alleged to have been committed in 1863, and pleaded guilty, he was allowed to withdraw his plea, and plead not guilty, and no information and warrant being produced shewing that the prosecution had been commenced within twelve calendar months as directed by 9 Geo. 4, c. 69, sec. 4, Byles, J., directed an acquittal. (25)

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(19) R. v. Willace, 1 East, P. C., 186. See, also, R. v. Brooks, 1 Den., 217; 2 C. & K., 402.
(20) R. v. Austin, 1 C. & K., 621.
(21) R. v. Hull, 2 F. & F., 16.
(22) R. v. Casbolt, 11 Cox C. C., 385, 386.
(23) R. v. Parker, L. & C., 459; 33 L. J. (M. C.), 135.
(24) R. v. Philips, R. & R., 369.
(25) R. v. Casbolt, *supra*. See, also, Tilladam v. Inhabitants of Bristol, 4 N. & M., 144; 2 A. & E., 389; 4 L. J. M. C., 35.

The time limited for the commencement of a criminal prosecution begins to run as soon as the act which constitutes the offence has taken place. For instance, it was held in an American case that the crime of embezzlement was committed, and the statute of limitations of the State of Indiana, relating to that offence, began to run when the defendant, as treasurer of a county failed to pay over the county's money in his hands to his successor in office, and that the mere fact of a subsequent demand and refusal did not take the case out of the operation of the statute. (26)

A defence based upon the provisions of section 551, as to the limitation of the prosecution need not be specially pleaded, but may, under the terms of section 631, *post*, be relied on under the plea of not guilty.

In a decision recently rendered by the Supreme Court of Kansas, it was held that the failure of a defective indictment or information, and the presentation of a new and correct indictment or information after the statute of limitations has begun to run, does not revive the statute; but, that the statute is put aside by the presentation and filing of an indictment against a defendant, and remains silent until the legal proceedings thereon are terminated; and, that if a defective indictment is withdrawn by means of a *nolle prosequi*, or dismissed with consent of the court, and an information is filed charging the defendant with the same offence, the information continues the legal proceedings which were commenced by the presentation and filing of the original indictment. (27)

In an English case, an indictment for night poaching preferred against the defendant, within twelve months after the commission of the offence, was ignored. Four years afterwards another bill was laid and found against him, for the same offence, and, upon an objection that the proceeding was out of time, Coleridge, J., doubting whether the first indictment was not a proceeding sufficient to entitle the prosecutor to proceed, reserved the point; but, the defendant was acquitted by the jury, on the merits. (28)

It has been held, in England, that a prisoner may be indicted for and convicted of the misdemeanor of having carnal knowledge or attempting to have carnal knowledge of a girl between 13 and 16, although his committal for trial was on a charge of rape, and although the misdemeanor was committed more than 12 months (the time limited for prosecuting such misdemeanor), before the indictment was laid before the Grand Jury, — a prosecution for rape being a prosecution for any of the offences of which, on an indictment for rape, an accused may be found guilty. (29)

On the same principle, it has been held, in Canada, that, as an indictment for rape includes the lesser charge of assault, a verdict thereon of common assault was properly followed by a conviction, although the information for the rape was laid more than six months after the commission of the offence, and although the common assault of which the defendant was found guilty might have been summarily tried, provided the information had been laid (as required by section 841, *post*), within six months after the offence was committed and although that period of six months had expired before the information for rape was laid. (30)

**552. Arrest without warrant.** (Amended by 58-59 V., c. 40).— Any one found committing any of the offences mentioned in the following sections, may be arrested without warrant by ANY ONE, that is to say:

(26) State v. Mason, (Ind. Supr. Ct.), 8 N. East Rep., 716.
(27) State v. Child, 24 Pac. Rep., 952.
(28) R. v. Killminster, 7 C. & P., 228.
(29) R. v. West, [1898] 1 Q. B., 174.
(30) R. v. Edwards, 2 Can. Cr. Cas., 96; 29 O. R., 451.

PART IV. — Sections sixty-five, treason; sixty-seven, accessories after the fact to treason; sixty-eight, sixty-nine and seventy, treasonable offences; seventy-one, assaults on the Queen; seventy-two, inciting to mutiny.

PART V. — Sections eighty-three, offences respecting the reading of the Riot Act; eighty-five, riotous destruction of buildings; eighty-six, riotous damage to buildings.

PART VII. — Sections one hundred and twenty, administering, taking or procuring the taking of oaths to commit certain crimes; one hundred and twenty-one, administering, taking or procuring the taking of other unlawful oaths.

PART VIII. — Sections one hundred and twenty-seven, piracy; one hundred and twenty-eight, piratical acts ; one hundred and twenty-nine, piracy with violence.

PART XI. — Sections one hundred and fifty-nine, being at large while under sentence of imprisonment ; one hundred and sixty-one, breaking prison; one hundred and sixty-three, escape from custody or from prison; one hundred and sixty-four, escape from lawful custody.

PART XIII.— Section one hundred and seventy-four, unnatural offence.

PART XVIII. — Sections two hundred and thirty-one, murder; two hundred and thirty-two, attempt to murder ; two hundred and thirty-five, being accessory after the fact to murder; two hundred and thirty-six, manslaughter; two hundred and thirty-eight, attempt to commit suicide.

PART XIX. — Sections two hundred and forty-one, wounding with intent to do bodily harm; two hundred and forty-two, wounding; two hundred and forty-four, stupefying in order to commit an indictable offence; two hundred and forty-seven and two hundred and forty-eight, injuring or attempting to injure by explosive substances; two hundred and fifty, intentionally endangering persons on railways; two hundred and fifty-one, wantonly endangering persons on railways; two hundred and fifty-four, preventing escape from wreck.

PART XXI. — Sections two hundred and sixty-seven, rape; two hundred and sixty-eight, attempt to commit rape ; two hundred and sixty-nine, defiling children under fourteen.

PART XXII. — Section two hundred and eighty-one, abduction of a woman.

PART XXV. — Section three hundred and fourteen, receiving property dishonestly obtained.

PART XXVI. — Sections three hundred and nineteen, theft by clerks and servants, etc. ; three hundred and twenty, theft by

agents, etc.; three hundred and twenty-one, public servant refusing to deliver up chattels, etc.; three hundred and twenty-two, theft by tenants and lodgers; three hundred and twenty-three, theft of testamentary instruments ; three hundred and twenty-four, theft of documents of title; three hundred and twenty-five, theft of judicial or official documents; three hundred and twenty-six, theft of postal matter; three hundred and twenty-seven, theft of postal matter; three hundred and twenty-eight, theft of postal matter; three hundred and twenty-nine, theft of election documents; three hundred and thirty, theft of railway tickets; three hundred and thirty-one, theft of cattle; three hundred and thirty-four, theft of oysters ; three hundred and thirty-five, theft of things fixed to buildings or land; three hundred and forty-four, stealing from the person; three hundred and forty-five, stealing in dwelling-houses ; three hundred and forty-six, stealing by picklocks, etc.; three hundred and forty-seven, stealing in manufactories ; three hundred and forty-nine, stealing from ships, etc. ; three hundred and fifty, stealing from wreck ; three hundred and fifty-one, stealing on railways; three hundred and fifty-five, bringing stolen property into Canada.

PART XXIX. — Sections three hundred and ninety-eight, aggravated robbery; three hundred and ninety-nine, robbery; four hundred, assault with intent to rob; four hundred and one, stopping the mail; four hundred and two, compelling execution of documents by force; four hundred and three, sending letter demanding with menaces; four hundred and four, demanding with intent to steal; four hundred and five, extortion by certain threats.

PART. XXX.— Sections four hundred and eight, breaking place of worship and committing an indictable offence; four hundred and nine, breaking place of worship with intent to commit an indictable offence; four hundred and ten, burglary; four hundred and eleven, housebreaking and committing an indictable offence; four hundred and twelve, housebreaking with intent to commit an indictable offence; four hundred and thirteen, breaking shop and committing an indictable offence; four hundred and fourteen, breaking shop with intent to commit an indictable offence; four hundred and fifteen, being found in a dwelling-house by night ; four hundred and sixteen, being armed, with intent to break a dwelling-house; four hundred and seventeen, being disguised or in possession of housebreaking instruments.

PART XXXI. — Sections four hundred and twenty-three, forgery ; four hundred and twenty-four, uttering forged documents; four hundred and twenty-five, counterfeiting seals; four hundred and thirty, possessing forged bank notes; four hundred and thirty-two, using probate obtained by forgery or perjury.

PART XXXII.—Sections four hundred and thirty-four, making, having or using instrument for forgery or uttering forged bond

or undertaking ; four hundred and thirty-five, counterfeiting stamps; four hundred and thirty-six, falsifying registers.

PART XXXIV. — Section four hundred and fifty-eight, personation of certain persons.

PART XXXV. — Sections four hundred and sixty-two, counterfeiting gold and silver coin; four hundred and sixty-six, making instruments for coining ; four hundred and sixty-eight, clipping current coin; four hundred and seventy, possessing clipping of current coin; four hundred and seventy-two, counterfeiting copper coin; four hundred and seventy-three, counterfeiting foreign gold and silver coin; four hundred and seventy-seven, uttering counterfeit current coin. (31)

PART XXXVII.—Sections four hundred and eighty-two, arson; four hundred and eighty-three, attempt to commit arson ; four hundred and eighty-four, setting fire to crops; four hundred and eighty-five, attempting to set fire to crops ; four hundred and eighty-eight, attempt to damage by explosives; four hundred and eighty-nine, mischief on railways; four hundred and ninety-two, injuries to electric telegraphs, etc. ; four hundred and ninety-three, wrecking ; four hundred and ninety-four, attempting to wreck ; four hundred and ninety-five, interfering with marine signals; four hundred and ninety-eight, mischief to mines; four hundred and ninety-nine, mischief.

2. A PEACE OFFICER may arrest, without warrant, any one who has committed or is found committing any of the offences mentioned in the said sections or in the following sections, that is to say:

PART XXVII. — Sections three hundred and fifty-nine, obtaining by false pretense; three hundred and sixty, obtaining execution of valuable securities by false pretence.

PART XXXV.— Sections four hundred and sixty-five, exporting counterfeit coin; four hundred and seventy-one, possessing counterfeit current coin; four hundred and seventy-three paragraph (*b*), possessing counterfeit foreign gold or silver coin; four hundred and seventy-three, paragraph (*d*), counterfeiting foreign copper coin.

PART XXXVII. — Sections four hundred and ninety-seven, cutting booms, or breaking loose rafts or cribs of timber or sawlogs; five hundred, attempting to injure or poison cattle.

PART XXXVIII. — Sections five hundred and twelve, cruelty to animals; five hundred and thirteen, keeping cock-pit.

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(31) This is a mistake. Section 477, *ante*, relates to uttering *uncurrent copper coin*. The sections having reference to the uttering of *counterfeit current coin* are sections 474 and 475.

3. A PEACE OFFICER may arrest, without warrant, any one whom he finds committing any criminal offence, and ANY PERSON may arrest, without warrant, any one whom he finds committing any criminal offence *by night*. (32)

4. ANY ONE may arrest without warrant a person whom he, on reasonable and probable grounds, believes to have committed an offence and to be escaping from, and to be freshly pursued by, those whom the person arresting, on reasonable and probable grounds believes to have lawful authority to arrest such person.

5. The owner of any property on or with respect to which any person is *found committing* any offence, or any person authorized by such owner, may arrest, without warrant, the person so found, who shall forthwith be taken before a justice of the peace to be dealt with according to law. (33)

6. Any OFFICER in Her Majesty's service, any WARRANT or PETTY OFFICER in the navy, and any NON-COMMISSIONED OFFICER OF MARINES may arrest without warrant any person found committing any of the offences mentioned in section one hundred and nineteen of this Act.

7. Any PEACE OFFICER may, without a warrant, take into custody any person whom he finds lying or loitering in any highway, yard or other place *during the night*, and whom he has good cause to suspect of having committed, or being about to commit, any indictable offence, and may detain such person until he can be brought before a justice of the peace, to be dealt with according to law;

(*a*) No person who has been so apprehended shall be detained after noon of the following day without being brought before a justice of the peace.

Clause (*a*) of this sub-section 7, applies only to cases coming within the sub-section; and it is not necessary, in other cases, to bring the arrested person before a justice of the peace before noon of the day following the arrest.

A prisoner had been arrested, in Winnipeg, by the Chief of Police there, on receipt by him of a telegram from the Chief Constable at Montreal, informing him that a warrant had been issued at the latter place against the accused on a charge of obtaining goods by false pretences. — *Held*, — on an application, by *habeas corpus*, for the prisoner's discharge, — that, although the alleged offence was one committed in the province of Quebec, the criminal law being enacted for the whole of Canada, a police officer appointed under provincial authority may make an arrest in his own province for an offence committed in another province, that section 22, *ante*, operates not merely to protect a peace officer from civil and criminal pro-

(32) "Night" is the interval between 9 p. m. and 6 a. m. of the following day. (See section 3 *q*, *ante*.)

(33) As to the meaning of "found committing," see p. 35, *ante*, and cases there cited.

ceedings, but, also, to authorize the arrest and make it lawful, and that, as the return to the writ of *habeas corpus* shewed that the prisoner was charged with having committed one of the offences specified in section 552, the officer had authority to arrest the prisoner without warrant, he having reasonable and probable grounds for believing that the prisoner had committed the alleged offence. (34)

Under section 26 of the *Criminal Procedure Act*, R. S. C., c. 194, a person, to whom any property was offered for sale or for pawn, was, if he had reasonable cause to suspect that an offence had been committed on or with respect to such property, empowered to apprehend and carry before a justice of the peace the property offered and the person offering the same, to be dealt with according to law. It will be seen, however, by section 981 and Schedule Two of the present Code, *post*, that the whole of chapter 174 R. S. C., is repealed.

But the *Pawnbroker's Act*, (R. S. C., c. 128), is still in force, and sections 9 and 10, thereof, contain the following provisions: —

"If any person offers to any pawnbroker, by way of pawn or pledge or of exchange or sale, any goods, and is not able or refuses to give a satisfactory account of himself or of the means whereby he became possessed of the goods, or wilfully gives any false information to the pawnbroker or his servant as to whether such goods are his own property or not or as to his name and place of abode or as to the owner of the goods, — or if there is any other reason to suspect that such goods have been stolen or otherwise illegally or clandestinely obtained,—or if any person, not entitled or not having any color of title by law to redeem goods that have been pawned, attempts to redeem them, the person, to whom the goods first above mentioned are offered to be pawned, or to whom the offer to redeem goods in pawn is made, may seize and detain the person offering to pawn or the person offering to redeem as aforesaid, and shall convey such person and the goods offered to be pawned, or the person offering to redeem, and immediately deliver the person so offering to pawn and the goods offered to be pawned, or the person so offering to redeem, into the custody of a peace officer or constable, who shall, as soon as possible, convey such person and goods, or such person, as the case may be, before a justice of the peace of the district or county." (Sec. 9).

"If such justice of the peace, upon examination and inquiry, has cause to suspect that such goods have been stolen or illegally or clandestinely obtained, or that the person offering to redeem them has not any pretence or color of right so to do, he shall commit the offender into safe custody for such reasonable time as is necessary for obtaining proper information, in order to be further examined; and if, upon further examination, it appears to the satisfaction of the justice that such goods were stolen or illegally or clandestinely obtained, or that the person offering to redeem them

(34) R. v. Cloutier, 18 C. L. T., 269; 12 Man. L. R., 183; 2 Can. Cr. Cas., 43.

had not any pretence or color of right so to do, he shall, unless the offence authorizes such commitment by any other law, commit the offender to the common gaol of the district or county where the offence was committed, for any term not exceeding three months." (Sec. 10).

See sections 22-30, *ante*, and comments, authorities and illustrations, as to powers of arrest without warrant and justification thereof, at pp. 33-38, *ante*.

The following is a list, — *alphabetically arranged*, — of the offences, enumerated in the first clause of the foregoing section 552, for which an offender *found committing* any of them may be arrested, without warrant by ANY ONE, and in respect of which an offender *who has committed* or is *found committing* any of them may be arrested without warrant by a PEACE OFFICER : —

Abduction, (section 281).

Accessory to murder, (section 235).

Accessory to treason, (section 67).

Administering, taking or procuring unlawful oaths, (sections 120, 121).

Arson, setting fires, etc. (sections 482, 483, 484, 485).

Assaults on the Queen, (section 71).

Assault with intent to rob, (section 400).

Attempt to commit rape, (section 268).

Attempt to commit suicide, (section 238).

Attempt to damage property by explosives, (section 488).

Attempt to do bodily harm by explosives, (section 248).

Attempt to murder, (section 232).

Attempt to wreck, (section 254).

Being at large while under sentence of imprisonment, (section 159).

Breaking prison, (section 161).

Bringing stolen property into Canada, (section 355).

Burglary, housebreaking, shopbreaking, etc., (sections 410, 411, 412, 413, 414) ; Breaking place of worship (sections 408, 409) ; Being found in a dwellinghouse by night, (section 415) ; Being found armed with intent to break dwellinghouse (section 416) ; Being disguised or in possession of housebreaking instruments, (section 417).

Cattle, Theft of, (section 331).

Counterfeiting current or foreign gold and silver coin, (sections 462, 473) ; Clipping current coin, possessing clippings, (sections

468, 470) ; Counterfeiting copper coin, (section 472) ; Making coining instruments (section 466) ; Uttering counterfeit current coin, (section 477).

Counterfeiting seals ; Counterfeiting stamps ; (sections 425, 435).

Defiling children, (section 269).

Demanding by threatening letters, (section 403).

Demanding with intent to steal, (section 404).

Doing bodily harm by explosives, (section 247).

Election documents, Theft of, (section 329).

Endangering persons on railways, (sections 250, 251).

Escapes, (sections 163, 164)..

Explosives, Attempting to damage property by, (section 488).

Explosives, Injuring or attempting to do injury to a person by, (sections 247, 248).

Extortion by threats, (section 405).

Falsifying registers, (section 436).

Forcibly compelling execution of documents, (section 402).

Forgery, (section 423) ; Making, having or using instruments for forgery, (section 434) ; Possessing forged bank notes, (section 430) ; Using probate obtained by forgery, or perjury, (section 432) ; Uttering forged documents, (section 424).

Housebreaking instruments, Being in possession of, (section 417).

Inciting to mutiny, (section 72).

Injuring or attempting to injure a person by explosives, (sections 247, 248).

Injuring electric telegraphs, etc., (section 492).

Interfering with marine signals, (section 495).

Levying war, (section 68).

Manslaughter, (section 236).

Marine signals, Interfering with, (section 495).

Mischief on railways, etc., (sections 489, 498, 499).

Murder ; Attempt to murder ; Accessory to murder, (sections 231, 232, 235.

Personation, (section 458).

Piracy ; Piratical Acts ; Piracy with violence ; (sections 127, 128, 129).

Postal matter, Theft of, (sections 327, 328).

Public servant refusing to deliver up chattels, etc., (sec. 321).

Railways, Stealing on, (section 351).

Railway tickets, Theft of, (section 330).

Rape ; Attempt to commit rape ; Defiling children under 14, (sections 267, 268, 269).

Receiving stolen property, (section 314).

Riot Act, offences respecting the reading of, (section 83).

Riotous damage, (section 86).

Riotous destruction, (section 85).

Robbery ; Aggravated robbery ; Assault with intent to rob ; Stopping the mail, (sections 398, 399, 400, 401).

Stealing in dwellinghouses, (section 345); Stealing in manufactories, (section 347); Stealing from the person, (section 344); Stealing by picklocks, etc., (section 346); Stealing on railways, (section 351); Stealing from ships, (section 349); Stealing from wreck, (section 350).

Stupefying in order to commit an indictable offence, (section 244).

Suicide, Attempt to commit, (section 238).

Theft by agents, etc., (section 320) ;Thefts by clerks and servants, etc., (section 319); Theft by tenants and lodgers (section 322); Theft of cattle, (section 321); Theft of documents of title, (section 324); Theft of election documents, (section 329); Theft of judicial or official documents, (section 325); Theft of postal matter, (sections 327, 328) ; Theft of railway tickets, (section 330); Theft of testamentary instruments, (section 323); Theft of things fixed to buildings or land, (section 335).

Threats, (sections 402, 403, 404, 405).

Treason; Accessory; Treasonable offences; (sections 65, 67, 68, 69, 70).

Unnatural offence, (section 174).

Using probate obtained by forgery or perjury, (section 432).

Uttering counterfeit current coin, (section 477). (35)

Uttering forged documents, (section 424).

Wounding, (sections 241, 242).

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(35) An evident mistake in section 552. Section 477 relates to Uttering *uncurrent copper coin.*

Wrecking, Attempt to wreck, (sections 493, 494).

Wreck, preventing escape from, (section 254).

Wreck, stealing from, (section 350).

The following is a list, alphabetically arranged, of additional offences, — that is, offences in addition to those enumerated in the first clause of section 552, — in respect of which a peace officer is by the second clause of that section empowered to arrest without warrant, an offender who *has committed* or who is *found committing* any of them : —

Attempt to injure or poison cattle, (section 500).

Counterfeiting foreign copper coin, (section 473, par. *d*); Exporting counterfeit coin, (section 465); Possessing counterfeit current coin, (section 471); Possessing counterfeit foreign gold or silver coin, (section 473, par *b*).

Cruelty to Animals, (section 512) ; Keeping cockpit, (section 513).

Cutting booms or breaking loose rafts or cribs of timber. (section 497).

Obtaining by false pretences, (section 359); Obtaining execution of a valuable security by false pretences, (section 360).

## PART XLIV.

**Modes of prosecution.** — Before the coming into force of the present Code there were four entirely different modes of proceeding against a person accused of having committed a criminal offence.

These different modes of prosecution and the changes proposed to be made by the English Draft Code were explained and commented upon by the Royal Commissioners in their Report, in the following terms : —

" He (the accused) may be taken before a Magistrate, and committed for trial: he may, except in a few cases, be indicted by a Grand Jury, without being so committed; he may in the case of homicide be committed and tried upon a coroner's inquisition ; and in cases of misdemeanor he may be put upon his trial by a Criminal Information filed either by the Attorney-General *ex officio*, or, if the Queen's Bench division so orders, by the Master of the Crown office, at the instance of a private person injured. (1)

" According to the ancient theory of the law from which it still derives its force, the course is this: The Queen from time to time, sends Commissioners through the country to hear and determine all accusations of crime, and to deliver the gaols. The Grand Ju-

(1) For notes, illustrations and authorities on Criminal Informations, see pp. 330-333, *ante;* and for forms, see p. 606, *ante.*

ries of the different counties accuse by way of *presentment* certain persons as offenders, and the accusations are referred to a petty jury, by whom they are disposed of.

"The common practice is different : Suspected persons are brought before a justice of the peace by the police or by private complainants. The Magistrate takes the depositions of the witnesses, and either discharges the prisoner or commits him for trial. The accusation is put in the form of an indictment and laid before the Grand Jury, who, having heard the evidence, determine whether the accused is to be put upon his trial or not.

"The Grand Jury are still, however, in theory, the sole accusers ; but, inasmuch as they have long ceased to report matters within their own knowledge, and have come to act upon information supplied by others, any one can send up a bill before them accusing any person of any offence whatever, with certain specified exceptions.

"The proceedings upon coroner's inquisitions is a relic of times preceding the appointment of justices of the peace. The Coroner and his jury at that time had a power of accusation concurrent with that of the Grand Jury, much as if a suspected person could in the present day be put on his trial upon the Magistrate's committal without any bill being found by the Grand Jury.

"As to Criminal Informations they form a mode of proceeding adopted in peculiar cases, and call for no observation here.

"In all common cases we think that of these modes of prosecution, that of initiating the charge before a magistrate is by far the fairest and most satisfactory in every way. It gives suspected persons full notice of the case against them, and it enables the judge and jury, who finally dispose of the prosecution, to discharge their duties with confidence that the whole matter has been properly prepared for their decision.

"It is, moreover, the common mode in use. All others have become exceptional, and we think that, being the common course, it ought to be made imperative, in all cases.

"We doubt whether the existence of the power to send up a bill before a Grand Jury without a preliminary enquiry before a magistrate, the extent of this power, and the facilities which it gives for abuse, are generally known.

"It is not improbable that many lawyers, and most persons who are not lawyers, would be surprised to hear that, theoretically, there is nothing to prevent such a transaction as this : — Any person might go before a Grand Jury, without giving any notice of his intention to do so. He might there produce witnesses, who would be examined in secret, and of whose evidence no record would be kept, to swear, without a particle of foundation for the

charge, that some named person had committed any atrocious crime. If the evidence appeared to raise a *prima facie* case, the Grand Jury, who cannot adjourn their enquiries, who have not the accused person before them, who have no means of testing in any way the evidence produced, would probably find the bill. The prosecutor would be entitled to a certificate from the officer of the Court that the indictment had been found. Upon this he would be entitled to get a warrant for the arrest of the person indicted, who on proof of his identity must be committed to prison. The person so committed would not be entitled as of right, to bail, if his alleged offence were felony. Even if he were bailed, he would have no means of discovering upon what evidence he was charged, and no other information as to his alleged offence than he could get from the warrant: as he would not be entitled by law to see the indictment or hear it read till he was called upon to plead. He would have no legal means of obtaining the least information as to the nature of the evidence to be given, or (except in cases of treason) even as to the names of the witnesses to be called against him; and he might thus be tried for his life without having the smallest chance of preparing for his defence, or the least information as to the character of the charge.

"Of course, in practice, the conviction of an innocent man, under such circumstances, would be practically impossible. The judge would postpone the trial, the jury would acquit the prisoner, the prosecutor would probably be subjected to exemplary damages in an action for malicious prosecution; but it still remains that such is the law, though it could not be put in force without shocking the feelings of the whole community. That such, however, is the law, subject only to certain exceptions hereinafter mentioned, there can be no doubt.

"Although the law is theoretically the same in Ireland, a salutory practice has prevailed there, whereby if the accused has not been *committed* for trial, a private prosecutor is not permitted to lay an indictment before the Grand Jury without the leave of the presiding Judge, obtained in open Court.

"The exceptions we have referred to are constituted by the statutes which provide that it shall not be lawful to present an indictment against any person for perjury, subornation of perjury, conspiracy, obtaining property by false pretences, keeping a gambling house, keeping a disorderly house, or any indecent assault, unless the prosecutor has been bound over to prosecute or give evidence, or unless the accused person has been committed to or detained in custody, or is bound by recognizance to appear to answer to the indictment, or unless the indictment is prefered with leave of the Court or of a Judge or the Attorney-General, as in these statutes mentioned.

"So far as it goes this legislation appears to us wise and sound.

On the one hand, it secures, to the person accused, the fullest possible notice of the nature of the charge against him and of the evidence on which it is to be supported; on the other, it does not invest the Magistrate with an absolute veto, on a prosecution. It enables the prosecutor, if he thinks proper, to take the opinion of the Grand Jury as to whether the accused person should or should not be put on his trial. It is, however, impossible to defend, on any principle which occurs to us, the narrow range of the provisions. Why are indecent assaults included, and other charges of indecency, most easily made, most hard to refute, and commonly employed as the engines of extortion, excluded ? On what possible ground can it be right that a man should be at liberty to accuse another of murder, piracy, or arson, without giving him notice of the nature of the charge against him, whilst he is obliged to give him notice if he charges him with perjury or conspiracy ? It is obvious that this legislation was partial and tentative.

"As to persons committed upon a coroner's inquisition, the common though not universal practice is to take a prisoner, committed before the Coroner, before a Magistrate. We do not undervalue the coroner's inquest; but we see no reason why, in cases in which they result in a committal for murder or manslaughter, the suspected person should not have a right, by law, to be taken before a magistrate, and have the advantages which other accused persons possess; and upon the whole we propose to extend the principle of the Vexatious Indictments Act to all offences whatever, except those which are tried on Criminal Informations.

"Section 505 (2) accordingly provides that no one except the Attorney-General may prefer any Bill of indictment, unless he is bound over to prosecute, or unless he has the written consent of a judge of the High Court (3) or of the Attorney-General, or of the court before which the Bill is to be preferred, to do so; and section 506 (4) enacts that, henceforth, no one shall be tried upon a coroner's inquisition.

"The effect of this will be that, as a rule, no one will be liable to be indicted without a preliminary enquiry being first held before a magistrate.

"Should these proposals be adopted the regular course of a prosecution would consist of the following steps :

"1. Procuring the appearance of the suspected person before a magistrate, either by *summary* arrest, *summons*, or *warrant* :

(2) Section 505 of the English Draft Code is to the same effect as section 641 of the present Code. (See section 641, *post*.)

(3) Instead of the words "High Court" our section, 641, uses the words "any Court of Criminal Jurisdiction."

(4) See section 642, *post*.

"2. The preliminary hearing before the Magistrate, resulting either in the discharge or committal of the prisoner, and, in the case of his discharge, being followed, or not, by the binding over of the prosecutor.

"3. The preferring of the indictment before the Grand Jury:

"4. The trial :

"5. Proceedings by way of appeal subsequent to the trial.

"We have provided in section 440, (5) with respect to both warrants and summonses, that they should not be refused by a magistrate merely because the alleged offender may be arrested *without* a warrant. This we believe to express the spirit, though not to be found in the letter of the present law. — We are, however, informed that some justices take a different view, and refuse in cases of felony to issue either a warrant or a summons, leaving the person applying for one to arrest the alleged offender on his own responsibility." (Eng. Commrs.' Rep. pp. 32, 33).

## COMPELLING APPEARANCE OF ACCUSED BEFORE JUSTICE.

**553. Magisterial jurisdiction.** — For the purposes of this Act, the following provisions shall have effect with respect to the jurisdiction of justices :

(*a*) Where the offence is committed in or upon any water, tidal or other, or upon any bridge, between two or more magisterial jurisdictions, such offence may be considered as having been committed in either of such jurisdictions ;

(*b*) Where the *offence* is committed on the boundary of two or more *magisterial jurisdictions*, or within the distance of five hundred yards from any such boundary, or is begun within one *magisterial jurisdiction* and completed within another, such *offence* may be considered as having been committed in any one of such *jurisdictions;*

(*c*) Where the offence is committed on or in respect to a mail, or a person conveying a post-letter bag, post-letter or anything sent by post, or on any person, or in respect of any property, *in* or *upon* any vehicle employed in a journey, or on board any vessel employed on any navigable river, canal or other inland navigation, the person accused shall be considered as having committed such offence in any magisterial jurisdiction through which such vehicle or vessel passed in the course of the journey or voyage during which the offence was committed: and where the centre or other

(5) See section 559, *post*.

part of the road, or any navigable river, canal or other inland navigation along which the vehicle or vessel passed in the course of such journey or voyage, is the boundary of two or more magisterial jurisdictions, the person accused of having committed the offence may be considered as having committed it in any one of such jurisdictions. (As amended by the *Criminal Code Amendment Act 1900*).

This section is, in effect, if not in words, a re-enactment of sections 10, 11 and 12 of R. S. C., c. 174, which were derived from sections 12 and 13 of the Imperial Statute, 7 Geo. 4, c. 64; clause (*b*), being only slightly varied from the wording of section 12 of 7 Geo. 4, c. 64, which is as follows: "Where a *felony or misdemeanor* is committed on the boundary of two or more *counties*, or within the distance of five hundred yards from any such boundary or is *begun* in *one county* and *completed in another*, the venue may be laid in either *county*, in the same manner as if it had been committed therein.

In cases of murder or manslaughter, where the cause of death arises in one magisterial jurisdiction and the death takes place in another, it seems that the prisoner may, under the above section, be indicted in either jurisdiction. (6)

If a man commit a theft in one magisterial jurisdiction and carry the stolen goods with him into another, he may be indicted within the limits of the jurisdiction where he committed it, or in the place into which, or any of the places through which he carried the goods; for in contemplation of law there is such a taking and carrying away as to constitute the offence of theft in every place through which, at any distance of time, the goods were carried by him. (7) For instance, where a prisoner, in November, stole a note in Yorkshire, and, in March, he carried it into Durham, it was held that the interval between the first taking and carrying the note into Durham did not prevent it from being a theft in Durham, and that the conviction in that county was right. (8)

A country bank note was stolen during its transit, through the post, from Swindon, in Wiltshire, to the City of Bristol, which lies between the counties of Somerset and Gloucester, and the same note was afterwards enclosed by the defendant in a letter posted by him in Somersetshire to the Bankers at Swindon, requesting payment of it, which letter, with the bank note in it, arrived in due course at Swindon. The defendant was held triable in Wiltshire, the possession of the Post Office servants or of the Bankers at Swindon, in Wiltshire, being held, for this purpose, the defendant's possession. (9)

A charge of sending a threatening letter may be prosecuted either in the Magisterial jurisdiction where the prosecutor received it, or in the place from which the offender sent it; because the offence, in such a case, is begun in the one and completed in the other. (10)

A charge against the president of a company of having made and sent a false statement of its affairs with intent to defraud may be tried either in

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(6) 1 Russ. Cr. & M. (by Greaves), 4th Ed., 753.

(7) 1 Hale, 507; 2 Hale, 163; 3 Inst., 113; 1 Hawk., c. 33, s. 52, 4 Bl. Com., 304; 2 East, P. C., 771.

(8) R. v. Parkin, 1 Mood. C. C., 45.

(9) R. v. Cryer, Dears. & B., 324; 36 L. J. (M. C.), 192.

(10) R. v. Girdwood, 2 East, P. C., 1120; 1 Leach, 142; R. v. Esser, 2 East, P. C., 1125; R. v. Burdett, 4 B. & Ald., 95.

the province where the statement was mailed or in the province in which it was received by mail at the address to which the defendant directed it. (11)

D, who resided in the District of Iberville, gave to H, a resident of the District of Bedford, a note to collect from the maker, another resident of the District of Bedford, the note being handed by D to H, at Iberville. H, collected from the maker of the note, in Bedford, the amount of it and converted the proceeds to his own use. *Held*, that, the offence of fraudulent conversion mentioned in section 308, *ante*, consists of a continuity of acts, — the reception of the valuable security, the collection of the proceeds thereof, and the conversion of and failure to account for such proceeds, — that the information against H was properly laid before a magistrate in Iberville, that H having been brought to the latter district on a warrant issued on such information and committed for trial after a preliminary examination, such committal was regular; and a conviction on trial by the Court sitting at Iberville was sustained, upon a reserved case. (12)

An application was made in the province of New Brunswick, for a writ of prohibition to prevent the Charlotte County Court from trying an indictment charging the applicant with obtaining goods under false pretences from one G. The applicant resided at Woodstock, Carleton County, and the prosecutor, G., did business and resided at St. Stephen, Charlotte County; and, the jury having, on a first trial in Charlotte County, disagreed, the application was to prevent a second trial in that county, on the ground that the offence, if any, was committed in Woodstock, outside of the jurisdiction of Charlotte County Court. The charge was based upon the following facts, — that the applicant had sent a telegram from Woodstock to G., at St. Stephen, asking the price of soap, that G. had answered by telegram giving the price of the soap delivered at Woodstock, that the applicant had then, by telegram, ordered 24 boxes of soap, which were shipped to him by rail from St Stephen, that shortly afterwards, the applicant had made an assignment for the benefit of his creditors, and that his trustees took possession of the soap, under the trust deed. *Held*, that, by using the telegraph wire, the applicant had constituted the Telegraph Company, his agent, that, therefore, the delivery of the message to G., at St. Stephen was the same as if the applicant had gone there and made a personal request to G. for the goods, and that consequently a portion at least of the alleged offence was committed in Charlotte County, and that this gave jurisdiction to the Court there. Application refused. (13)

Where money obtained by a false pretence was transmitted in a letter posted, in accordance with the defendant's request, in County A., but which reached him in County B., it was held that, this was an obtaining of the money in County A. (14)

If two persons steal a thing in one county, though one of them alone carry it into another county, yet if both afterwards co-operate to secure the thing in the latter county, both may be indicted there; for the subsequent concurrence may be connected with the previous taking. Thus, two men, named County and Donovan, laid a plan to obtain, under pretence of buying them, some coats from a woman, in Surrey. After making a pretended bargain to buy them from her, the two prisoners induced the prosecutrix to leave the coats with one of them (Donovan), whilst she went with the other prisoner, County, who asked her to go with him, to

(11) R. v. Gillespie, 1 Can. Cr. Cas., 551; Que. Jud. Rep., 7 Q. B., 422; 2 Can. Cr. Cas., 309.

(12) R. v. Hogle, Que. Jud. Rep., 5 Q. B., 59.

(13) Ex parte Slipp, 13 C. L. T., 153.

(14) R. v. Jones, 1 Den., 551; 19 L. J. (M. C.), 162; R. v. Buttery, 4 B. & Ald., 179.

get the money to pay her for the coats. In the prosecutrix's absence Donovan carried off the coats into Middlesex, and County, afterwards joined him there, and concurred in securing them. The indictment was laid against the prisoners, in Middlesex, and, upon a case reserved, it was held that, as County was present aiding and abetting in *Surrey* at the original larceny, his concurrence afterwards in *Middlesex*, though after an interval, might be connected with the original taking, and brought down, as larceny, to the subsequent possession in *Middlesex;* and the conviction was maintained. (15)

Where two jointly committed a theft in one county, and one of them carried the stolen goods into another county, the other still accompanying him, without their ever being separated, they were held both indictable in either county; the possession of one being the possession of both, in each of the counties, as long as they continued in company. (16)

The taking into the other county or jurisdiction must be *animo furandi*. For instance, a constable apprehended a prisoner with two stolen horses at Croyden in Surrey. On being so arrested, the prisoner said he had been at Dorking to fetch the horses and that they belonged to his brother, who lived at Bromley. The police constable offered to go with him to Bromley; and they rode together as far as Beckenham Church, when the prisoner said he had left a parcel at the *Black Horse*, in some place in Kent. The constable, accordingly, went there with him, each riding one of the horses. When they got there, the constable gave the horses to the ostler. The prisoner did not enquire for any parcel, but made his escape, and was, afterwards, again apprehended in Surrey, and indicted in Kent for stealing the two horses. Upon a case reserved, it was held that there was no evidence of stealing in Kent. (17)

Where a theft was committed in County A., and the receiving of the property stolen took place in County B., it was held that both were triable in A., and that the stealing and receiving could both be alleged to have been in A. (18)

Where an offence has been committed within 500 yards of the boundary between two magisterial jurisdictions, Clause (*b*) of section 553, will not enable the prosecutor to lay it in one jurisdiction and try it in another, but it merely gives him the option of both laying and trying the offence in either jurisdiction. (19)

With regard to Clause (*c*) of section 553, it seems that, in order to maintain an indictment in a magisterial jurisdiction other than that in which an offence has been committed, in respect of property in or upon a vehicle or vessel employed in a journey, etc., it would be necessary to prove that the offence was committed *in* or *upon* the vehicle or vessel itself. For instance, a defendant was held to bail to appear at the Cumberland Assizes to answer a charge of stealing committed on a journey. He had acted as guard of a coach from Penrith in Cumberland to Kendal in Westmoreland, and was entrusted with a banker's parcel, containing bank notes and two sovereigns. On changing horses near Penrith, he carried the parcel to a privy, and while there took out of it the sovereigns: and Parke, B., held, that as the stealing was not "in or upon the coach," the case was not within the statute, and the felony having been committed in Westmoreland, the indictment ought to be preferred in that county. (20)

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(15) R. v. County & Donovan, East T., 1816, M. S. Bailey, J., 2 Russ., 175, *cit. in* Arch. Cr. Pl. & Ev., 21st Ed., 41.
(16) R. v. McDonagh, Carr. Supp., 2nd Ed., 23.
(17) R. v. Simmonds, 1 Mood. C. C., 408.
(18) R. v. Hinley, 2 M. & Rob., 524.
(19) R. v. Mitchell, 2 G. & Dav., 274; 2 Q. B., 638.
(20) Sharpe's Case, 2 Lew., 233.

Clause (*c*) is not confined to the carriages of common carriers or to public conveyances, but extends to any vehicle employed in any journey. (21)

**554. When a justice may compel appearance.** — Every justice may issue a warrant or summons as hereinafter mentioned to compel the attendance of an accused person before him, for the purpose of preliminary inquiry in any of the following cases :

(*a*) If such person is accused of having committed in any place whatever an indictable offence triable in the province in which such justice resides, and is, or is suspected to be, within the limits over which such justice has jurisdiction, or resides or is suspected to reside within such limits ;

(*b*) If such person, whereever he may be, is accused of having committed an indictable offence within such limits ;

(*c*) If such person is alleged to have any where unlawfully received property which was unlawfully obtained within such limits ;

(*d*) If such person has in his possession, within such limits, any stolen property.

**555. Offences committed in certain parts of Ontario.** — All offences committed in any of the unorganized tracts of country in the province of Ontario, including lakes, rivers and other waters therein, not embraced within the limits of any organized county, or within any provisional judicial district, may be laid and charged to have been committed and may be enquired of, tried and punished within any county of such province; and such offences shall be within the jurisdiction of any Court having jurisdiction over offences of the like nature committed within the limits of such county, before which court such offences may be prosecuted; and such court shall proceed therein to trial, judgment and execution or other punishment for such offence, in the same manner as if such offence had been committed within the county where such trlal is had.

2. When any provisional judicial district or new county is formed and established in any of such unorganized tracts, all offences committed within the limits of such provisional judicial district or new county, shall be inquired of, tried and punished within the same, in like manner as such offences would have been inquired of, tried and punished if this section had not been passed.

3. Any person accused or convicted of any offence in any such provisional district may be committed to any common gaol in the

(21) R. v. Sharpe, Dears., 415; 24 L. J. (M. C.), 40; Arch. Cr. Pl. & Ev., 21st Ed., 42.

province of Ontario; and the constable or other officer having charge of such person and intrusted with his conveyance to any such common gaol, may pass through any county in such province with such person in his custody; and the keeper of the common gaol of any county in such province in which it is found necessary to lodge for safe keeping any such person so being conveyed through such county in custody, shall receive such person and safely keep and detain him in such common gaol for such period as is reasonable or necessary; and the keeper of any common gaol in such province, to which any such person is committed as aforesaid, shall receive such person and safely keep and detain him in such common gaol under his custody until discharged in due course of law, or bailed in cases in which bail may by law be taken. R. S. C., c. 174, s. 14.

**Offences committed in territory east of Manitoba and Keewatin and north of Ontario and Quebec.** — It is provided, by the 62-63 Vic., c. 47, that,

"All offences committed in any part of Canada east of the province of Manitoba and the district of Keewatin and north of the provinces of Ontario and Quebec may be laid and charged to have been committed, and may be inquired of and tried within any district, county or place in any of the said provinces; and such offences shall be within the jurisdiction of any court having jurisdiction over offences of the like nature committed within the limits of such district, county or place; and such court shall proceed therein to trial, judgment and execution or other punishment for any such offence in the same manner as if such offence had been committed within the district, county or place where such trial is had;" and the several courts of criminal jurisdiction in the said provinces of Ontario, Quebec and Manitoba, including justices of the peace, are thereby constituted and established as courts having the same powers, jurisdiction and authority in case of such offences, as they respectively have with reference to offences within their ordinary jurisdiction as provincial courts.

**Territories of Abittibi, Mistassini and Ashnanipi.** — For special provisions as to these territories, — which are situated in the north-east, north and north-west parts of the province of Quebec, — see the 62 Vic., c. 5 of the statutes of Quebec.

**556. Offences committed in the district of Gaspé.** — Whenever any offence is committed in the district of Gaspé, the offender, if committed to gaol before trial, may be committed to the common gaol of the county in which the offence was committed, or may, in law, be deemed to have been committed, and if tried before the Court of Queen's Bench, he shall be so tried at the sitting of such court held in the county to the gaol of which he has been committed, and if imprisoned in the common gaol after trial he shall be so imprisoned in the common gaol of the county in which he has been tried. R. S. C., c. 174, s. 15.

**557. Offences committed out of the Magistrate's Jurisdiction.**— The preliminary inquiry may be held either by one justice or by more justices than one: Provided that if the accused person is brought before any justice charged with an offence committed out of the limits of the jurisdiction of such justice, such justice may, after hearing both sides, order the accused at any stage of the inquiry to be taken by a constable before some justice having jurisdiction in the place where the offence was committed. The justice so ordering shall give a warrant for that purpose to a constable, which may be in the FORM A IN SCHEDULE ONE hereto, (22) or to the like effect, and shall deliver to such constable the information, depositions and recognizances if any taken under the provisions of this Act, to be delivered to the justice before whom the accused person is to be taken, and such depositions and recognizances shall be treated to all intents as if they had been taken by the last-mentioned justice.

2. Upon the constable delivering to the justice the warrant, information, if any, depositions and recognizances, and proving on oath or affirmation, the handwriting of the justice who has subscribed the same, such justice, before whom the accused is produced, shall there-upon furnish such constable with a receipt or certificate in the FORM B IN SCHEDULE ONE hereto, (23) of his having received from him the body of the accused, together with the warrant, information, if any, depositions and recognizances, and of his having proved to him, upon oath or affirmation, the handwriting of the justice who issued the warrant.

4. If such justice does not commit the accused for trial, or hold him to bail, the recognizances taken before the first mentioned justice shall be void.

**557a.** (Added by the 58-59 Vic., c. 40). In the district of Montreal the clerk of the peace or deputy clerk of the peace shall have all the powers of a justice of the peace under parts XLIV and XLV.

**558. Laying information.** — Any one who, upon reasonable or probable grounds, believes that any person has committed an indictable offence against this Act may make a complaint or lay an information in writing and under oath before any magistrate or justice of the peace having jurisdiction to issue a warrant or summons against such accused person in respect of such offence.

2. Such complaint or information may be in the FORM C IN SCHEDULE ONE hereto, (24) or to the like effect.

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(22) For Form A, see p. 687, *post*.
(23) For Form B, see p. 688, *post*.
(24) For Form C, see p. 688, *post*.

**559. Hearing on information.** — Upon receiving any such complaint or information the justice shall hear and consider the allegations of the complainant, and if of opinion that a case for so doing is made out he shall issue a summons or warrant, as the case may be, in manner hereinafter mentioned, and such justice shall not refuse to issue such summons or warrant, only because the alleged offence is one for which an offender may be arrested without warrant. R. S. C., c. 174, s. 30.

The Information and Complaint should contain the Informant's or Complainant's name, occupation and address, (25) the date and place of preferring it, with the name and style of the justice before whom it is laid or made, (26) and the name and description of the person charged. (27)

If the Act under which the proceedings are taken extends only to persons of a particular class, office or station in life, the party charged should be shewn to come within the description of such persons, bearing in mind the broad rule, for construing statutes, as laid down by Lord Tenterdon that, "where general words follow particular ones, the rule is to construe them as applicable to persons *ejusdem generis*. (28)

The prosecutor may prosecute all or any of the parties, and the omission of a *particeps criminis* cannot, as in cases of joint contracts in civil actions, be taken advantage of by those who are prosecuted. (29)

The above section, 558, requires the information and complaint to be in writing and under oath.

The description of the charge in the information and complaint should include, in express terms, every ingredient required by the statute to — or a statement of facts which — constitute the offence. (30)

It is, however, provided, by section 578, *post*, that no irregularity or defect in the substance or form of the summons or warrant and that no variance between the charge contained in the summons or warrant and the charge contained in the information or between either and the evidence adduced on the part of the prosecution at the enquiry shall affect the validity of the proceedings at or subsequent to the hearing; so, that, the possibility of taking technical objections either to the information or complaint or to the case as made out in the evidence adduced at the preliminary investigation of an indictable offence is thus done away with.

The information or complaint in the case of an indictable offence is taken merely for the purpose of enabling the justice to judge whether or not he should interfere, and to guide his discretion as to the propriety of issuing a summons or a warrant; (31) so, that, after the summons or warrant issues, the information or complaint ceases to be of any importance, and it necessarily follows that, if the evidence taken before the justice reveals an indictable offence as having been committed by the party summoned or apprehended, though it may not be the same offence as the one charged in the information or complaint, he is bound to adjudicate upon the evidence and to discharge, bind over, or commit the accused, as directed by sections 579, 586, 587, 594 and 596, *post*.

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(25) R. v. Stone, 2 Ld. Raym., 1545.
(26) R. v. Johnson, 1 Str., 261.
(27) R. v. Dobbin, 2 Salk., 473.
(28) Sandiman v. Broach, 7 B. & C., 100.
(29) R. v. Brown, 26 L. J., M. C., 183.
(30) R. v. Denman, 1 Chit. Rep., 152; Ex parte Askew, 15 J. P., 485.
(31) Saund. Prac. Mag. Cts., 5th Ed., 212.

If a justice of the peace is not himself personally arresting the offender on view or upon suspicion, or if he is not personally acting in effecting the arrest by calling some one to his assistance in making the same, he cannot legally direct the arrest, except by a warrant issued by him upon a written complaint or information under oath; and a justice of the peace who illegally issues a warrant without having received a sworn information in respect of the charge, is liable in trespass for the arrest made thereunder, and he cannot justify the commanding of the constable to make the arrest by shewing that he, the justice, had a reasonable suspicion that an offence had been committed. (32)

Section 559, *ante*, expressly provides that the justice *shall* hear and consider the allegations of the information or complaint before issuing a summons or warrant.

The summons or the warrant, as the case may be, should be issued by the magistrate who hears the information. The Courts disapprove of the practice of the magistrate's clerk hearing the complaint and filing up the summons or warrant and getting it signed by the magistrate, without the latter having heard the party complaining. (33)

The information should be taken as nearly as possible in the language of the party complaining. (34)

A magistrate should not place upon the complainant's words a legal construction which they do not bear. If, for instance, the complainant's statement shews only a civil trespass, it should not be construed by the magistrate as an indictable offence, nor should he so describe it in the information. (35)

If the information discloses no offence in law, it will not authorize the issue of a warrant, as it contains nothing to found the magistrate's jurisdiction. (36) But, if it can, by reasonable intendment, be read as disclosing a criminal offence, the rule is to so read it. (37)

There are cases, occasionally, in which it may be thought advisable to issue merely a summons; but it is very seldom that this process is deemed sufficient upon an information being laid for an indictable offence.

A magistrate can before issuing the warrant, legally receive, in support of an information and complaint made before him, affidavits or depositions, in the absence of the accused; and such affidavits or depositions do not form part of a record, but are merely taken in the exercise of the magistrate's discretion,—before issuing the warrant,—to consider the allegations of the complaint, and cannot be used afterwards as part of the preliminary enquiry. (38)

A justice of the peace acting in the illness or absence or at the request of a police magistrate should be designated as so acting in warrants or other processes; otherwise the latter will be invalid. (39)

Where a police magistrate receives an information, and, after hearing and considering the allegations of the informant, decides that the statute invoked in support of the prosecution does not apply and that what is

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(32) McGuiness v. Dafoe, 3 Can. Cr. Cas., 139.
(33) Dixon v. Wells, 25 Q. B. D., 249.
(34) Cohen v. Morgan, 6 D. & R., 8.
(35) Rogers v. Hassard, 2 Ont. A. R., 507.
(36) Stephens v. Stephens, 24 U. C., C. P., 424.
(37) Lawrence v. Hill, 10 Ir. C. L. R., 177.
(38) Weir et al Petitioners for prohibition v. Choquet, Respondent, 6 Rev. de Jur., 121.
(39) R. v. Lyons, 2 Can. Cr. Cas., 218.

charged does not constitute an offence, and therefore refuses to issue either a summons or warrant against the accused, a mandamus does not lie to compel him to do so. (40)

A magistrate is not under a legal obligation to issue a warrant of arrest upon an information in respect of an indictable offence, if, on consideration of the complainant's allegations he is of opinion that a case for so doing is not made out; and a magistrate refusing to issue a warrant on an information for an indictable offence is not bound to state his reasons for refusing; he has merely to express his opinion, after a consideration of the complainant's allegations, as to whether a warrant should be issued or not, and that he did not properly appreciate the evidence submitted upon an application to him for the issue of a warrant of arrest for an indictable offence is not a ground for a mandamus to compel him, against his opinion, formed in good faith, to grant a warrant. (41)

The issue of a summons, whether in relation to an indictable offence or in relation to an offence punishable summarily, is a judicial act,—the justice being required to hear and consider the allegations of the information or complaint, and the issue of the summons being dependent upon his opinion as to whether or not a case is therein made out. (42)

**560. Warrant in cases of offences committed on high seas, etc.** —Whenever any indictable offence is committed on the high seas, or in any creek, harbour, haven or other place in which the Admiralty of England have or claim to have jurisdiction, and whenever any offence is committed on land beyond the seas for which an indictment may be preferred or the offender may be arrested in Canada, any justice for any territorial division in which any person charged with, or suspected of, having committed any such offence is or is suspected to be, may issue his warrant, in the FORM D IN SCHEDULE ONE hereto, (43) or to the like effect, to apprehend such person, to be dealt with as herein and hereby directed. R. S. C., c. 174, s. 32.

**561. Arrest of suspected deserters.** — Every one who is reasonably suspected of being a deserter from Her Majesty's service may be apprehended and brought for examination before any justice of the peace, and if it appears that he is a deserter he shall be confined in gaol until claimed by the Military or Naval authorities, or proceeded against according to law. R. S. C., c. 169, s. 6.

2. No one shall break open any building to search for a deserter unless he has obtained a warrant for that purpose from a justice of the peace, — such warrant to be founded on affidavit that there is reason to believe that the deserter is concealed in such building, and that admittance has been demanded and refused; and every one who resists the execution of any such warrant shall incur a penalty of eighty dollars, recoverable on summary conviction in

(40) Re E. J. Parke, 3 Can. Cr. Cas., 122.
(41) Thompson v. Desnoyers, 3 Can. Cr. Cas., 68; 5 Rev. de Jur., 405.
(42) R. v. Ettinger, 3 Can. Cr. Cas., 387.
(43) For Form D, see p. 689, *post*.

like manner as other penalties under this Act. R. S. C., c. 169, section 7.

See sections 73 and 74, *ante*, pp. 83 and 84.

See Appendix, *post*, for section 9, R. S. C., c. 169,(remaining unrepealed).

**562. Contents of summons.— Service.**— Every summons issued by a justice under this Act shall be directed to the accused, and shall require him to appear at a time and place to be therein mentioned. Such summons may be in the FORM E IN SCHEDULE ONE hereto, (44) or to the like effect. No summons shall be signed in blank.

2. Every such summons shall be served by a constable or other peace officer upon the person to whom it is directed, either by delivering it to him personally or, if such person cannot conveniently be met with, by leaving it for him at his last or most usual place of abode with some inmate thereof apparently not under sixteen years of age.

3. The service of any such summons may be proved by the oral testimony of the person effecting the same or by the affidavit of such person purporting to be made before a justice.

The words "last or most usual place of abode" mean the party's present place of abode, if he has any, or the last place of abode which he had if he has ceased to have any. (45)

The delivery of the summons to a person on the premises apparently residing there as a servant is sufficient. (46)

Where the service is effected by leaving the summons with a person other than the accused, the constable must tell the person, with whom he leaves it, that it is for the defendant; and the person with whom the summons is left should be made to understand the nature of it. (47)

The affidavit or other proof of service of a summons must, (in case of the accused not appearing), shew either that the service was personal, or, if the service has not been made personally, it must shew that the accused could not be conveniently met with and that the summons was left for him at his last or most usual *place of abode* with an *inmate* thereof, of the age of at least sixteen years.

So, that, where the proof of service shewed that a copy of the summons was served on the defendant's wife, at the defendant's last place of abode, but omitted to state that the defendant "could not be conveniently met with," it was held that the proof of service was insufficient. (48)

Where the service of the summons was made by leaving it with a clerk in an hotel of which the accused was the reputed proprietor and in which

(44) For Form E, see p. 689, *post*.
(45) *Ex parte* Rice Jones, 1 L. M. & P., 357.
(46) R. v. Chandler, 14 East, 267.
(47) *Ex parte* Smith, 39 J. P., 614.
(48) R. v. Carrigan, 17 C. L. T., 224. See, also, *Ex parte* Hogan, 32 N. B. R., 247, 13 C. L. T., 315, 3 Can. Cr. Cas., 286; *Ex parte* Donovan, 32 N. B. R., 374; *Ex parte* Fleming, 14 C. L. T., 106, and other cases, fully cited under section 843, *post*.

he resided, it was held that this was not sufficient evidence of service, as it was not shewn that the clerk was an *inmate* of the accused's last or most usual place of abode. (49)

**563. Warrant to arrest, in the first instance.** — The warrant issued by a justice for the apprehension of the person against whom an information or complaint has been laid as provided in section five hundred and fifty-eight may be in the FORM F in SCHEDULE ONE hereto, (50) or to the like effect. No such warrant shall be signed in blank.

2. Every such warrant shall be under the hand and seal of the justice issuing the same, and may be directed, either to any constable by name, or to such constable, and all other constables within the territorial jurisdiction of the justice issuing it, or generally to all constables within such jurisdiction.

3. The warrant shall state shortly the offence for which it is issued, and shall name or otherwise describe the offender, and it shall order the officer or officers to whom it is directed to apprehend the offender and bring him before the justice or justices issuing the warrant, or before some other justice or justices, to answer to the charge contained in the said information or complaint, and to be further dealt with according to law. It shall not be necessary to make such warrant returnable at any particular time, but the same shall remain in force until it is executed.

4. The fact that a summons has been issued shall not prevent any justice from issuing such warrant at any time before or after the time mentioned in the summons for the appearance of the accused; and where the service of the summons has been proved and the accused does not appear, or when it appears that the summons cannot be served, the warrant (FORM G) may issue. (51) R. S. C., c. 174, ss. 43, 44 and 46.

**564. Execution of warrant.** — Every such warrant may be executed by arresting the accused wherever he is found in the territorial jurisdiction of the justice by whom it is issued, or in the case of fresh pursuit, at any place in an adjoining territorial division within seven miles of the border of the first-mentioned division. R. S. C., c. 174, ss. 47 and 48.

2. Every such warrant may be executed by any constable named therein, or by any one of the constables to whom it is directed, whether or not the place in which it is to be executed is within the place for which he is constable.

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(49) *Ex parte* Wallace, 19 C. L. T., 406. And see *Re* Barron, Can. Ann. Dig. (1897) 51, also fully cited under section 843, *post*.

(50) For Form F, see p. 690, *post*.

(51) For Form G, see p. 690, *post*.

3. Every warrant authorized by this Act may be issued and executed on a Sunday or statutory holiday. R. S. C., c. 174, ss. 47 and 48.

For the meaning of the expression "holiday," see clause 26 of section 7 of the *Interpretation Act*, set out at p. 10, *ante*.

The police have a right, under a warrant for the arrest of a person charged with stealing goods, to take possession of the goods; and any property found in the possession of a person arrested for an indictable offence may, — if believed to have been used for the purpose of committing the offence, — be seized and detained as evidence in support of the charge. (52)

See further comments on this subject under section 577, *post*.

See section 17, *ante*, and comments thereunder, as to the execution of lawful warrants and the justification thereof.

**565. Proceeding when the offender is not within the justice's jurisdiction.** — If the person against whom any warrant has been issued cannot be found within the jurisdiction of the justice by whom the same was issued, but is or is suspected to be in any other part of Canada, any justice within whose jurisdiction he is or is suspected to be, upon proof being made on oath or affirmation of the hand-writing of the justice who issued the same, shall make an endorsement on the warrant, signed with his name, authorizing the execution thereof within his jurisdiction; and such endorsement shall be sufficient authority to the person bringing such warrant, and to all other persons to whom the same was originally directed, and also to all constables of the territorial division where the warrant has been so endorsed, to execute the same therein and to carry the person against whom the warrant issued, when apprehended, before the justice who issued the warrant, or before some other justice for the same territorial division. Such endorsement may be in the FORM H in SCHEDULE ONE hereto. (53) R. S. C., c. 174, s. 49.

**566. Disposal of person arrested on endorsed warrant.** — If the prosecutor or any of the witnesses for the prosecution are in the territorial division where such person has been apprehended upon a warrant endorsed as provided in the last preceding section the constable or other person or persons who have apprehended him may, if so directed by the justice endorsing the warrant, take him before such justice, or before some other justice for the same territorial division; and the said justice may thereupon take the examination of such prosecutor or witnesses, and proceed in every respect as if he had himself issued the warrant. R. S. C., c. 174, s. 50.

(52) Dillon v. O'Brien, 16 Cox C. C., 245.
(53) For Form H, see p. 691, *post*.

**567. Bringing arrested person before a justice.** — When any person is arrested upon a warrant he shall, except in the case provided for in the next preceding section, be brought as soon as is practicable before the justice who issued it or some other justice for the same territorial division, and such justice shall either proceed with the inquiry or postpone it to a future time, in which latter case he shall either commit the accused person to proper custody or admit him to bail or permit him to be at large on his own recognizance according to the provisions hereinafter contained.

**568. Coroner's inquisition.**—Every coroner, upon any inquisition taken before him whereby any person is charged with manslaughter or murder, shall (if the person or persons, or either of them, affected by such verdict or finding be not already charged with the said offence before a magistrate or justice), by warrant under his hand, direct that such person be taken into custody and be conveyed, with all convenient speed, before a magistrate or justice; or such coroner may direct such person to enter into a recognizance before him, with or without a surety or sureties, to appear before a magistrate or justice. In either case, it shall be the duty of the coroner to transmit to such magistrate or justice, the depositions taken before him in the matter. Upon any such person being brought or appearing before any such magistrate or justice, he shall proceed in all respects as though such person had been brought or had appeared before him upon a warrant or summons.

Section 642, *post*, declares that no one shall henceforth be tried on any Coroner's inquisition.

See comments under section 642, *post*.

**569. Search warrants, generally.** — Any justice who is satisfied by information upon oath in the FORM J in SCHEDULE ONE hereto, (54) that there is reasonable ground for believing that there is in any building, receptacle, or place —

(*a*) anything upon or in respect of which any offence against this Act has been or is suspected to have been committed; or

(*b*) anything which there is reasonable ground to believe will afford evidence as to the commission of any such offence; or

(*c*) anything which there is reasonable ground to believe is intended to be used for the purpose of committing any offence against the person for which the offender may be arrested without warrant—may at any time issue a warrant under his hand authorizing some constable *or other person named therein* to search such building, receptacle or place, for any such thing, and to seize and carry it before the justice issuing the warrant, or some other jus-

(54) For Form J, see p. 692, *post*.

tice for the same territorial division to be by him dealt with according to law. R. S. C., c. 174, ss. 51 and 52.

2. Every search warrant shall be executed by day, unless the justice shall by the warrant authorize the constable or other person to execute it at night.

3. Every search warrant may be in the FORM I in SCHEDULE ONE hereto, (55) or to the like effect.

4. When any such thing is seized and brought before such justice he may detain it, taking reasonable care to preserve it till the conclusion of the investigation; and, if any one is committed for trial, he may order it further to be detained for the purpose of evidence on the trial. If no one is committed, the justice shall direct such thing to be restored to the person from whom it was taken, except in the cases next hereinafter mentioned, unless he is authorized or required by law to dispose of it otherwise. In case any improved arm or ammunition in respect to which any offence under section one hundred and sixteen has been committed has been seized, it shall be forfeited to the Crown. R. S. C., c. 50, s. 101.

5. If under any such warrant there is brought before any justice any forged bank note, bank note-paper, instrument or other thing, the possession whereof in the absence of lawful excuse is an offence under any provision of this or any other Act, the court to which any such person is committed for trial or, if there is no commitment for trial, such justice may cause such thing to be defaced or destroyed. R. S. C., c. 174, s. 55.

6. If under any such warrant there is brought before any justice, any counterfeit coin or other thing the possession of which with knowledge of its nature and without lawful excuse is an indictable offence under any provision of Part XXXV of this Act, every such thing as soon as it has been produced in evidence, or as soon as it appears that it will not be required to be so procured, shall forthwith be defaced or otherwise disposed of as the justice or the court directs. R. S. C., c. 174, s. 56.

7. Every person acting in the execution of any such warrant may seize any explosive substance which he has good cause to suspect is intended to be used for any unlawful object, — and shall, with all convenient speed, after the seizure, remove the same to such proper place as he thinks fit, and detain the same until ordered by a judge of a Superior Court to restore it to the person who claims the same. R. S. C., c. 150, s. 11.

8. Any explosive substance so seized shall, in the event of the person in whose possession the same is found, or of the owner

(55) For Form I, see p. 692, *post*.

thereof, being convicted of any offence under Part VI of this Act, be forfeited; and the same shall be destroyed or sold under the direction of the court before which such person is convicted, and, in the case of sale, the proceeds arising therefrom shall be paid to the Minister of Finance and Receiver General, for the public uses of Canada. R. S. C., c. 150, s. 12.

9. If offensive weapons believed to be dangerous to the public peace are seized under a search warrant the same shall be kept in safe custody in such place as the justice directs, unless the owner thereof proves, to the satisfaction of such justice, that such offensive weapons were not kept for any purpose dangerous to the public peace; and any person from whom any such offensive weapons are so taken may, if the justice of the peace upon whose warrant the same are taken, upon application made for that purpose, refuses to restore the same, apply to a judge of a superior or county court for the restitution of such offensive weapons, upon giving ten days' previous notice of such application to such justice; and such judge shall make such order for the restitution or safe custody of such offensive weapons as upon such application appears to him to be proper. R. S. C., c. 149, ss. 2 and 3.

10. If goods or things by means of which it is suspected that an offence has been committed under Part XXXIII, are seized under a search warrant, and brought before a justice, such justice and one or more other justice or justices shall determine summarily whether the same are or are not forfeited under the said Part XXXIII ; and if the owner of any goods or things which, if the owner thereof had been convicted, would be forfeited under this Act, is unknown or cannot be found, an information or complaint may be laid for the purpose only of enforcing such forfeiture, and the said justice may cause notice to be advertised stating that unless cause is shown to the contrary at the time and place named in the notice, such goods or things will be declared forfeited; and at such time and place the justice, unless the owner, or any person on his behalf, or other person interested in the goods or things, shows cause to the contrary, may declare such goods or things, or any of them, forfeited. 51 V., c. 41, s. 14.

It sometimes happens that, without any direct proof of guilt existing against a party, there is evidence of his being in possession of goods which have been stolen and which the owner is able to identify. In such a case, criminal proceedings may be initiated by an application to a justice for a search warrant, which being granted, the suspected premises are searched by a constable, and should the goods be discovered, they are taken possession of, and the occupier of the premises whereon they are found is himself apprehended and brought before the magistrate to answer the charge either of having stolen them or of having received them knowing them to have been stolen.

When the charge is likely to mould itself into one of receiving goods knowing them to have been stolen, the obtaining of a search warrant in the first instance will be the most advisable course, since the prosecutor is thereby enabled at the same time not only to seize the goods upon the premises before they are made away with, — and so obtain cogent evidence in support of his case, — but also to apprehend the party suspected of guilt in the transaction; whereas, if merely a warrant to apprehend be obtained in the first instance, great difficulty may afterwards be experienced in getting at the property, and a case, otherwise almost conclusive, may fail for want of the necessary evidence to support it.

When, therefore, a party whose goods have been stolen has reasonable grounds for suspecting that they are upon the premises of some other person, he should go before a justice having jurisdiction in the district where the premises to be searched are situate, and make oath by himself or by witness of the facts upon which he bases his application ; and, upon the justice being satisfied either that the goods have been stolen, or that there is reason to suspect they are stolen, and that there is also reason to believe they are upon the premises indicated, he will grant his warrant to search the premises and seize the goods and also to apprehend the party in whose possession they may be found. (56)

The above section 569 authorizes the issue of a search warrant whenever the justice is satisfied by information upon oath that there is reasonable ground for believing that there is in any premises, 1, anything upon or in respect of which any offence has been or is suspected to have been committed, or, 2, anything which there is reasonable ground to believe will afford evidence as to the commission of any offence, or, 3, anything which there is reasonable ground to believe is *intended to be used* to commit any offence for which the offender may be arrested without warrant.

To justify a magistrate in granting a search warrant to search for stolen goods, the information made before him need not allege that the goods have been actually stolen, but it is sufficient if the information can be fairly understood as alleging reasonable grounds for *suspecting* that the goods have been stolen; and the search warrant need not specify the goods for which search is desired. (57)

The constable to whom a search warrant is directed and to whom it is entrusted should use great caution in the execution of it. He should be accompanied to the premises by the owner of the property or by some other person able to point out and swear to the goods in question. If the premises are closed and the con-

(56) Elsee v. Smith, 1 D. & R., 97.
(57) Jones v. German, 18 Cox C. C., 411, 497; [1896] 2 Q. B., 418.

stable is denied admission after making demand of admission and disclosing his authority and the object of his visit, the premises may be forced open by him.

In making the search, care must be taken that no other goods than those designated in the warrant, (58) or such as have been actually stolen, (59) be seized.

Should the goods sought for be found, the constable will seize and keep them in his possession, and he will then, also, by virtue of his warrant, apprehend the person on whose premises they have been found and take him before the magistrate to answer the charge which will then be preferred against him.

Where, on the preliminary enquiry into a charge of having and concealing property belonging to another, the prisoner was acquitted of any wrongful taking, detention or concealment thereof, it was held that the magistrate was still entitled to retain the property, if proved to have been stolen, until the offence could be tried, or until for some sufficient reason no trial could be had ; but that if it appear that the property was not stolen it should be returned to the owner. (60)

**570. Search for public stores.** — Any constable or other peace officer, if deputed by any public department, may, within the limits for which he is such constable or peace officer, stop, detain and search any person reasonably suspected of having or conveying in any manner any public stores defined in section three hundred and eighty-three, stolen or unlawfully obtained, or any vessel, boat or vehicle in or on which there is reason to suspect that any public stores stolen or unlawfully obtained may be found.

2. A constable or other peace officer shall be deemed to be deputed within the meaning of this section, if he is deputed by any writing signed by the person who is the head of such department, or who is authorized to sign documents on behalf of such department.

**571. Search warrant for mined gold, silver, etc.** — On complaint in writing made to any justice of the county, district or place, by any person interested in any mining claim, that mined gold or gold-bearing quartz, or mined or unmanufactured silver or silver-ore, is unlawfully deposited in any place, or held by any person contrary to law, a general search warrant may be issued by such justice, as in the case of stolen goods, including any number of places or persons named in such complaint; and if, upon such

(58) Price v. Messenger, 2 B. & P., 158; Bell v. Oakley, 2 M. & Sel., 259.
(59) Crozier v. Cundy, 6 B. & C., 232.
(60) Howell v. Armour, 7 Ont. R., 363.

search, any such gold or gold-bearing quartz, or silver or silver-ore is found to be unlawfully deposited or held, the justice shall make such order for the restoration thereof to the lawful owner as he considers right.

2. The decision of the justice in such case is subject to appeal as in ordinary cases coming within the provisions of Part LVIII. R. S. C., c. 174, s. 53.

As to conditions of Appeal, see section 880, *post*.

**572. Search by peace officer for detained lumber, etc.** — If any constable or other peace officer has reasonable cause to suspect that any timber, mast, spar, saw-log or other description of lumber, belonging to any lumberman or owner of lumber, and bearing the registered trade-mark of such lumberman or owner of lumber, is kept or detained in any saw-mill, mill-yard, boom or raft, without the knowledge or consent of the owner, such constable or other peace officer may enter into or upon the same, and search or examine for the purpose of ascertaining whether such timber, mast, spar, saw-log or other description of lumber is detained therein without such knowledge and consent. R. S. C., c. 174, s. 54.

**573. Search for and seizure of intoxicating liquors on Her Majesty's Ships.** — Any officer in Her Majesty's service, any warrant or petty officer of the navy, or any non-commissioned officer of marines, with or without seamen or persons under his command, may search any boat or vessel which hovers about or approaches, or which has hovered about or approached, any of Her Majesty's ships or vessels mentioned in section one hundred and nineteen, Part VI, of this Act, and may seize any intoxicating liquor found on board such boat or vessel; and the liquor so found shall be forfeited to the Crown. 50-51 V., c. 46, s. 3.

The words "His Majesty's" should be here substituted for "Her Majesty's." (See section 7 of the *Interpretation Act*, at p. 9, *ante*.

**574. Warrants to search houses of ill-fame.** — Whenever there is reason to believe that any woman or girl mentioned in section one hundred and eighty-five, Part XIII, has been inveigled or enticed to a house of ill-fame or assignation, then upon complaint thereof being made under oath by the parent, husband, master or guardian of such woman or girl, or in the event of such woman or girl having no known parent, husband, master nor guardian in the place in which the offence is alleged to have been committed, by any other person, to any justice of the peace, or to a judge of any court authorized to issue warrants in cases of alleged offences against the criminal law, such justice of the peace or judge of the court may issue a warrant to enter, by day or night, such house

of ill-fame or assignation, and if necessary use force for the purpose of effecting such entry whether by breaking open doors or otherwise, and to search for such woman or girl, and bring her, and the person or persons in whose keeping and possession she is, before such justice of the peace or judge of the court, who may, on examination, order her to be delivered to her parent, husband, master or guardian, or to be discharged, as law and justice require. R. S. C., c. 157, s. 7.

**575. Searching gaming houses, betting houses, and lotteries.** — (As amended by the 58-59 Vic., c. 40). — If the chief constable or deputy chief constable of any city, town, incorporated village or other municipality or district, organized or unorganized, or place, or other officer authorized to act in his absence, reports in writing to any of the commissioners of police or to the mayor or chief magistrate or to the police magistrate of such city, town, incorporated village or other municipality, district or place, or to any police magistrate having jurisdiction there, or if there be no such mayor, or chief magistrate, or police magistrate, to any justice of the peace having such jurisdiction, that there are good grounds for believing, and that he does believe that any house, room or place within the said city or town, incorporated village or other municipality, district or place is kept or used as a common gaming or betting house as defined in part XIV., sections one hundred and ninety-six and one hundred and ninety-seven, or is used for the purpose of carrying on a lottery, or for the sale of lottery tickets, or for the purpose of conducting or carrying on any scheme, contrivance or operation for the purpose of determining the winners in any lottery contrary to the provisions of part XIV., section two hundred and five, whether admission thereto is limited to those possessed of entrance keys or otherwise, the said commissioners or commsisioner, mayor, chief magistrate, police magistrate or justice of the peace, may, by order in writing, authorize the chief constable, deputy chief constable, or other officer as aforesaid, to enter any such house, room or place, with such constables as are deemed requisite by him, and if necessary to use force for the purpose of effecting such entry, whether by breaking open doors or otherwise, and to take into custody all persons who are found therein, and to seize, as the case may be (1) all tables and instruments of gaming or betting, and all moneys and securities for money, and (2) all instruments or devices for the carrying on of such lottery, or of such scheme, contrivance or operation, and all lottery tickets, found in such house or premises, and to bring the same before the person issuing such order or some other justice, to be by him dealt with according to law.

2. The chief constable, deputy chief constable or other officer making such entry, in obedience to any such order, may, with the assistance of one or more constables, search all parts of the house,

room or place which he has so entered, where he suspects that tables or instruments of gaming or betting or any instruments or devices for the carrying on of such lottery or of such scheme, contrivance or operation, or any lottery tickets, are concealed, and all persons whom he finds in such house or premises, and seize all tables and instruments of gaming or betting, or any such instruments or devices or lottery tickets as aforesaid, which he so finds.

3. The justice before whom any person is taken by virtue of an order or warrant under this section, may direct any cards, dice, balls, counters, tables or other instruments of gaming, or used in playing any game, or of betting, or any such instruments or devices for the carrying on of a lottery, or for the conducting or carrying on of any such scheme, contrivance or operation, or any such lottery tickets, so seized as aforesaid, to be forthwith destroyed, and any money or securities so seized shall be forfeited to the Crown for the public uses of Canada.

4. The expression "chief constable" includes the chief of police, city marshal or other head of the police force of any such city, town, incorporated village or other municipality, district or place, and in the province of Quebec, the high constable of the district, and means any constable of a municipality, district or place which has no chief constable or deputy chief constable.

5. The expression "deputy chief constable" includes deputy chief of police, deputy or assistant marshal or other deputy head of the police force of any such city, town, incorporated village, or other municipality, district or place, and in the province of Quebec, the deputy high constable of the district; and the expression "police magistrate" includes stipendiary and district magistrates.

In October 1893, in execution of a warrant issued by a police magistrate, the deputy high constable of Montreal seized certain moneys and instruments of gaming in a common gaming-house, and, in due course, these monies and gaming instruments were, by the police magistrate, declared forfeited. *Held*, by the Supreme Court of Canada, affirming the judgment of the Court of Appeal for the province of Quebec, that the seizure of the moneys and instruments was legal and that the police magistrate's order declaring them forfeited could not be impeached in an action for their revendication brought against the High Constable and against the Clerk of the Peace for the recovery of the moneys and things so confiscated.(61)

Sections 9 and 10 of the R. S. C., chap. 158, (which are unrepealed), (62) empower a police magistrate to swear and examine, when brought before him, any persons found in any gaming-house entered and searched under the provisions of section 575. These sections are as follows: —

"The police magistrate, mayor or justice of the peace, before whom any person is brought who has been found in any house, room or place, entered

(61) O'Neil v. Atty. Gen. for Can., 16 C. L. T., 179; 26 S. C. R., 122; 1 Can. Cr. Cas., 303.

(62) See SCHEDULE TWO, *post*.

in pursuance of any warrant or order issued under this Act, may require any such person to be examined on oath and to give evidence touching any unlawful gaming in such house, room or place, or touching any act done for the purpose of preventing, obstructing or delaying the entry, into such house, room or place, or any part thereof, of any constable or officer authorized as aforesaid; and no person so required to be examined as a witness shall be excused from being so examined when brought before such police magistrate, mayor or justice of the peace, or from being so examined at any subsequent time by or before the police magistrate or mayor, or any justice of the peace, or by or before any court, on any proceeding, or on the trial of any indictment, information, action or suit in anywise relating to such unlawful gaming or any such acts as aforesaid, or from answering any question put to him touching the matters aforesaid, on the ground that his evidence will tend to criminate himself; and any such person so required to be examined as a witness who refuses to make oath accordingly, or to answer any such question, shall be subject to be dealt with in all respects as any person appearing as a witness before any justice or court in obedience to a summons or subpœna and refusing without lawful cause or excuse to be sworn or to give evidence, may, by law, be dealt with; but nothing in this section shall render any offender, under the sixth section of this Act, liable on his trial to examination hereunder." (Section 9.)

"Every person so required to be examined as a witness, who, upon such examination, makes true disclosure, to the best of his knowledge, of all things as to which he is examined shall receive from the judge, justice of the peace, magistrate, examiner or other judicial officer before whom such proceeding is had, a certificate in writing to that effect, and shall be freed from all criminal prosecutions and penal actions, and from all penalties, forfeitures and punishments to which he has become liable for anything done before that time in respect of the matters regarding which he has been examined; but, such certificate shall not be effectual for the purpose aforesaid, unless it states that such witness made a true disclosure in respect to all things as to which he was examined; and any action, indictment or proceedings pending or brought in any court against such witness, in respect of any act of gaming regarding which he was so examined, shall be stayed, upon the production and proof of such certificate, and upon summary application to the court in which such action, indictment or proceeding is pending, or any judge thereof, or any judge of any of the superior courts of any province." (Section 10.)

See sections 702 and 703, *post*, (as amended by the *Criminal Code Amendment Act, 1900*), as to *prima facie* evidence of a place being a common gaming-house, and that persons found therein were playing there.

**576. Warrant to search for vagrants.** — Any stipendiary or police magistrate, mayor or warden, or any two justices of the peace, upon information before them made, that any person described in Part XV, as a loose, idle or disorderly person, or vagrant, is or is reasonably suspected to be harboured or concealed in any disorderly house, bawdy-house, house of ill-fame, tavern or boarding-house, may, by warrant, authorize any constable or other person to enter at any time such house or tavern, and to apprehend and bring before them or any other justices of the peace, every person found therein so suspected as aforesaid. R. S. C., c. 157, s. 8.

**Other search warrants and Powers of Search and Entry.** — In the *North West Territories*, any justice of the peace or any judge of the Supreme Court of the Territories may, upon a sworn complaint made before him

that any intoxicating liquor is manufactured, imported, sold, etc., in violation of the *North West Territories Act*, issue a search warrant as in cases of stolen goods. (63) And in the District of Keewatin, a similar warrant to search for intoxicating liquor may upon a like complaint, be issued by any judge, stipendiary magistrate or justice of the peace. (64)

An inspector, under the *Animal Contagious Diseases Act*, may enter any field, stable, cow-shed or other premises within his district, in which he has reasonable ground for supposing that any animal affected with any infectious or contagious disease is to be found, but shall, if required, state in writing the ground on which he so enters. And he may enter any steamship, steamer, vessel or boat in respect of which he has reasonable ground for supposing that any company or person has failed to obey any order for cleansing and desinfecting a steamship, steamer, etc. (65)

Under the *Seamen's Act*, justices of the peace at any port or place in the provinces of Quebec, Nova Scotia, New Brunswick, Prince Edward Island, and British Columbia, are authorized to grant warrants to search for seamen or apprentices unlawfully concealed or secreted; and any police officer or constable required by the Act to assist in apprehending any seaman or apprentice unlawfully absenting himself from his ship may enter any tavern, inn, ale house, beer house, seamen's boarding house, or other house or place of entertainment, or into any liquor shop or other refreshment place, or any house of ill-fame. (66) And, under the *Inland Waters' Seamen's Act*, similar powers are given to justices of the peace, at any port in Canada, to grant warrants to search for seamen unlawfully harbored or secreted, and to police officers and constables to enter taverns, etc. (67)

Under the *Wrecks and Salvage Act*, a wreck receiver, who suspects that any wreck is secreted or concealed, may obtain from any justice of the peace a search warrant to search for, remove, and obtain the secreted wreck. (68)

Any superintendent of harbor and river police, and any constable appointed under the authority of the Act respecting the Harbor and River Police of the province of Quebec, may board any vessel for the purpose of arresting or searching for any person for whose arrest a warrant has been issued. (69)

A fishery officer or other justice of the peace may search or grant a warrant to search any vessel or any place where there is reason to believe that any fish taken in violation of the *Fisheries' Act*, or anything used in violation thereof, is concealed. (70) And certain officers and persons are, by the *Act respecting Fishing by Foreign Vessels*, and its amendments, empowered to bring, into port, any ship, vessel or boat being within any harbor in Canada or hovering in British waters within three marine miles of any of the coasts, bays, creeks or harbors in Canada, and to search her cargo. (71)

Any gas inspector, appointed under the *Gas Inspection Act*, may at all reasonable hours enter any place within his district to inspect the meter delivered to a purchaser and used for measuring gas; (72) and, under the

(63) R. S. C., c. 50, section 94.
(64) R. S. C., c. 53, section 37.
(65) R. S. C., c. 69, sections 34, 35.
(66) R. S. C., c. 74, sections 119, 124.
(67) R. S. C., c. 75, ss. 42, 43.
(68) R. S. C., c. 81, section 41.
(69) R. S. C., c. 89, section 6.
(70) R. S. C., c. 95, section 17, par. 2.
(71) R. S. C., c. 114, section 1.
(72) R. S. C., c. 101, section 6.

*Petroleum Inspection Act*, any duly authorized inspector may at any time during ordinary business hours enter the refinery, shop or warehouse of any person, who refines or keeps petroleum or naphtha for sale, in order to test the quality of the petroleum or naphtha therein found. (73)

A weights' and measures' inspector or his assistant may, at all reasonable times, enter any place, within his division, where any commodity is bought, sold, exposed or kept for sale, etc., and there examine all weights, measures, scales, steelyards or other weighing machines. (74)

For the provisions respecting the issue of search warrants to search for weapons or for intoxicating liquor in the vicinity of public works, see sections 8 and 16 of the R. S. C., c. 151, set out in the APPENDIX to the present Code, *post*, and with regard to warrants to search for property alleged to have been stolen, etc., by a fugitive offender, see section 12 of the R. S. C., c. 143, set out in the EXTRA APPENDIX, *post*.

In those portions of the *North West Territories*, in which the law relating to the prohibition of intoxicating liquor remains in force, the members of the North West Mounted Police Force may, upon reasonable grounds of suspicion and without any process of law, enter any shop, store, hut, tent, wigwam, dwelling or building, or place or enclosure, and enter and stop and detain, while travelling, any vessel, canoe, carriage, wagon, cart, sleigh, or other vehicle and search all parts thereof, and any receptacles of any kind, for spirits, etc., or intoxicating drink of any kind, and break all receptacles found containing the same; but no constable shall so enter any hut, tent, wigwam, or dwelling, unless accompanied by or under the order of a commissioned officer. (75)

Any game guardian, who has reason to suspect that a breach of any provision of the Act for the preservation of game in the unorganized portions of the *North West Territories* has been committed, or that any part of any beast or bird, in respect of which such a breach has been committed is likely to be in any tent or premises or on board any vessel or in any conveyance may issue a warrant to any constable to enter and search such tent, etc., and, if found, to seize such beast, etc. (76)

Under the *Electric Light Inspection Act*, any officer of the contractors furnishing electricity for lighting purposes may, by written authority of the Inspector, enter, at all reasonable times, any premises to which electricity is or has been supplied by the contractors, in order to inspect their electric wires, etc., or to ascertain the quantity of electricity consumed, etc. (77)

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(73) R. S. C., c. 102, section 17.
(74) R. S. C., c. 104, section 45; 51 Vic., c. 25; 52 Vic., c. 17.
(75) See the *North West Mounted Police Act, 1894*, 57-58 Vic., c. 27, section 13.
(76) 57-58 Vic., c. 31, section 20.
(77) 57-58 Vic., c. 39, section 11.

## FORMS UNDER PART XLIV.

FROM

SCHEDULE ONE.

A. — (*Section* 557.)

WARRANT TO CONVEY BEFORE A JUSTICE OF ANOTHER COUNTY.

Canada,
Province of ,
County of .

Whereas information upon oath was this day made before the undersigned, that A. B. of , on the day of , in the year , at , in the county of *(state the charge)*.

And whereas I have taken the deposition of X. Y. as to the said offence.

And whereas the charge is of an offence committed in the county of

This is to command you to convey the said *(name of accused)*, of , before some justice of the last-mentioned county, near the above place, and to deliver to him this warrant and the said deposition.

Dated at , in the said county of this day of , in the year

J. S.,

*J. P., (Name of County.)*

To of

B. — (*Section* 557.)

RECEIPT TO BE GIVEN TO THE CONSTABLE BY THE JUSTICE FOR THE COUNTY IN WHICH THE OFFENCE WAS COMMITTED.

Canada,
Province of ,
County of .

I., J. L., a justice of the peace in and for the county of , hereby certify that W. T., peace officer of the county of , has, on this day of , in the year by virtue of and in obedience to a warrant of J. S., Esquire, a justice of the peace in and for the county of , produced before me one A. B., charged before the said J. S., with having *(etc., stating shortly the offence)*, and delivered him into the custody of by my direction, to answer to the said charge, and further to be dealt with according to law, and has also delivered unto me the said warrant, together with the information *(if any)* in that behalf, and the deposition (*s*) of C. D. (*and of* ), in the said warrant mentioned, and that he has also proved to me, upon oath, the handwriting of the said J. S. subscribed to the same.

Dated the day and year first above mentioned, at in the said county of

J. L.,

*J. P., (Name of County.)*

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C. — (*Section* 558.)

INFORMATION AND COMPLAINT FOR AN INDICTABLE OFFENCE.

Canada,
Province of ,
County of .

The information and complaint of C. D. of (*yeoman*), taken this day of , in the year , before the undersigned (*one*) of Her Majesty's justices of the peace (78) in and for the said county of , who saith that (*&c., stating the offence*).

Sworn before (*me*), the day and year first above mentioned, at

J. S.,

*J. P., (Name of County.)*

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(78) Substitute the words "His Majesty's" for "Her Majesty's," in this and the following forms.

D. — (*Section* 560.)

WARRANT TO APPREHEND A PERSON CHARGED WITH AN INDICTABLE OFFENCE COMMITTED ON THE HIGH SEAS OR ABROAD.

*For offences committed on the high seas the warrant may be the same as in ordinary cases, but describing the offence to have been committed* "on the high seas, out of the body of any district or county of Canada and within the jurisdiction of the Admiralty of England."

*For offences committed abroad, for which the parties may be indicted in Canada, the warrant also may be the same as in ordinary cases, but describing the offence to have been committed* "on land out of Canada, to wit: at in the Kingdom of ,*or*, at , in the Island of , in the West Indies, *or* at , in the East Indies," *or as the case may be.*

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E. — (*Section* 562.)

SUMMONS TO A PERSON CHARGED WITH AN INDICTABLE OFFENCE.

Canada,
Province of ,
County of .

To A. B., of , (*labourer*):

Whereas you have this day been charged before the undersigned , a justice of the peace in and for the said county of , for that you on , at (*stating shortly the offence*): These are therefore to command you, in Her Majesty's name, to be and appear before (*me*) on , at o'clock in the (fore) noon, at , or before such other justice or justices of the peace for the same county of , as shall then be there, to answer to the said charge, and to be further dealt with according to law. Herein fail not.

Given under (*my*) hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL]

*J. P., (Name of County.)*

F. — (*Section* 563.)

WARRANT IN THE FIRST INSTANCE TO APPREHEND A PERSON CHARGED WITH AN INDICTABLE OFFENCE.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of

Whereas A. B. of , (*labourer*), has this day been charged upon oath before the undersigned , a justice of the peace in and for the said county of , for that he, on , at , did (*&c., stating shortly the offence*). These are therefore to command you, in Her Majesty's name, forthwith to apprehend the said A. B., and to bring him before (*me*) (or some other justice of the peace in and for the said county of ), to answer unto the said charge, and to be further dealt with according to law.

Given under (*my*) hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL]

*J. P., (Name of County.)*

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G. — (*Section* 563.)

WARRANT WHEN THE SUMMONS IS DISOBEYED.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of

Whereas on the day of , (instant *or* last past) A. B., of , was charged before (*me* or *us,*) the undersigned (*or name the justice or justices, or as the case may be,* (*a*) justice of the peace in and for the said county of , for that (*&c., as in the summons*); and whereas I (*or* he *the said justice of the peace, or* we *or* they *the said justices of the peace*) did then issue (*my, our his* or *their*) summons to the said A. B., commanding him, in Her Majesty's name, to be and appear before (*me*) on at o'clock in the (fore) noon, at , or before such other justice or jus-

tices of the peace as should then be there, to answer to the said charge and to be further dealt with according to law; and whereas the said A. B. has neglected to be or appear at the time and place appointed in and by the said summons, although it has now been proved to (*me*) upon oath that the said summons was duly served upon the said A. B.: These are therefore to command you in Her Majesty's name, forthwith to apprehend the said A. B., and to bring him before (*me*) or some other justice of the peace in and for the said county of , to answer the said charge, and to be further dealt with according to law.

Given under (*my*) hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL]

*J. P., (Name of County.)*

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H. — (*Section* 565.)

ENDORSEMENT IN BACKING A WARRANT.

Canada,
Province of ,
County of .

Whereas proof upon oath has this day been made before me a justice of the peace in and for the said county of , that the name of J. S. to the within warrant subscribed, is of the handwriting of the justice of the peace within mentioned: I do therefore hereby authorize W. T. who brings to me this warrant and all other persons to whom this warrant was originally directed, or by whom it may be lawfully executed, and also all peace officers of the said county of , to execute the same within the said last mentioned county.

Given under my hand, this day of , in the year , at , in the county aforesaid.

J. L.,

*J. P., (Name of County.)*

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I. — (*Section* 569).

WARRANT TO SEARCH.

Canada,
Province of ,
County of .

Whereas it appears on the oath of A. B. of , that there is reason to suspect that (*describe things to be searched for and offence in respect of which search is made*) are concealed in at

This is, therefore, to authorize and require you to enter between the hours of (*as the justice shall direct*) into the said premises, and to search for the said things, and to bring the same before me or some other justice.

Dated at , in the said county of , this day of , in the year

J. S.,

*J. P., (Name of County.)*

To of

———

J. — (*Section* 569.)

INFORMATION TO OBTAIN A SEARCH WARRANT.

(As amended by the *Criminal Code Amendment Act, 1900*).

Canada,
Province of ,
County of .

The information of A. B., of in the said county (*yeoman*), taken this day of , in the year , before me, J. S., Esquire, a justice of the peace, in and for the district (*or* county, *etc.*,) of who says that (*describe things to be searched for and offence in respect of which search is made*), and that he has just and reasonable cause to suspect, and suspects, that the said goods and chattels, or some part of them are concealed in the (*dwelling-house, &c.*) of C. D., of in the said district (*or* county, *etc.*) (*here add the causes of suspicion whatever they may be*) : Wherefore (*he*) prays

that a search warrant may be granted to him to search the (*dwelling-house, &c.*), of the said C. D., as aforesaid, for the said goods and chattels so stolen, taken and carried away as aforesaid (*or as the case may be*).

Sworn (*or* affirmed) before me the day and year first above mentioned, at in the said county of

J. S.,

*J. P., (Name of District or County, etc.).*

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## ADDITIONAL FORM.

### DEPOSITION OF CONSTABLE OR OTHER PEACE OFFICER OF SERVICE OF SUMMONS.

Canada, }
Province of , }
County of , }

The deposition of A. B., of taken at in the said (*county or district*) of this day of A. D., 190 , before me, the undersigned, a justice of the peace (or, *as the case may be*), for the said (*county or district*) of who being duly sworn doth depose and say that at in the (*county or district*), of on the day of he the said A. B. did serve C. D. of with the summons hereunto annexed marked A., (or, *within set forth*), by delivering a duplicate thereof to him the said C. D., in person, [or, *by leaving a duplicate thereof, for him the said C. D., at his last,* (or *most usual*) *place of abode to wit at No. Street, in with an inmate thereof apparently not under sixteen years of age.*]

Taken and sworn, before me, }
at this day }
of A.D. 190 . } A. B.

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PART XLV.

## PROCEDURE ON APPEARANCE OF ACCUSED.

**577. Enquiry by justice.** — When any person accused of an indictable offence is before a justice, whether voluntarily or upon summons, or after being apprehended with or without warrant, or while in custody for the same or any other offence, the justice shall proceed to inquire into the matters charged against such person in the manner hereinafter defined.

Where a justice of the peace issues a summons or a warrant, and the party charged comes or is brought before him in obedience to the summons or warrant, such justice of the peace is seized of the case, and, except at his request, no other magistrate has any jurisdiction therein nor any right to interfere in the preliminary investigation or summary trial of or adjudication upon the charge. (1)

**Property in accused's possession when arrested.** — When a person is apprehended upon a criminal charge, all weapons and everything connected with or having a tendency to throw light upon the subject matter of the charge should be searched for and taken from him, and be kept in safety until the charge is in some way disposed of or some order made in reference thereto. But a prisoner should not be deprived of his property for any other purpose.

It is not right, — although too frequently the course adopted, — for a constable to search a person whom he apprehends, and, unscrupulously, to take from him every particle of property in his possession, without regard to the nature of the charge upon which he is apprehended.

Upon this subject, Mr. Justice Patteson, in a case which came before him, made the following observations: — "The prisoner complains that his money was taken from him and that he was thereby deprived of the means of making his defence. Generally speaking, it is not right that a man's money should be taken away from him, unless it is connected, in some way, with the property stolen. If it is connected with the robbery, it is quite proper that it should be taken, but, unless it is, it is not a fair thing to take away his money which he might require for his defence. (2) And, after the trial of an action of trespass brought by a plaintiff, whose conviction on a charge of infringing the English *Copyright or Designs Act*, had been quashed, Lord Campbell, C. J., said: — "At the conclusion of the trial of this case, I expressed my disapprobation, — which I now repeat, — of the manner in which the plaintiff was searched when taken to the station-house. There is no right, *in a case of this kind*, to inflict the indignity to which the plaintiff was subjected. But I am informed that an erroneous impression of what I said has gone abroad, and that it has been supposed that I asserted that there was *no right in any one to search a prisoner*. I have not said so. It is often the duty of an officer to search a prisoner. If, for instance, a man is taken in the commission of a felony, he may be searched to see whether the stolen articles are in his possession, or whether he has any instrument of violence about him. I have never said that searching a prisoner was a forbidden act. What I said applied to

(1) R. v. McRae, 28 O. R., 569; 2 Can. Cr. Cas., 49; 17 C. L. T., 217.
(2) R. v. O'Donnell, 7 C. & P., 138. See, also, R. v. Kinsey, 7 C. & P., 449, and R. v. Griffiths, 9 J. P., 66.

circumstances such as existed in the present case. If a tradesman be charged with an offence such as that with which the plaintiff in the present case was charged, and he appear by counsel and not in person, and a warrant be issued against him, not charging him with any crime, but merely to make him appear in person, the act of searching him is contrary to law." (3)

There is no doubt that when a person is arrested on a charge of committing a criminal offence, any property in his possession believed to have been used by him for the purpose of committing the offence may be seized and detained as evidence in support of the charge; and if necessary such property may be taken from him by force, provided no unnecessary violence be used. (4)

If an accused has, upon his apprehension, been deprived of his property, an application should be made to the magistrate to order its restoration: and, if it appears to the magistrate, after due consideration of the circumstances, that there is no connection between the subject matter of the charge and the property applied for, and that such property is not the produce of crimes which may form the subject of enquiry, he will act wisely in ordering it to be restored, provided, of course, that the property itself is not of a dangerous nature.

See, after ADDITIONAL FORMS, at the end of this Part, XLV, (at p. 744 *post*), the *Identification of Criminals Act*.

**578. Irregularity in procuring appearance.** — No irregularity or defect in the substance or form of the summons or warrant, and no variance between the charge contained in the summons or warrant and the charge contained in the information, or between either and the evidence adduced on the part of the prosecution at the inquiry, shall affect the validity of any proceeding at or subsequent to the hearing. R. S. C., c. 174, s. 58.

**579. Adjournment in case of variance.** — If it appears to the justice that the person charged has been deceived or misled by any such variance in any summons or warrant, he may adjourn the hearing of the case to some future day, and in the meantime may remand such person, or admit him to bail as hereinafter mentioned. R. S. C., c. 174, s. 59.

**580. Procuring attendance of witnesses.** — If it appears to the justice that any person being or residing within the province is likely to give material evidence either for the prosecution or for the accused on such inquiry he may issue a summons under his hand, requiring such person to appear before him at a time and place mentioned therein to give evidence respecting the charge, and to bring with him any documents in his possession or under his control relating thereto.

2. Such summons may be in the FORM K in SCHEDULE ONE hereto, or to the like effect. R. S. C., c. 174, s. 60. (5)

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(3) Bessell v. Wilson, 17 J. P., 52, 567.
(4) Dillon v. O'Brien & Davis, 16 Cox C. C., 245
(5) For form K, see p. 727 *post*.

**581. Service of summons for witness.** — Every such summons shall be served by a constable or other peace officer upon the person to whom it is directed either personally, or, if such person cannot conveniently be met with, by leaving it for him at his last or most usual place of abode with some inmate thereof apparently not under sixteen years of age.

A witness who is served with the summons or subpœna cannot refuse to attend until his expenses are paid; and it is not necessary, therefore, to tender him his expenses to the time of serving the summons or subpœna. (6)

See section 562 and comments and authorities thereon, at p. 673. *ante*, as to service of summons.

**582. Warrant for witness after summons.**— If any one to whom such last mentioned summons is directed does not appear at the time and place appointed thereby, and no just excuse is offered for such non-appearance, then, (after proof upon oath that such summons has been served as aforesaid, or that the person to whom the summons is directed is keeping out of the way to avoid service) the justice before whom such person ought to have appeared, being satisfied by proof on oath that he is likely to give material evidence, may issue a warrant under his hand to bring such person at a time and place to be therein mentioned before him or any justice in order to testify as aforesaid.

2. The warrant may be in the FORM L IN SCHEDULE ONE hereto, (7) or to the like effect. Such warrant may be executed anywhere within the territorial jurisdiction of the justice by whom it is issued, or, if necessary, endorsed as provided in section five hundred and sixty-five and executed anywhere in the province but out of such jurisdiction. R. S. C., c. 174, s. 61.

3. If a person summoned as a witness under the provisions of this part is brought before a justice on a warrant issued in consequence of refusal to obey the summons such person may be detained on such warrant before the justice who issued the summons, or before any other justice in and for the same territorial division who shall then be there, or in the common gaol, or any other place of confinement, or in the custody of the person having him in charge, with a view to secure his presence as a witness on the day fixed for the trial; or in the discretion of the justice such person may be released on recognizance, with or without sureties, conditioned for his appearance to give evidence as therein mentioned, and to answer for his default in not attending upon the said summons as for contempt; and the justice may, in a summary

(6) R. v. James, 1 C. & P., 322; R. v. Cook, 1 C. & P., 321.

(7) For Form L, see p. 728, post. And for Form of Deposition that a person is a material witness, see "Additional Forms" at the end of this Part.

manner, examine into and dispose of the charge of contempt against such person, who, if found guilty thereof, may be fined or imprisoned, or both, such fine not to exceed twenty dollars, and such imprisonment to be in the common gaol, without hard labour, and not to exceed the term of one month, and may also be ordered to pay the costs incident to the service and execution of the said summons and warrant and of his detention in custody. 51 V., c. 45, s. 1.

(The conviction under this section may be in the FORM PP in SCHEDULE ONE hereto). (8)

**583. Warrant for witness in first instance.** — If the justice is satisfied by evidence upon oath that any person within the province, likely to give material evidence either for the prosecution or for the accused, will not attend to give evidence without being compelled so to do, then instead of issuing a summons, he may issue a warrant in the first instance. Such warrant may be in the FORM M in SCHEDULE ONE hereto, (9) or to the like effect, and may be executed anywhere within the jurisdiction of such justice, or, if necessary, endorsed as provided in section five hundred and sixty-five and executed anywhere in the province but out of such jurisdiction. R. S. C., c. 174, s. 62.

**584. Procuring attendance of witnesses beyond the province.**— If there is reason to believe that any person residing anywhere in Canada out of the province and not being within the province, is likely to give material evidence either for the prosecution or for the accused, any judge of a Superior Court or a County Court, on application therefor by the informant or complainant, or the Attorney-General, or by the accused person or his solicitor or some person authorized by the accused, may cause a writ of subpœna to be issued under the seal of the court of which he is a judge, requiring such person to appear before the justice before whom the inquiry is being held or is intended to be held at a time and place mentioned therein to give evidence respecting the charge and to bring with him any documents in his possession or under his control relating thereto.

2. Such subpœna shall be served personally upon the person to whom it is directed and an affidavit of such service by a person effecting the same purporting to be made before a justice of the peace, shall be sufficient proof thereof.

3. If the person served with a subpœna as provided by this section, does not appear at the time and place specified therein, and

(8) For Form PP, see forms under Part LIV, *post*.
(9) For Form M, see p. 728, post.

no just excuse is offered for his non-appearance, the justice holding the inquiry, after proof upon oath that the subpœna has been served, may issue a warrant under his hand directed to any constable or peace officer of the district, county or place where such person is, or to all constables or peace officers in such district, county or place, directing them or any of them to arrest such person and bring him before the said justice or any other justice at a time and place mentioned in such warrant in order to testify as aforesaid.

4. The warrant may be in the FORM N in SCHEDULE ONE hereto, (10) or to the like effect. If necessary, it may be endorsed in the manner provided by section five hundred and sixty-five, and executed in a district, county or place other than the one therein mentioned.

**585. Commitment of a witness refusing to be examined.** — Whenever any person appearing, either in obedience to a summons or subpœna, or by virtue of a warrant, or being present and being verbally required by the justice to give evidence, refuses to be sworn, or having been sworn, refuses to answer such questions as are put to him or refuses or neglects to produce any documents which he is required to produce, or refuses to sign his depositions without in any such case offering any just excuse for such refusal such justice may adjourn the proceedings for any period not exceeding eight clear days, and may in the meantime by warrant in FORM O in SCHEDULE ONE hereto, (11) or to the like effect, commit the person so refusing to gaol, unless, he sooner consents to do what is required of him. If such person, upon being brought up upon such adjourned hearing, again refuses to do what is so required of him, the justice, of he sees fit, may again adjourn the proceedings, and commit him for the like period, and so again from time to time until such person consents to do what is required of him.

2. Nothing in this section shall prevent such justice from sending any such case for trial, or otherwise disposing of the same in the meantime, according to any other sufficient evidence taken by him. R. S. C., c. 174, s. 63.

**586. Discretionary powers of the justice.** — A justice holding the preliminary inquiry may in his discretion:

(*a*) permit or refuse permission to the prosecutor, his Counsel or Attorney to address him in support of the charge, either by way of opening or summing up the case, or by way of reply upon any evidence which may be produced by the person accused;

(*b*) receive further evidence on the part of the prosecutor after hearing any evidence given on behalf of the accused;

(10) For Form N, see p. 729, post.
(11) For Form O, see p. 730, post.

(*c*) adjourn the hearing of the matter from time to time, and change the place of hearing, if from the absence of witnesses, the inability of a witness who is ill to attend at the place where the justice usually sits, or from any other reasonable cause, it appears desirable to do so, and may remand the accused if required by warrant in the FORM P in SCHEDULE ONE hereto: (12) Provided that no such remand shall be for more than eight clear days, the day following that on which the remand is made being counted as the first day; and further provided, that if the remand is for a time not exceeding three clear days, the justice may verbally order the constable or other person in whose custody the accused then is, or any other constable or person named by the justice in that behalf, to keep the accused person in his custody and to bring him before the same or such other justice as shall be there acting at the time appointed for continuing the examination; R. S. C., c. 174, s. 65.

(*d*) order that no person other than the prosecutor and accused, their counsel and solicitor shall have access to or remain in the room or building in which the inquiry is held (which shall not be an open court), if it appears to him that the ends of justice will be best answered by so doing.

(*e*) regulate the course of the inquiry in any way which may appear to him desirable, and which is not inconsistent with the provisions of this Act.

**587. Bail on remand.** — If the accused is remanded under the next preceding section the justice may discharge him, upon his entering into a recognizance in the FORM Q in SCHEDULE ONE hereto, (13) with or without sureties in the discretion of the justice, conditioned for his appearance at the time and place appointed for the continuance of the examination. R.S.C., c. 174, s. 67.

**588. Hearing may be ordered to proceed during time of remand.** — The justice may order the accused person to be brought before him, or before any other justice for the same territorial division, at any time before the expiration of the time for which such person has been remanded, and the gaoler or officer in whose custody he then is shall duly obey such order. R. S. C., c. 174, s. 66.

**589. Breach of recognizance on remand.** — If the accused person does not afterwards appear at the time and place mentioned in the recognizance the said justice, or any other justice who is then and there present, having certified upon the back of the re-

(12) For Form P, see p. 731, post.
(13) For Form Q, see p. 732, post.

cognizance the non-appearance of such accused person, in the FORM R in SCHEDULE ONE hereto, (14) may transmit the recognizance to the proper officer appointed by law, to be proceeded upon in like manner as other recognizances; and such certificate shall be *primâ facie* evidence of the non-appearance of the accused person. R. S. C., c. 174, s. 68.

2. The proper officer to whom the recognizance and certificate of default are to be transmitted in the province of Ontario, shall be the clerk of the peace of the county for which such justice is acting; and the Court of General Sessions of the Peace for such county shall, at its then next sitting, order all such recognizances to be forfeited and estreated, and the same shall be enforced and collected in the same manner and subject to the same conditions as any fines, forfeitures or amercements imposed by or forfeited before such court. In the province of British Columbia, such proper officer shall be the clerk of the County Court having jurisdiction at the place where such recognizance is taken, and such recognizance shall be enforced and collected in the same manner and subject to the same conditions as any fines, forfeitures or amercements imposed by or forfeited before such County Court; and in the other provinces of Canada such proper officer shall be the officer to whom like recognizances have been heretofore accustomed to be transmitted under the law in force before the passing of this Act, and such recognizances shall be enforced and collected in the same manner as like recognizances have heretofore been enforced and collected. (Added by the *Criminal Code Amendment Act 1900*).

**590. Evidence for the prosecution.** — When the accused is before a justice holding an inquiry, such justice shall take the evidence of the witnesses called on the part of the prosecution.

2. The evidence of the said witnesses shall be given upon oath and in the presence of the accused; and the accused, his counsel or solicitor, shall be entitled to cross-examine them.

3. The evidence of each witness shall be taken down in writing in the form of a deposition, which may be in the FORM S in SCHEDULE ONE hereto, (15) or to the like effect.

4. Such deposition shall, at some time before the accused is called on for his defence, be read over to and signed by the witness and the justice, the accused, the witness and justice being all present together at the time of such reading and signing.

5. The signature of the justice may either be at the end of the deposition of each witness, or at the end of several or of all the

(14) See Form R, at p. 732, post.
(15) See Form S, at p. 733, post.

depositions in such a form as to show that the signature is meant to authenticate each separate deposition.

6. Every justice holding a preliminary inquiry is hereby required to cause the depositions to be written in a legible hand and on one side only of each sheet of paper on which they are written. R.S.C., c. 174, s. 69.

7. Provided that the evidence upon such inquiry or any part of the same may be taken in shorthand by a stenographer who may be appointed by the justice and who before acting shall make oath that he shall truly and faithfully report the evidence; and where evidence is so taken, it shall not be necessary that such evidence be read over to or signed by the witness, but it shall be sufficient if the transcript be signed by the justice and be accompanied by an affidavit of the stenographer that it is a true report of the evidence.

This section requires the evidence of the witnesses to be given upon oath. But if a witness objects on grounds of conscientious scruples to take an oath or if he is objected to as incompetent to take an oath, he may, by virtue of section 23 of the *Canada Evidence Act*, *post*, give his evidence, by affirming, instead of being sworn.

The general form of oath is as follows : —

"The evidence you shall give touching this information (or *complaint*, or *present charge*, or *as the case may be*), wherein is the informant (or *complainant*, or, *as the case may be*), and is the defendant (or *as the case may be*), shall be the truth, the whole truth, and nothing but the truth. So help you God."

The New Testament should, if the witness is a Christian, be held by him in his right hand, during the administration of the oath; and at its conclusion he should kiss the book.

The form of oath is to be accommodated to the religious persuasion which the swearer entertains of God, and is to be administered in such a manner as is binding on the witness' conscience.

A person who has no belief in God nor in a future state, cannot be a witness in Canada. He can neither be sworn nor affirm.

At one time, it was even held that infidels, (that is to say, persons professing some other than the Christian faith), could not be witnesses. But, for a long time past, there has existed a different rule, under which it has become well settled that those infidels, who believe in a God and that He will punish them if they swear falsely, may be admitted as witnesses. (16)

In England, various statutes were passed, from time to time, enabling quakers, and others having conscientious scruples against the taking of an oath, to give evidence under an affirmation instead of upon oath.

(16) Omichund v. Barker, Willes' Rep., 549.

In Canada, we have, in effect, the same law in the *Canada Evidence Act, post*, section 23 of which provides, that,—"If a person, called or desiring to give evidence, objects, on grounds of conscientious scruples, to take an oath or is objected to as incompetent to take an oath, such person may make the following affirmation:—'I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth and nothing but the truth,'" and that, "upon the person making such solemn affirmation, his evidence shall be taken and have the same effect as if taken under oath."

By certain statutes passed, in recent years, the law of England has been still further altered, so as to give to persons, having *no religious belief*, the right not only to give evidence by means of an affirmation but to make an affirmation instead of taking an oath as a member of parliament. For instance, section 4 of the *Evidence Further Amendment Act 1869*, (32-33 Vic., c. 68), as amended by the *Evidence Amendment Act 1870*, (33-34 V., c. 49), provided that if any person called to give evidence in any Court of Justice should object to take an oath, or be objected to as incompetent to take an oath, such person should, upon the presiding judge being satisfied that the taking of an oath would have no binding effect on his conscience, make a solemn promise and declaration to tell the truth. And, in the famous case of Clarke v. Bradlaugh, it was held by Mathews, J., (confirmed in Appeal), that, although the Act did not give to a member of parliament, *having no religious belief*, the right to affirm instead of taking the oath required of him by the *Parliamentary Oaths Act, 1866*, (29 Vic., c. 19), before taking his seat in the House, it enabled and even *required* persons, *having no religious belief and upon whose conscience an oath would have no binding effect*, to give evidence, by solemnly affirming and declaring instead of swearing. (17) And later on, it has been enacted by section 1 of the *Imperial Oaths Act 1888*, (51-52 Vic., c. 47) that in *all places*, and for *all purposes*, where an oath is required, by law, every person, upon objecting to be sworn and stating as the ground of such objection, either, that he has *no religious belief*, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn declaration and affirmation, instead of taking an oath, and that such affirmation shall be of the same effect as if he had taken the oath.

A witness who states that he is a Christian cannot be further questioned before being sworn. (18)

A Jew is sworn on the Pentateuch, and he keeps his head covered while taking the oath. (19) But a Jew who stated that he professed Christianity, although he had never been baptized, and had

(17) Clarke v. Bradlaugh, 7 Q. B. D., 38.
(18) R. v. Serva, 2 C. & K., 53.
(19) 2 Hale, P. C., 279; Omichund v. Barker, Willes' Rep., 538; Roscoe Cr. Ev. 12th Ed., 104.

never formally renounced the Jewish faith was allowed to be sworn on the New Testament. (20)

A Mahomedan is sworn on the Koran. Placing his right hand flat upon the book and the other hand to his forehead, he brings the top of his forehead down to the book, which he touches with his head. He then looks, for some time, upon it; and, being asked what effect that ceremony produces, he answers that he is bound by it to speak the truth. (21)

A Parsee swears in a similar manner, except that instead of the Koran, he swears upon the Parsee prayer book. (22)

Part of the ceremony of swearing a Gentoo (a native of India or Hindostan professing the Brahmin religion) consists in his touching, with his hand, the foot of a Brahmin. If the witness, himself, is a priest, he touches the Brahmin's hand. (23)

This, however, does not appear to be the only mode of swearing among the Hindoos. In some parts of India, the natives swear on a portion of the waters of the Ganges. (24)

A Chinese witness on entering the witness box, kneels down, and a china saucer being placed in his hand, he breaks it against the box. The clerk then administers the oath to him (through the interpreter) in these words, — "You shall tell the truth and the whole truth ; the saucer is cracked, and, if you do not tell the truth, your soul will be cracked, like the saucer." (25)

It is said that, in the Island of Hong Kong, even since it became an English possession, part of the ceremony of swearing a Chinese witness consists in cutting off the head of a live cock or other fowl. (26)

A witness, who stated that he believed both the Old and New Testament to be the word of God, but that as the latter prohibited and the former countenanced swearing, he wished to be sworn on the former, was permitted to be sworn accordingly. (27) And, where a witness refused to be sworn by laying his right hand on the book, and afterwards kissing it, but desired to be sworn by having the book laid open before him and holding up his right hand, he was sworn accordingly. (28)

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(20) R. v. Gilham, 1 Esp., 285.
(21) R. v. Morgan, 1 Leach, 54; Roscoe Cr. Ev., 12th Ed., 105.
(22) Kerr's Mag. Acts, 21; Best on Ev., § 163.
(23) Omichund v. Barker, 1 Atk., 22; Willes' Rep., 538.
(24) Best on Ev., § 163.
(25) R. v. Entrehman C. & Mar., 248; Roscoe Cr. Ev., 12th Ed., 105.
(26) Berncastle's Voyage to China, 39; 2 Best on Ev., § 163 (*n*).
(27) Edmonds v. Rowe, Ry. & Moo. N. P. C., 77; Roscoe Cr. Ev., 12th Ed., 104.
(28) Dalton v. Colt, 2 Sid., 6.

Where, on a trial for high treason, a witness refused to be sworn in the usual manner, but put his hands to his buttons, and in reply to a question whether he was sworn stated that he was sworn and was under oath, it was held sufficient. (29)

A Scotch witness has been allowed to be sworn by holding up the hand without touching the book, or kissing it, and the form of oath administered to him was, "You swear according to the custom of your country and of the religion you profess that the evidence, etc., etc." (30)

The following is given as the form of oath of a Scotch Covenanter :—"I, A. B., do swear, by God himself, as I shall answer to him at the great day of judgment, that the evidence I shall give, touching the matter in question, is the truth, the whole truth, and nothing but the truth." (31).

A North American Indian, who was not a Christian, and who knew of no ceremony, in use among his tribe, for binding him to speak the truth, was offered as a witness in a murder trial. As he appeared to have a full sense of the obligation to speak the truth, and as he and his tribe had a belief in a Supreme Being, who created all things, and in a future state of reward and punishment, he was allowed to be sworn in the usual way on the New Testament, and his evidence was held admissible. If, however, his tribe had had in use among them any particular ceremony for binding them to speak the truth, the witness would have had to be sworn according to that ceremony, however strange and fantastical it might be ; because everything should be done that can be done to bind the conscience of the witness according to his notions however superstitious they may be. (32)

A witness, who is unable to speak, may give his evidence in any other manner in which he can make it intelligible. (See section 6 of the Can. Ev. Act, *post.*)

A witness who does not speak the language of the justice should be sworn and give his evidence through the medium of another person duly qualified to interpret him, the interpreter being first sworn faithfully to interpret what the witness may say.

The oath of the interpreter may be as follows :—

"You shall truly and faithfully interpret the evidence about to be given, and all other matters and things touching the present information (or *charge*, or *as the case may be*), and the Italian (or *German*, or *as the case may be*) language into the English (or

(29) R. v. Love, 5 How. St. Tr., 113.
(30) R. v. Mildrone, 1 Leach, 319, 412; Mee v. Reid, Peake, N. P. C., 23.
(31) 1 Leach, 412 (*n*).
(32) R. v. Pah-mah-gay, 20 U. C., Q. B., 195-198.

*French*) language, and the English (or *French*) language into the Italian (or *German*, or, *as the case may be*) language, according to the best of your skill and ability. So help you, God.'"

At the preliminary investigation before a magistrate, the accused has, under the terms of the above section, 590, the right to be present, and hear the witnesses give their evidence, to catch the words as they fall from their lips, and to mark the expression and demeanor of each witness while testifying; and, when depositions of witnesses in a preliminary enquiry, to which an accused was not a party, and, consequently, taken in his absence, are afterwards read over to the same witnesses in a case against such accused, and these witnesses, after being re-sworn in his presence, either reaffirm that their former depositions contain the truth or make corrections therein, as the case may be, and then affirm the truth of the depositions as corrected, the prosecutor then being given permission to ask further questions and the accused to cross-examine, such proceeding does not afford the accused the full and complete opportunity to cross-examine contemplated by law. (33)

When depositions in a preliminary enquiry before a magistrate have not been taken according to law and a material provision of the law, — such as that contained in paragraph 2 of the above section, 590, — has not been complied with, the indictment may, upon motion at any time before the accused is given in charge to the jury, be quashed, under section 641, *post*. (34)

**591. Evidence to be read to the accused.** — After the examination of the witnesses produced on the part of the prosecution has been completed, and after the depositions have been signed as aforesaid, the justice unless he discharges the accused person, shall ask him whether he wishes the depositions to be read again, and, unless the accused dispenses therewith, shall read or cause them to be read again. When the depositions have been again read, or the reading dispensed with, the accused shall be addressed by the justice in these words, or to the like effect :

"Having heard the evidence, do you wish to say anything in answer to the charge ? You are not bound to say anything, but whatever you do say will be taken down in writing and may be given in evidence against you at your trial. You must clearly understand that you have nothing to hope from any promise of favour and nothing to fear from any threat which may have been held out to you to induce you to make any admission or confession of guilt, but whatever you now say may be given in evidence against you upon your trial notwithstanding such promise or threat."

2. Whatever the accused then says in answer thereto shall be taken down in writing in the FORM T in SCHEDULE ONE hereto, (35) or to the like effect, and shall be signed by the justice and

(33) R. v. Lepine and others, 4 Can. Cr. Cas., 145.
(34) *Ib.*
(35) For Form T, see p. 733, post.

kept with the depositions of the witnesses and dealt with as hereinafter mentioned. R. S. C., c. 174, ss. 70 and 71.

Section 689, *post*, provides for making proof, at the trial, of a statement made by the accused under the above section, 591.

When a prisoner wishes to make a statement, it is the magistrate's duty to receive it, but, before doing so, he ought to get rid entirely of any impression that there may have been on the prisoner's mind that his statement may be used for his own benefit, and to tell him, as provided by the above section, 591, that what he thinks fit to say will be taken down and may be used against him on his trial.

When a prisoner has been duly cautioned by the magistrate in accordance with section 591, anything then said by the prisoner is admissible in evidence against him on his trial, although, at some time previous to such caution by the magistrate, there may have been some promise or threat held out to the prisoner to induce him to confess. (36)

After the prisoner has been duly cautioned by the committing magistrate, it ought to be left entirely with the prisoner whether he will make any statement or not; and the magistrate ought not to go to the extent of dissuading him from making a perfectly voluntary statement. (37)

**592. Evidence of confession or admission.** — Nothing herein contained shall prevent any prosecutor from giving in evidence any admission or confession, or other statement, made at any time by the person accused or charged, which by law would be admissible as evidence against him. R. S. C., c. 174, s. 72.

**Confessions.** — Confessions are received in evidence or are rejected under a consideration of whether they are or are not entitled to credit.

A free and voluntary confession of guilt made by a prisoner, either in course of conversation with private individuals, or under examination before a magistrate is admissible in evidence as perfectly legal and sufficient. (38)

A confession in order to be admissible must not be extracted by *any sort* of threats or violence, nor be obtained by any *direct* or *implied* promise, *however slight*, nor by the exertion of any improper influence, but it must be entirely FREE and VOLUNTARY; and the *onus* is upon the prosecution to establish that it is entirely free and voluntary; so, that, in the case of a confession made before a magistrate or before any other person, unless it be affirmatively shewn, by the prosecution, that it was made without the defendant being induced, — by any promise of favor or by menaces or undue terror, — to make it, it is not admissible in evidence against him.

A confession obtained from the accused by the flattery of hope or by the torture of fear comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no reliance can be placed in it and no credit should be given to it. (39)

Where a committing magistrate had told a prisoner that he would do all that he could for him if he would make a disclosure, and, after this,

(36) R. v. Bate, 11 Cox C. C., 686.
(37) R. v. Green and others, 5 C. & P., 312.
(38) Gilb. Ev., 123; Lambe's Case, 2 Leach, 252; Wheeling's Case, 1 Leach, 311; R. v. Eldridge, R. & R., 440.
(39) Warwickshall's Case, — (Eyres & Nares, B. B.), — 1 Leach, 263

the prisoner made a statement to a turnkey of the prison who held out no inducement to the prisoner to confess, it was held that what the prisoner said to the turnkey could not be received in evidence, more especially as the turnkey had not given the prisoner any warning. (40)

If it be said to the defendant that it will be better or worse for him if he do or do not confess; (41) or if a confession be procured by a threat to take the defendant before a magistrate, if he do not give a more satisfactory account; (42) or to send for a constable for that purpose; (43) or by saying, "Tell me where the things are, and I will be favorable to you;" (44) or, "You had better tell all you know," (said by the surgeon to a woman suspected of poisoning; (45) or, "You had better tell where you got the property;" (46) or, "You had better split, and not suffer for all of them;" (47) or, "It would have been better if you had told at first;" (48) or, "I should be obliged to you if you would tell us what you know about it: if you will not, of course, we can do nothing; (49) or, "It will be best for you if you will tell how it was transacted;" (50) or, "It might be better for you to tell the truth, and not a lie;" (51) or, "You had better tell the truth; it may be better for you;" (52) the confession is not free and voluntary and will not be admissible.

Instances have occurred in which innocent persons have confessed themselves guilty of crimes of the gravest nature.

Three men were tried and convicted of the murder of a Mr. Harrison. One of the three men had, under promise of a pardon, confessed himself guilty of the murder. But, on account of the confession having been made under a promise of pardon, it was not given in evidence against him. A few years after the trial and conviction of the prisoners it turned out that Mr. Harrison had not been murdered at all ,but was alive. (53)

Where a prosecutor asked a defendant for the money which the latter had taken, adding, before the money was produced, "I only want my money, and if you give me that, you may go to the devil, if you please," upon which the defendant took part of the money from his pocket, and said that was all he had left, a majority of the judges held that the evidence was inadmissible. (54)

Where a constable said to the prisoner who was suspected of the murder of her child that, "if she did not tell him where it was she might get herself into trouble, and that it would be the worse for her," a statement thereupon made by her to the constable was rejected. (55)

A made to B, a confession, which was inadmissible in evidence, in consequence of its having been made after a promise held out by B. The lat-

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(40) R. v. Cooper & Wicks, 5 C. & P., 535.
(41) 2 East, P. C., 659.
(42) R. v. Thompson, 1 Leach, 291. See R. v. Jackson, 2 Can. Cr. Cas., 149.
(43) R. v. Richards, 5 C. & P., 318; R. v. Hearn, C. & Mar., 109.
(44) R. v. Cass, 1 Leach, 293.
(45) R. v. Kingston, 4 C. & P., 387.
(46) R. v. Dunn, 4 C. & P., 543.
(47) R. v. Thomas, 6 C. & P., 353.
(48) R. v. Walkley, 6 C. & P., 175.
(49) R. v. Partridge, 7 C. & P., 551.
(50) R. v. Warningham, *post*.
(51) R. v. Bate, 11 Cox C. C., 686.
(52) R. v. Fennell, 7 Q. B. D., 147; 50 L. J. (M. C.), 126.
(53) 2 Hale, 285. And see, 1 Leach, 264 (*n*).
(54) R. v. Jones, R. & R., 152; R. v. Parratt, 4 C. & P., 570.
(55) R. v. Coley, 10 Cox C. C., 526.

ter, shortly after the confession so made to her, sent for and informed C, a neighbor, who then had an interview alone with A, and asked her questions upon the subject, but he held out no inducements, and A then made a confession to C. *Held*, that this second confession was so connected with the promise held out by B, as to be also inadmissible. (56)

Where a prisoner was told by A, a constable, at 10 A. M., that it would be better for him to tell the truth, an admission by the prisoner to B, another constable, after 6 P. M. of the same day, was not allowed to be given in evidence, although B had, before the prisoner made the admission, cautioned him not to say anything to criminate himself for that anything he would say would thereafter come in evidence against him. (57) This decision proceeded upon the ground that the caution given by B, the second constable, might not have had the effect of removing the expectation which might have been raised by the language of the first constable, A.

A confession made with a view, and under a hope, of being thereby permitted to turn King's evidence, or of obtaining a pardon, or reward, has been held inadmissible. (58) And this is clearly so where such hope is the reasonable result of a communication from, or the conduct of a person in authority. (59)

It was stated in one case to be the opinion of the judges that evidence of a confession is receivable, unless there has been some inducement held out by some person, who has authority, and that if a person who has no authority holds out to the accused party an inducement to confess, this will not exclude the confession made to that party. (60) But, where such a person, without authority, held out an inducement to a defendant in the presence of the wife of the prosecutor, and the prosecutor's wife expressed no dissent to the inducement so held out, it was held that evidence of a confession then made by the defendant was not receivable. (61) And where the prisoner was taken by the constable to an Inn and the Innkeeper, *in the constable's hearing*, held out an inducement to him to confess, and the prisoner, *in the constable's hearing*, made a confession to the Innkeeper, which the constable was called to prove, Alderson, B., thought the evidence inadmissible. (62)

Where a girl, being arrested for the murder of her child, was left by the constable in the custody of a woman who told her she had better tell the truth, or it would be upon her, and the man would go free; upon which she made a confession, it was held by Parke, J., and Taunton, J., that this confession was not receivable, as it was made in consequence of an inducement held out to the prisoner by a person who had her in custody. (63)

A, a woman in custody on a charge of murder, was, on arriving at the gaol, placed in a room, alone with B, a "searcher" of female prisoners, having no other duties or authority in the gaol except that of searching.

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(56) R. v. Rae, 13 Cox C. C., 209.
(57) R. v. Doherty, 13 Cox C. C., 23, 24.
(58) R. v. Hall, 2 Leach, 559.
(59) R. v. Gillis, 11 Cox C. C., 69. R. v. Boswell, C. & M., 584.
(60) R. v. Sarah Taylor, 8 C. & P., 733.
(61) *Id.*; R. v. Spencer, 7 C. & P., 776; R. v. Hewett, C. & Mar., 534; R. v. Garner, 1 Den., 329; 2 C. & K., 920; 18 L. J. (M. C.), 1; R. v. Luckhurst, Dears., 245; 23 L. J. (M. C.), 18.
(62) R. v. Pountney, 7 C. & P., 302. See R. v. Slaughter, 4 C. & P., 544; R. v. Laugher, 2 C. & K., 225.
(63) R. v. Enoch, 5 C. & P., 539.

Whilst the search was being made, A said to B, "I shall be hung; I shall be sure to be hung;" and, shortly afterwards, she added, "If I tell the truth, shall I be hung?" to which, — in order to soothe her, — B answered, "No; nonsense. You will not be hung. Who told you so?" *Held*, that a statement which, (immediately after this), A made to B was not admissible. (64)

Confessions obtained from a servant through hopes held out and threats made by the *wife* or by the *relations* and neighbors of her master and prosecutor, or by the wife or relations or neighbors of any one of several persons who are in partnership, the offence being committed against the partnership concern, have been held by all the judges to be inadmissible. (65) But this does not apply to a case where the charge against the servant has no relation to the persons or property of the servant's master or family, as for instance, a case of child murder or concealment of birth by the servant. (66)

A confession made by an accused, in the presence of a police officer, in consequence of an inducement held out to the accused by his employer, — in the words, "You had better tell me all about the corn that is gone, it will be better for you to tell the truth," — is not admissible evidence. (67)

A prisoner was tried for embezzling the moneys of a Company; and it was proved that, on being taxed with the crime by the Company's Chairman, the prisoner had said, "Yes, I took the money," and that afterwards, he made out a list of the sums embezzled, and, with the assistance of his brother, he paid to the Company a part of the money. In his evidence, the Chairman stated that, at the time of the confession, no threat was used and no promise made as to the prosecution of the prisoner; but, he admitted that, previous to the making of the confession, he had said to the prisoner's brother, "It will be a right thing for your brother to make a statement;" and the Court drew the inference that the prisoner, when he made the confession, knew that the Chairman had thus spoken to his brother; and it was held that, it was not satisfactorily proved by the prosecution that the confession was free and voluntary, and that, therefore, the evidence of the confession ought not to have been received. (68)

An Indian was convicted of the murder of another Indian; the only evidence against him being his own admission to the Indian agent, of his reserve, who visited him after he was arrested, and to whom he said, through an interpreter, "I killed the policeman, and I killed him well. *I also killed a boy up the river.*" The italicised words were supposed to refer to the Indian, with whose murder the prisoner was charged, because of the fact that the body was found up the river referred to. The interpreter, after first stating that, at the time of the confession, no threats were made and no inducements were held out, said, in cross-examination, that he did not remember telling the accused that he need not be afraid, and the Indian Agent, himself, after stating that it was his custom to look after and assist in the defence of an Indian of his reserve when charged with an offence, and that they all understood that he did so, added that he was not prepared to swear that he did not hold out any threat or inducement to get the accused to make a statement. *Held*, that the evidence of the accused's statement should have been struck out, that the Indian agent was *quoad* the Indians of his reserve, a person in authority, that the

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(64) R. v. Windsor, 4 F. & F., 361.

(65) R. v. Warningham, 2 Den., 447; R. v. Simpson, 1 Mood. C. C., 410; R. v. Upchurch, 1 Mood. C. C., 465.

(66) R. v. Moore, 2 Den., 520; 21 L. J., M. C., 199.

(67) R. v. Rose, 18 Cox C. C., 67 L. J., Q. B., 289.

(68) R. v. Thompson, [1893] 2 Q. B., 12; 62 L. J., M. C., 93; 17 Cox C. C., 641. See, also, R. v. Fennell, 7 Q. B. D., 147; 14 Cox C. C., 607.

burden of proving that the accused's admission was not made under any inducement or threat is upon the Crown, and that it was not satisfactorily proved that the accused's confession was free and voluntary. (69)

Where a prisoner was charged with stealing a post-letter from a post-office box, and it was proposed to prove a confession of guilt made by the prisoner, previous to his arrest, to a post-office inspector, in the presence of a police sergeant, — who proved that the inspector had, during the conversation, said to the prisoner, "You may as well tell us what you did with those letters as to have it brought out in a Court of law,"— it was held that such evidence could not be received. (70)

On a trial for seduction, an officer testified that he had told the defendant that the brothers of the prosecutrix would force him to leave the country and that it would be lighter on him to own up, as he could not deny the charge, and that, in reply, the defendant had said, "I have no witnesses to prove myself out, and it may be that I had better own up." *Held*, that the confession was not voluntary. (71)

The inducement must refer to a temporal benefit. Hopes which are referable to a future state, merely, are not within the principle which renders a confession obtained by improper influence inadmissible. (72)

Thus, where a prisoner, under fourteen years of age, was arrested on a charge of murder and was spoken to by a man who was present at the time of the arrest, as follows; "Now, kneel down, I am going to ask you a very serious question, and I hope you will tell me the truth in the presence of the Almighty," and the prisoner, in consequence, made a statement, it was held admissible. (73)

Where a defendant, being in custody charged with setting fire to her master's farm-building, was spoken to by her master's married daughter, as follows: "I am very sorry for you. You ought to have known better. Tell me the truth whether you did it or no," and the defendant replied, "I am innocent," whereupon her questioner said: "Don't run your soul into more sin, but tell the truth;" it was held that a confession thereupon made was admissible. (74)

Where one of the prisoner's employers having called the prisoner up into his private room said, "I think it right that I should tell you that, besides being in the presence of my brother and myself, you are in the presence of two police officers; and I should advise you that to any questions that may be put to you, you will answer truthfully, *so that if you have committed a fault you may not add to it by stating what is untrue*," and having shewn him a letter which he denied having written, added: "Take care, we know more than you think we know," and the prisoner thereupon made a confession, it was held that such confession was admissible. (75)

So, where the mother of a little boy in custody on a criminal charge said to him and another little boy also in custody on the same charge, in the presence of the latter's mother and of the policeman, "You had bttter, *as good boys*, tell the truth," whereupon both boys confessed, it was held that, the confession was clearly admissible. (76) In this case, as well as in R. v. Jarvis, *supra*, the inducements appear to amount merely to a moral exhortation, and not to refer to a temporal benefit.

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(69) R. v. Pah-cah-pah-ne-capbi, 4 Can. Cr. Cas., 93.
(70) R. v. McDonald, 16 C. L. T., 396; 2 Can. Cr. Cas., 221.
(71) Anderson v. S., (Ala.), 16 So., 108; 17 Cr. L. Mag., 135.
(72) R. v. Gilham, R. & M. C. C., 186.
(73) R. v. Wild, 1 Mood. C. C., 452.
(74) R. v. Sleeman, Dears., 249; 23 L. J., M. C., 19.
(75) R. v. Jarvis, L. R., 1 C. C. R., 96; 37 L. J., M. C., 1.
(76) R. v. Reeve, L. R., 1 C. C. R., 362; 41 L. J., M. C., 92.

The object of the rule relating to the exclusion of confessions is to exclude all confessions which may have been procured by the prisoner being led to suppose that it will be better for him to admit himself to be guilty of an offence, which he really never committed. (77)

The proper question to be determined, therefore, is whether the inducement held out to the prisoner was calculated to make his confession an *untrue* one. (78) If not, it will be admissible. Thus, where a prisoner asked a witness with whom he was conversing whether he had better confess, and the witness replied that he had better not confess, but he might say what he had to say to him, for it should go no further, a statement thereupon made by the prisoner was held admissible. (79)

A statement made to a constable, — after he has told the prisoner the nature of the charge against him and informed him that he need not say anything to criminate himself, but, that, whatever he may say, will be taken down and used as evidence against him, — is admissible. (80)

When a constable or police officer takes a person into custody, he should let him know what he is arrested for, but he should, first of all, caution him, because the very fact of charging him induces him to make a statement, and he should be informed that any statement he may make will be used against him. After giving such a caution, the constable or police officer is not bound to stop the prisoner from making a statement. His duty, then, is to listen and report. (81)

A. L. Smith, J., refused to receive admissions elicited by the questions of a constable; (82) and, it was said, in one case, by Hawkins, J., that persons about to be taken into custody should not be cross-examined by the police, and that even after having on one day cautioned a prisoner in custody, the police have no right on a subsequent occasion, — and without renewing the caution, — to put questions to him tending to elicit incriminating answers, and that it is a matter in the discretion of the Judge to admit or reject the answers given to such questions, and that they should be rejected if there is any reason to believe that a trap was being laid for the prisoner. (83)

In the case of R. v. Male, Cave, J., said, "The law does not allow the judge or the jury to put questions in open Court to prisoners; and it would be monstrous if the law permitted a police officer to go,— without any one being present to see how the matter was conducted, — and put a prisoner through an examination, and then produce the effects of that examination against him. Under these circumstances, a policeman should keep his mouth shut and his ears open. A policeman is not to discourage a statement, and certainly not to encourage one. It is no business of a policeman to put questions which may lead a prisoner to give answers on the spur of the moment, thinking perhaps he may get himself out of a difficulty by telling lies." (84)

Although the practice of questioning prisoners is reprobated by most of the Judges, there are cases in which statements, made by a prisoner in answer to questions put to him by the constable, have been admitted in evidence. (85)

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(77) *Per* Littledale, J., in R. v. Court, 7 C. & P., 485.
(78) *Per* Coleridge, J., in R. v. Thomas, 7 C. & P., 345.
(79) R. v. Thomas, 7 C. & P., 345.
(80) R. v. Baldry, 2 Den., 430; R. v. Farley, 1 Cox C. C., 76; R. v. Harris, 1 Cox C. C., 106.
(81) R. v. Male & Cooper, 17 Cox C. C., 690.
(82) R. v. Gavin, 15 Cox C. C., 656.
(83) R. v. Histed, 19 Cox C. C., 16.
(84) See R. v. Male & Cooper, 17 Cox C. C., 690.
(85) R. v. Brackenbury, 17 Cox C. C., 628; R. v. Day, 20 O. R., 209.

In one case, in which the prisoner was charged with murder, it was, at the trial, proved, among other things, that a detective inspector had called upon the prisoner and had said to him, "I am going to ask you some questions on a very serious matter, and you had better be careful how you answer." The detective inspector had then questioned the prisoner as to all his movements on the night of the murder and the following morning, and he asked him to produce his clothes, and, when they were produced, to account for the blood stains on them; and, at the end of the conversation, the detective inspector had taken the prisoner into custody upon the charge of murder. The prosecution proposed to give evidence of the prisoner's answers to the inspector's questions and that subsequent enquiries which had been made tended to shew that the prisoner's answers to the inspector's questions were untrue. Upon this being objected to, Hawkins, J., — without expressing dissent from R. v. Gavin, R. v. Thompson, R. v. Male & Cooper, and other cases cited on behalf of the prisoner, — held, (admitting the evidence), that no inducement had been held out to the prisoner to make any admission and that there had been no threat and no duress exercised towards him, and that the prisoner's answers were voluntary statements which he was under no obligation to make. (86)

Where one of two prisoners, in custody on a charge made against them jointly, had, voluntarily, and after being cautioned, made and signed a statement implicating the other, and such statement was read over to the prisoner implicated, and the latter, after being cautioned, made a confession which was taken down in writing and which he signed when so written, the statement of the one prisoner and the confession of the other were admitted in evidence on the trial of the latter. (87)

It has been held, in Canada, that, where a prisoner, who is in custody on a criminal charge, has been first warned by the officer in charge of him against saying anything that may incriminate him, and then gives answers in response to questions put to him by the officer, his answers are admissible in evidence at his trial, if the presiding Judge is satisfied that they were not unduly or improperly obtained, having regard to the circumstances of the particular case. (88)

What a prisoner has been overheard to say to another or to himself is admissible; though it is a species of evidence to be acted upon with much caution, as being liable to be inadvertently and unintentionally misrepresented by the witnesses. (89)

In all cases, the whole confession should be proved; for it is a general rule that the whole of the account which a party gives of a transaction should be taken together; and his admissions of a fact disadvantageous to himself should not be received without receiving, at the same time, his contempraneous assertion of a fact favorable to him. (90)

Where an alleged confession is received in evidence, after objection thereto by the accused, and the trial Judge, before the conclusion of the trial, reverses his ruling and strikes out the evidence of the alleged confession, at the same time directing the jury to disregard it, the jury should be discharged and a new jury empanelled; and, if the trial Judge refuse to empanel a new jury in such a case, a new trial will be ordered by the

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(86) R. v. Miller, 18 Cox C. C., 54.

(87) R. v. Hirst, 18 Cox C. C., 374.

(88) R. v. Elliott, 19 C. L. T., 274; 31 O. R., 14; 3 Can. Cr. Cas., 95. See R. v. Viau, Que. Jud. Rep., 7 Q. B., 362; 2 Can. Cr. Cas., 540; Rogers v. Hawken, 67 L. J., Q. B., 526; 19 Cox C. C., 122; and Bram v. U. S., 168 U. S. Rep., 557.

(89) R. v. Simons, 6 C. & P., 540.

(90) 4 Taunton, 245. And, see the Queen's Case, 2 Brod. & B., 294.

Court of Appeal; and, on a motion for a new trial, the Court of Appeal, in such a case will not go into the question of the admissibility of the alleged confession, but will take it for granted, from the final ruling of the trial Judge, that it was inadmissible. (91)

A man's confession is only evidence against himself and not against his accomplices; (92) unless the confession be one made by a man in the presence of his accomplices,—at a time when they are not before a magistrate,—in which case it would be evidence,(although of doubtful value), against his accomplices, and that, even although the accomplices made no observation upon it. (93)

A letter given by a prisoner to the gaoler to put into the post, is evidence against him. (94) But, where the prosecution tendered, in evidence, a letter written by the prisoner, while in custody, to his wife, and given by him to a constable for the purpose of being posted, the constable instead of posting having detained it, Kelly, C. B., refused to admit it, on the ground, apparently, that the letter, in reality, belonged to the wife, who could not have been called upon to produce it, had it reached her hands as intended by the prisoner. (95) Such a letter would still be protected, although a wife is now a competent witness, under section 4 of the Canada Evidence Act, 1893; for that section contains a proviso declaring that, "no wife shall be competent to disclose any communication made to her by her husband during their marriage."

Before the coming into force of the present Code, it was held that, where a prisoner was on trial for arson, his deposition taken upon oath at an investigation, previously made before the Fire Commissioners into the causes of the fire, was admissible as evidence against him. (96)

By section 5 of the *Canada Evidence Act*, *post*, (as amended by the 61 Vic., c. 53), it is provided that, "no witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him," but that, "if, with respect to any question, the witness objects to answer upon the ground that his answer may tend to criminate him, and if but for this section the witness would, therefore, have been excused from answering such question, then, although the witness shall be compelled to answer, yet the answer so given shall not be used or receivable in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place other than a prosecution for perjury in giving such evidence."

See comments and authorities under section 5 of the *Canada Evidence Act*, *post*.

**Evidence of an accomplice.**—It is not a rule of law that the evidence of an accomplice must be corroborated to render a conviction valid; but it is usual in practice for judges to advise the jury not to convict on such testimony alone; and juries should attend to the judge's direction, and require corroboration. (97)

The corroboration should be not only as to the circumstances of the crime itself, but also as to the prisoner having taken part in it. (98)

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(91) R. v. Sonyer, 2 Can. Cr. Cas., 501.
(92) 1 Hale, 585; 2 Hawk. P. C., c. 46, s. 3; R. v. Tong, Kel., 17, 18; R. v. Boroski, 3 St. Tr., 474.
(93) 1 Phil. Ev., 400.
(94) R. v. Dorrington, 2 C. & P., 418.
(95) R. v. Parmenter, 12 Cox C. C., 177.
(96) R. v. Coote, L. R., 4 P. C., 599; 42 L. J., (P. C.), 45.
(97) R. v. Stubbs, 25 L. J., M. C., 16; R. v. Jones, 2 Camp., 131. *In re* Meunier, [1894] 2 Q. B., 415.
(98) R. v. Birkett, 8 C. & P., 732.

The evidence of other accomplices is not corroboration. (99)

There is a great difference between the confirmation of an accomplice as to the circumstances of the crime and his confirmation as to the circumstances which apply to the individual charged. The former only shew that the offence was committed, while the latter shew that the accused was connected with the commission of the offence. Confirmation of an accomplice as to the commission of the offence is really no confirmation at all as to its commission by the person accused; and, although the jury may legally convict upon the evidence of an accomplice, the judges advise them not to act on the evidence of an accomplice, unless the accomplice is confirmed as to the particular person charged with the offence having participated in the commission of it. Thus, where two persons were charged with the stealing of a lamb, and an accomplice, examined on the part of the prosecution, proved the case against both, and stated that they threw the skin of the lamb into a whirley hole, in confirmation of which a constable proved that he found the skin in the whirley hole, it was held that this was merely a confirmation of the accomplice's evidence of the commission of the offence, but, no confirmation of his evidence that the prisoners were the parties who committed it, as the fact of the lamb's skin having been thrown into the whirley hole and the fact of its having been afterwards found there, might exist without the prisoners having anything to do with it. Alderson, B., said, "The confirmation which I always advise juries to require is a confirmation of the accomplice in some fact which goes to fix the guilt on the particular person charged. (100)

Where an accomplice in giving evidence against two prisoners is confirmed as to his statement against one of them, it ought not to operate as a confirmation of his statement against the other. (101)

In cases of conspiracy and of treason in compassing the Sovereign's death, etc., anything said or written by one of the accomplices, not as a confession simply, but for the purpose of furthering the common design, is admissible evidence against the others. (102)

Where a witness, although accused of having been a party to the crime in question, has not been indicted jointly with the prisoner at the bar, and is not being tried jointly with the latter, his evidence is admissible as evidence for the prosecution in the trial of the prisoner at the bar. (103)

See comments at p. 370, *ante*, as to evidence of a thief against the alleged receiver.

**Dying Declarations.** — When the death of a person is the subject of a criminal charge, the declarations of the deceased before his death concerning the cause and circumstances of the death are admissible in evidence for or against the accused, if the deceased made them with a full consciousness and belief — without hope — of *immediate* death. (104) In other words, to render a dying declaration admissible in evidence, it must be made under the apprehension and expectation of *immediate* death. (105)

The dying declarations of a *felo de se*, were held good evidence against

(99) R. v. Noakes, 5 C. & P., 326.
(100) R. v. Wilkes & Edwards, 7 C. & P., 272.
(101) R. v. Jenkins, 1 Cox C. C., 177.
(102) R. v. Watson, 2 Stark., 140. And see R. v. Shellard, 9 C. & P., 277, etc., *cit.*, at p. 434, *ante*.
(103) R. v. Viau, Que. Jud. Rep., 7 Q. B., 362.
(104) Kerr's Mag. Acts, 28; R. v. Jenkins, 11 Cox C. C., 250; R. v. Goddard, 15 Cox C. C., 7; R. v. Smith, 16 Cox C. C., 170; R. v. McMahon, 18 O. R., 502; R. v. Mitchell, 17 Cox C. C., 503.
(105) R. v. Perkins, 9 C. & P., 395.

a person indicted for assisting him in his self-murder; and the judges were of opinion that this evidence would of itself be sufficient to convict. (106) This case is no infringement of the rule that a man's own confession is, as such, no evidence against his accomplice; for the corroborated evidence of an accomplice is admissible against his fellows and a dying declaration of a person who, if alive, would be admissible as a witness, is admissible as evidence, where the death is the subject of the charge and the cause of the death the subject of the dying declaration. (107)

A statement otherwise admissible as a dying declaration is not rendered inadmissible by the fact that the magistrate, to whom the statement is made, owing to the weak and exhausted condition of the declarant, repeats to her portions of a statement made by her some days previously and writes the same down in his own words, she stating that it is correct and signing it. (108)

It is no objection to a declaration *in articulo mortis*, that it was made in answer to questions put to the deceased by the surgeon and not a continuous declaration made by the deceased. (109)

To render a statement admissible as a dying declaration, it is not enough that it appears that the person making it was under the impression that death must *ultimately* ensue, but it is necessary that it should appear that the person was conscious, at the time, that death was actually *imminent*. (110)

Where, in a case of murder, it appeared that, two days before the death of the deceased, the surgeon told her that she was in a very precarious state, and that, the day before her death, when she had become much worse, she said to the surgeon that she found herself growing worse and that she had been in hopes of getting better, but as she was getting worse, she thought it her duty to mention what had taken p'ace; and, immediately afterwards, she made a statement,—it was held that this statement was not receivable in evidence as a declaration *in articulo mortis*, as it did not sufficiently appear that at the time of making it the deceased was without hope of recovery. (111)

It is the apprehension of his condition at the time of making the declaration which, when followed by death, makes the statement of the dying person admissible. The fact that such person, some time after making the declaration, entertains a hope of recovery, is irrelevant, except in so far as it may be evidence of the state of his mind when he made the declaration. (112)

On an indictment for murder, a dying declaration of the deceased that he was shot in the body and was "going fast" indicates a settled and hopeless consciousness that he was in a dying state, and his declaration was admissible in evidence. (113)

A mere statement not amounting to a dying declaration made by a deceased person in the presence of an accused person ought not to be admitted as evidence, unless it has been accompanied by evidence which would justify the jury in finding that such statement was made upon an

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(106) R. v. Tinckler, 1 East P. C., 354.
(107) Arch. Cr. Pl. & Ev., 21st Ed., 274.
(108) R. v. Whitmarsh, (No. 1), 62 J. P., 680; R. v. Whitmarsh, (No. 2), 62 J. P., 711.
(109) R. v. Fagent and another, 7 C. & P., 238.
(110) R. v. Forrester, 4 F. & F., 857.
(111) R. v. Megson, 9 C. & P., 418.
(112) R. v. Hubbard, 14 Cox C. C., 565.
(113) R. v. Davidson, 1 Can. Cr. Cas., 351.

occasion when the accused had an opportunity of answering and might be expected to answer it and in drawing, — from his omission to deny or question it and from his language or demeanor, — an inference that he did not dissent from the truth of it; and the question whether there is any such evidence for the consideration of the jury is for the Court to decide. If the Court thinks there is such evidence the weight of it and the inference to be drawn from it is for the jury to determine. (114)

A deposition read over to and signed by the deponent may be admissible in evidence as a dying declaration, although irregular as a deposition under section 687, *ante*, because taken in the absence of the accused. (115)

No particular form of dying declaration is necessary, and it need not be in writing; but, if it is a written declaration, it may be as follows: —

Canada, }
Province of . }
County (or *District, etc.*) of . }

I. C. D., of in the said county (or district) of do hereby solemnly and sincerely declare that (*here set out the statement in the very words used*).

Taken before me at }
this day of } C. D.
A. D., 190 . }

J. S.,

One of His Majesty's Justices of the Peace for the said county (or district) of

The principal ingredients of such a declaration in order to render it admissible in evidence against the accused, after the declarant's death, are: 1, The cause of the death of the declarant must be the subject of enquiry; 2, The circumstances of the death must be the subject of the declaration; and, 3, The declaration must (as shewn by the foregoing authorities) have been made at a time when the declarant (*deceased*) entertained no hope of recovery and was conscious that his death was imminent.

If the accused can be brought into the presence of the person injured, the latter's examination should be taken in the usual form.

**593. Evidence for the defence.** — After the proceedings required by section five hundred and ninety-one are completed the accused shall be asked if he wishes to call any witnesses.

2. Every witness called by the accused who testifies to any fact relevant to the case shall be heard, and his deposition shall be taken in the same manner as the depositions of the witnesses for the prosecution.

Under this section, the Magistrate is obliged to take, at the preliminary investigation, the examinations of the prisoner's witnesses as well as those of the witnesses for the prosecution.

(114) R. v. Smith, 18 Cox C. C., 470.
(115) R. v. Woods, 2 Can. Cr. Cas., 159.

This, however, does not authorize the magistrate to try the case; nor does it give the defendant the right, for instance, in a prosecution for publishing a libel, to prove, at the preliminary enquiry, the truth of the matter charged as a libel; for it has been held in England, since the granting, there, of the right to call witnesses for the defence at a police court investigation, that, although where the charge was that of maliciously *publishing* a defamatory libel KNOWING IT TO BE FALSE, the magistrate *had* jurisdiction to receive evidence of the truth of the libel, so as to negative the allegation that the defendant KNEW it to be false, he had *not* such jurisdiction where the charge was that of simply maliciously *publishing* a defamatory libel. (116)

B was charged before a justice of the peace with having obtained a mortgage from C by false pretences. At the preliminary enquiry, the sitting justices after hearing the evidence for the prosecution neglected to ask the accused if he wishes to call witnesses for his defence, and in fact refused to hear any witnesses for the defence when they were offered by the accused, and committed him for trial. *Held*, on petition by B for the issue of a writ of *habeas corpus*, with a view to his release, that such neglect and refusal on the part of the sitting justices,—although an irregularity of a serious character only related to procedure and did not render the proceedings absolutely null and void, so as to justify B's liberation on a writ of *habeas corpus;* and the writ was refused. (116*a*)

As to the expediency of calling witnesses for the defence, at the preliminary enquiry, this will greatly depend upon the nature of the case established by the prosecution and the probable result of the enquiry. If the case established at the close of the evidence for the prosecution is such that any proof to be adduced on the part of the accused will only amount, at most, to a conflict of evidence, it will not be advisable to make use of it at this stage, since, although the preponderance would, if the accused's witnesses were examined, be in his favor, the justice would, in all probability, commit for trial, it being no part of his duty to determine as to the guilt or innocence of a party, under such circumstances. There are, however, many cases of *prima facie* guilt which the accused may, by calling witnesses, be enabled so to explain as to clear up at once the imputation against him. Thus, upon a charge of theft, it may be that the only proof of guilt against him is his possession of the stolen property; and it may happen that he is in a situation to show by highly respectable testimony that he became possessed of the property in a perfectly fair and honest manner. Indeed, in all these cases, where the criminality of the party accused rests merely upon the presumption of law which the accused is able to explain by evidence, such evidence may be adduced with a reasonable expectation of success. The question to be asked, under such circumstances, before adducing evidence, should be: Will the production of the evidence be most likely to result in the discharge of the prisoner? If it will, then it will be judicious to offer it: but if such a result is not likely, then its production at the preliminary enquiry will not be advisable.

It is sometimes imagined that, if the accused has exculpatory evidence, and fails to offer it at the preliminary enquiry before the magistrate, advantage may be taken of the omission on his afterwards producing it on his trial. But learned judges have often reprehended observations made, upon this ground, by prosecuting counsel. For instance, in a case in which the prisoner's counsel, after addressing the jury, observed that he should call witnesses to prove an *alibi;* that these witnesses were not examined before the committing magistrate, and that perhaps some observation might be made on that account, but that the witnesses had gone to the

(116) R. v. Carden, 5 Q. B. D., 1; 49 L. J. M. C., 1.
(116*a*) *Ex parte* Burke, 2 Rev. de Jur., 151.

preliminary enquiry before the magistrate and, on the advice of the prisoner's attorney, were not called, — Pollock, C. B., said that, in his opinion, no such observation should be made as to witnesses not being called for a prisoner when being examined before the magistrate, and if made it would be very improper. Where, at the preliminary enquiry, one or more witnesses spoke of the accused as the person by whom the crime inquired into was committed, it would be the duty of the magistrate to commit, and it would be quite useless to call witnesses on the part of the prisoner either to prove an *alibi* or anything else in his favor. It would be useless expense to call them, at once, to prove the same thing as could be proved at the trial, and a thing which no discreet attorney ought to advise his client to do. This, the learned judge said, had always been his opinion, and, therefore, he never allowed such observations to be made. (117)

It will sometimes happen, where a party is charged with theft, and the only evidence against him is that of recent possession of the stolen article, that he defends himself by asserting that he received the property in question from a particular person whom he names. If such person so named is procurable, and there is nothing to show that the statement of the prisoner is an utter fabrication, he (the person named by the prisoner) should be sent for and examined as to the alleged fact. Upon this point, several judges have expressed a strong opinion. In one case, the prisoner was indicted for stealing a piece of wood, the property of a person named Herman, and it appeared from the evidence for the prosecution that on the piece of wood being found by a policeman in the prisoner's shop, about five days after Herman had lost possession of it, the prisoner stated that he had bought it from a person named Nash, who lived about two miles off. Nash was not produced as a witness for the prosecution, and the prisoner did not call any witnesses. Baron Alderson, in summing up, said: "In cases of this nature you may take it as a general principle, that where a man in whose possession stolen property is found gives a reasonable account of how he came by it, as by stating the name of the person from whom he received it, and who is known to be a real person, it is incumbent on the prosecution to show that that account is false; but if the account given by the prisoner be unreasonable or improbable on the face of it, the *onus* of proving that it is true lies on him. Suppose, for instance, a person were to charge me with stealing his watch, and I were to say I bought it from a particular tradesman, whom I name, that is *prima facie* a reasonable account, and I ought not to be convicted, unless it is shown that that account is a false one." (118)

This ruling was confirmed in the case of R. v. Hughes. (119) And, in a more recent case, Lord Denman, C. J., approved of it, and expressly laid down his view, of the duties of justices in such a case, in these words, — "I quite agree with the case of R. v. Crowhurst. It was mentioned to me by Baron Alderson, at the time when it occurred. If a person in whose possession stolen property is found give a reasonable account of how he came by it, and makes reference to some known person as the person from whom he received it, the magistrate should send for that person and examine him; as it may be that his statement may entirely exonerate the accused person, and put an end to the charge." (120)

This rule, of course, will apply only to the case of a reference not inconsistent with the other facts of the case; for, if the prisoner himself have given various accounts of how he became possessed of the property, (121)

(117) R. v. Clark, 5 Cox C. C., 230.
(118) R. v. Crowhurst, 1 C. & K., 370.
(119) R. v. Hughes, 1 Cox C. C., 176.
(120) R. v. Smith, 2 C. & K., 107.
(121) R. v. Debley, 2 C. & K., 818.

or if there are in the case circumstances which render the prisoner's account unreasonable or its truth improbable, the burden then of producing the party referred to will be cast upon the accused. (122)

**594. Discharge of accused when no sufficient case.** — When all the witnesses on the part of the prosecution and the accused have been heard the justice shall, if upon the whole of the evidence he is of opinion that no sufficient case is made out to put the accused upon his trial, discharge him; and in such case any recognizances taken in respect of the charge shall become void, unless some person is bound over to prosecute under the provisions next hereinafter contained. R. S. C., c. 174, s. 73.

When witnesses are produced and examined on the part of the prisoner, at the preliminary investigation, the proper course to be followed by the Magistrate seems to be this. If the prisoner's witnesses are believed, and their evidence, without actually contradicting the testimony of the witnesses for the prosecution, tends merely to *explain* the facts proved in support of the charge, and to thus shew the prisoner's innocence, they will thus have made out on behalf of the accused a defence which would render any further proceedings unnecessary. But if the prisoner's witnesses *contradict* those for the prosecution, in material points, the case would then be a proper one to be sent to a jury to ascertain and decide which of the two conflicting statements is the truth.

It should not be supposed that, because the hearing before the justice is only preliminary, and not of a final nature, slight evidence alone will be sufficient to warrant a committal for trial.

Justices have a right, in the preliminary investigation of an indictable offence, to expect, and ought to insist upon having the best evidence that exists in the case; and, although in a preliminary enquiry it is not for them to balance the evidence, yet such evidence as is produced ought to be of the same nature and quality as that which would be admitted at the trial of the accused. All the evidence, therefore, that would be required to support the charge upon the trial should be carefully gathered together for use upon the preliminary examination.

**595. Prosecutor shall be allowed to be bound over to indict.** — If the justice discharges the accused, and the person preferring the charge desires to prefer an indictment respecting the said charge, he may require the justice to bind him over to prefer and prosecute such an indictment, and thereupon the justice shall take his recognizance to prefer and prosecute an indictment against the accused before the court by which such accused would be tried if such justice had committed him, and the justice shall deal with the recognizance, information and depositions in the same way as if he had committed the accused for trial.

2. Such recognizance may be in the FORM U IN SCHEDULE ONE hereto, (123) or to the like effect.

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(122) R. v. Harmer, 2 Cox C. C., 487; R. v. Wilson, 2 Dears. C. C., 157.
(123) For Form U, see p. 734, post.

3. If the prosecutor so bound over at his own request does not prefer and prosecute such an indictment, or if the Grand Jury do not find a true bill, or if the accused is not convicted upon the indictment so preferred, the prosecutor shall, if the Court so direct, pay to the accused person his costs, including the costs of his appearance on the preliminary inquiry.

4. The Court before which the indictment is to be tried or a judge thereof may in its or his discretion order that the prosecutor shall not be permitted to prefer any such indictment until he has given security for such costs to the satisfaction of such Court or judge. R. S. C., c. 174, s. 80.

The person filling the office of Commissioner of Dominion Police has, as such, no legal capacity to act on behalf of the Crown, and, in laying an information in which he designated himself as such Commissioner, he acted as a private individual and not as the legal representative of the Crown. The Commissioner having bound himself by recognizance to prefer and prosecute an indictment on the charge contained in his information, and the Grand Jury having thrown out the indictment and the prisoner being discharged, the Commissioner was held, under the above section, 595, to be personally liable for the costs incurred by the accused on the preliminary enquiry and before the Court of Queen's Bench. The costs allowed were such as were held, by analogy with the costs allowed in civil suits, to be costs recoverable from a losing party. It was held that such costs should be taxed according to a tariff made for criminal proceedings, and, that in the absence of such tariff they were to be taxed in the discretion of the Judge, by implication, according to the spirit of the provisions of section 835, *post*. (123*a*)

**596. Committal for trial.** — If a justice holding a preliminary inquiry thinks that the evidence is sufficient to put the accused on his trial, he shall commit him for trial by a warrant of commitment, which may be in the FORM V in SCHEDULE ONE hereto, (124) or to the like effect. R. S. C., c. 174, s. 73.

Where evidence on a preliminary examination was commenced before one justice and finished before two justices, it was, upon *habeas corpus* proceedings, held, that a committal of the accused for trial by the two justices was irregular, seeing that both had not been present and had not heard all the evidence; and a motion was granted ordering the prisoner's release from custody and the discharge of the bail taken on his committal for trial. (124*a*)

A justice's warrant of committal for trial must contain a sufficient description of an indictable offence for which a committal for trial can be made. Threats verbally made to burn the complainant's hay-stack and buildings are not indictable and give rise only to proceedings to oblige the threatener to furnish security to keep the peace. So, that, a warrant of committment for trial on such a charge was held bad and was quashed, as not being a commitment for trial of an indictable offence. *Held*, further, that a warrant of commitment for trial by magistrates as "justices of the

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(123*a*) R. v. St. Louis, 1 Can. Cr. Cas., 141.
(124) For Form V, see p. 735, post.
(124*a*) R. v. Nunn, 2 Can. Cr. Cas., 429; *Re* Guerin, 16 Cox C. C., 596.

peace in and for the county of Labelle,"— there being no such justices appointed with such a description, and there being no such title or description existing at law, — was illegal, there being no application made for the amendment of the commitment, and upon *habeas corpus* such a commitment was quashed and the prisoner discharged. (124*b*)

In April 1899, a prisoner charged with forgery was committed to gaol by three justices, "until discharged in due course of law." The warrant of commitment being palpably bad, the gaoler refused to hold the prisoner, and let him go. In June 1899, the depositions taken before the three justices were submitted to the Grand Jury of the county, but no witnesses came forward, and the Grand Jury dropped the matter, — neither finding a "true bill" nor "no bill." In August 1899, the prisoner was again arrested and lodged in gaol on a warrant of commitment for trial, dated the 9th of May 1899, and signed by one only of the three justices. This commitment charged that the prisoner "has been in the habit of drawing documents without authority and forging names to public commissions, thus fraudulently obtaining public money and using it, in my belief, for his benefit." The prisoner was not brought before any justice after his second arrest. Upon the return of a writ of *habeas corpus*, the prisoner was unconditionally discharged, it being held that, the commitment was defective in not setting forth when and where the offence was committed. (124*c*)

A preliminary enquiry and a committal for trial are judicial proceedings, and cannot take place on a Sunday, notwithstanding section 729, *post*, which deals only with matters before a jury. So, that, where a preliminary enquiry was held on a Sunday and the prisoner was on that day committed for trial, it was held that the prisoner was entitled to be dis harged; and proof by affidavit was held admissible to shew that the proceedings took place on a Sunday, such proof being evidence of an extrinsic fact in confession and avoidance of but not contradicting the return to a writ of *habeas corpus*. (124*d*)

**597. Copies of depositions.** — Every one who has been committed for trial, whether he is bailed or not, may be entitled at any time before the trial to have copies of the depositions, and of his own statement, if any, from the officer who has custody thereof, on payment of a reasonable sum not exceeding five cents for each folio of one hundred words. R. S. C., c. 174, s. 74.

**598. Recognizance to prosecute or give evidence.** — When any one is committed for trial the justice holding the preliminary inquiry may bind over to prosecute some person willing to be so bound, and bind over every witness whose deposition has been taken, and whose evidence in his opinion is material, to give evidence at the court before which the accused is to be indicted.

2. Every recognizance so entered into shall specify the name and surname of the person entering into it, his occupation or profession if any, the place of his residence and the name and number if any of any street in which it may be, and whether he is owner or tenant thereof or a lodger therein.

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(124*b*) *Ex parte* Welsh, 2 Can. Cr. Cas., 35.
(124*c*) R. v. McDiarmid, 19 C. L. T., 329.
(124*d*) R. v. Cavalier, 1 Can. Cr. Cas., 134; 11 Man. L. R., 333

3. Such recognizance may be either at the foot of the deposition or separate therefrom, and may be in the FORM W, X or Y in SCHEDULE ONE hereto, (125) or to the like effect, and shall be acknowledged by the person entering into the same, and be subscribed by the justice or one of the justices before whom it is acknowledged.

4. Every such recognizance shall bind the person entering into it to prosecute or give evidence (both or either as the case may be), before the court by which the accused shall be tried.

5. All such recognizances and all other recognizances taken under this Act shall be liable to be estreated in the same manner as any forfeited recognizance to appear is by law liable to be estreated by the court before which the principal party thereto was bound to appear. R. S. C., c. 174, ss. 75 and 76.

6. Whenever any person is bound by recognizance to give evidence before a justice of the peace, or any Criminal Court, in respect of any offence under this Act, any justice of the peace, if he sees fit, upon information being made in writing and on oath, that such person is about to abscond, or has absconded, may issue his warrant for the arrest of such person ; and if such person is arrested any justice of the peace, upon being satisfied that the ends of justice would otherwise be defeated, may commit such person to prison until the time at which he is bound by such recognizance to give evidence, unless in the meantime he produces sufficient sureties; but any person so arrested shall be entitled on demand to receive a copy of the information upon which the warrant for his arrest was issued. 48-49 V., c. 7, s. 9.

**599. Witness refusing to be bound over.** — Any witness who refuses to enter into or acknowledge any such recognizance as aforesaid may be committed by the justice holding the inquiry by a warrant in the FORM Z in SCHEDULE ONE hereto, (126) or to the like effect, to the prison for the place where the trial is to be had, there to be kept until after the trial, or until the witness enters into such a recognizance as aforesaid before a justice of the peace having jurisdiction in the place where the prison is situated: Provided that if the accused is afterwards discharged any justice having such jurisdiction may order any such witness to be discharged by an order which may be in the FORM A A in the said SCHEDULE, (127) or to the like effect. R.S.C., c. 174, ss. 78 and 79.

**600. Transmission of documents.** — The following documents shall, as soon as may be after the committal of the accused, be

(125) For Forms W, X and Y, see pp. 735, 736, *post*.
(126) For Form Z, see p. 737, *post*.
(127) For Form AA, see p. 738, *post*.

transmitted to the clerk or other proper officer of the court by which the accused is to be tried, that is to say, the information if any, the depositions of the witnesses, the exhibits thereto, the statement of the accused, and all recognizances entered into, and also any depositions taken before a coroner if any such have been sent to the justice.

2. When any order changing the place of trial is made the person obtaining it shall serve it, or an office copy of it, upon the person then in possession of the said documents, who shall thereupon transmit them and the indictment, if found, to the officer of the court before which the trial is to take place. R. S. C., c. 174, s. 77.

**601. Rule as to bail.** — When any person appears before any justice charged with an indictable offence punishable by imprisonment for more than five years other than treason or an offence punishable with death, or an offence under Part IV, of this Act, and the evidence adduced is, in the opinion of such justice, sufficient to put the accused on his trial, but does not furnish such a strong presumption of guilt as to warrant his committal for trial, the justice, jointly with some other justice, may admit the accused to bail upon his procuring and producing such surety or sureties as, in the opinion of the two justices, will be sufficient to ensure his appearance at the time and place when and where he ought to be tried for the offence; and thereupon the two justices shall take the recognizances of the accused and his sureties, conditioned for his appearance at the time and place of trial, and that he will then surrender and take his trial and not depart the court without leave; and in any case in which the offence committed or suspected to have been committed is an offence punishable by imprisonment for a term less than five years any one justice before whom the accused appears may admit to bail in manner aforesaid, and such justice or justices may, in his or their discretion, require such bail to justify upon oath as to their sufficiency, which oath the said justice or justices may administer; and in the default of such person procuring sufficient bail, such justice or justices may commit him to prison, there to be kept until delivered according to law.

2. The recognizance mentioned in this section shall be in the FORM BB in SCHEDULE ONE to this Act. (128) R.S.C., c. 174, s. 81.

3. Where the offence is one triable by the Court of General or Quarter Sessions of the Peace and the justice is of opinion that it may better or more conveniently be so tried, the condition of the recognizance may be for the appearance of the accused at the next sittings of that court notwithstanding that a sittings of a superior

(128) For Form BB, see p. 738, *post*.

court of criminal jurisdiction capable of trying the offence intervenes. (Added by the *Criminal Code Amendment Act 1900*).

In the case of a prisoner charged with an indictable offence punishable by more than five years imprisonment, — other than treason or an offence punishable with death, or any offence against Part IV of the Code — this section gives to *two* justices, or, (by virtue of section 541 of the Code, *ante*), to a judge of sessions, police magistrate, recorder, or other functionary vested, by that Section, with the powers of two justices, a discretionary power to admit him to bail; and in the case of a prisoner charged with an offence punishable by less than five years imprisonment, he may be admitted to bail by *one* justice.

In deciding whether the accused should or should not be admitted to bail, it should be borne in mind that, the purpose of a committal to prison before trial is to *ensure the appearance of the accused* at the time and place when and where he is to be tried; (128*a*) and justices should consider the circumstances of each case, with this object only in view. As this duty involves an enquiry in which discretion must be exercised, no general rule can be laid down.

Usually, however, it will be sufficient for the justices to look at the nature and magnitude of the charge, the position in life of the accused, the cogency of the evidence against him, and the probable severity of the punishment likely to follow a conviction; and, if they consider it probable that the accused would sooner that he and his sureties should forfeit a sum of money than run the risk of a trial and conviction and the sentence likely to follow, they should refuse to admit the accused to bail.

The amount of the recognizance is entirely in the justice's discretion, and should depend upon the nature of the charge and the position of the parties.

A magistrate must not, however, in a case in which the accused is entitled to be admitted to bail, require *excessive* bail, so as in effect to amount to a denial of bail; or he may render himself liable to an action at the suit of the person wrongfully imprisoned, or even to a criminal prosecution. (129)

Still, it has been held that the power of a magistrate to accept or refuse bail, even in cases where the accused has a right to be bailed, is a judicial function, and that an action will not lie against him for refusing to take bail in such cases, in the absence of proof of express malice, even though the sureties tendered are found sufficient. (130)

For the purpose of determining the sufficiency of the persons tendered as sureties, the justice may require their names to be given to the prosecutor, some time previously, say 24 or 48 hours, and he may administer to the persons tendered an oath "to make true answer to all such questions as may be demanded of them;" and he may then put to them the usual questions as to their means, property and liabilities and whether or not they are solvent, and so on; but the justice ought not to interfere in any way to disquiet them from becoming bound as bail: (131) nor can he legally enquire into the personal character or political opinions of the persons offered as bail. His duty is restricted to an enquiry into the sufficiency of the property of the sureties to meet the recognizance. (132)

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(128*a*) R. v. Rose, 18 Cox C. C., 717.

(129) R. v. Badger, 12 L. J. M. C., 66; 4 Ad. & E., 468; R. v. Tracey, 15 L. J. M. C., 145.

(130) Linford v. Fitzroy, 18 L. J. M. C., 108; 13 Q. B., 240.

(131) R. v. Saunders, 2 Cox C. C., 240.

(132) R. v. Badger, *supra*.

In a case which came before Martin, B., that learned judge is reported to have stated his opinion to be that if the justice is satisfied of the solvency of the persons tendered as bail, he is not justified in rejecting them on account of any alleged objections to their moral character, or from the fact of their being indemnified by the defendant. (133)

Where there is danger that accused persons, committed for trial for alleged offences against the election laws, may purposely allow then bail to be forfeited with the view of avoiding scandal, the Court, on an application to admit them to bail, should require the bail to be of a substantial amount. (133*a*)

**602. Bail after commi/tal.** — In case of any offence other than treason or an offence punishable with death, or an offence under Part IV of this Act, where the accused has been finally committed as herein provided, any judge of any superior or county court, having jurisdiction in the district or county within the limits of which the accused is confined, may, in his discretion, on application made to him for that purpose, order the accused to be admitted to bail on entering into recognizance with sufficient sureties before two justices, in such amount as the judge directs, and thereupon the justices shall issue a warrant of deliverance as hereinafter provided, and shall attach thereto the order of the judge directing the admitting of the accused to bail.

2. Such warrant of deliverance shall be in the FORM CC in SCHEDULE ONE to this Act. (134) R. S. C., c. 174, s. 82.

**603. Bail by Superior Court.** — No judge of a county court or justices shall admit any person to bail accused of treason or an offence punishable with death, or an offence under Part IV of this Act, nor shall any such person be admitted to bail, except by order of a Superior Court of Criminal Jurisdiction for the province in which the accused stands committed or of one of the judges thereof, or, in the province of Quebec, by order of a judge of the Court of Queen's Bench or Superior Court. R. S. C., c. 174, s. 83.

**604. Application for Bail after committal.** — When any person has been committed for trial by any justice, the prisoner, his counsel solicitor or agent may notify the committing justice, that he will, as soon as counsel can be heard, move before a Superior Court of the province in which such person stands committed, or one of the judges thereof, or the judge of the county court, if it is intended to apply to such judge, under section six hundred and two, for an order to the justice to admit such prisoner to bail, — whereupon such committing justice shall, as soon as may be, trans-

(133) R. v. Broome, 18 L. T., 19.
(133*a*) R. v. Stewart and others, 4 Can. Cr. Cas., 131.
(134) For Form CC, see p. 739, *post*.

mit to the clerk of the Crown, or the chief clerk of the court, or the clerk of the county court or other proper officer, as the case may be, endorsed under his hand and seal, a certified copy of all informations, examinations and other evidence, touching the offence wherewith the prisoner has been charged, together with a copy of the warrant of commitment, and the packet containing the same shall be handed to the person applying therefor, for transmission, and it shall be certified on the outside thereof to contain the information concerning the case in question. R.S.C., c. 174, s. 93.

2. Upon such application to any such court or judge the same order concerning the prisoner being bailed or continued in custody, shall be made as if the prisoner was brought up upon a *habeas corpus*. R.S.C., c. 174, s. 94.

3. If any justice neglects or offends in anything contrary to the true intent and meaning of any of the provisionst of this section, the court to whose officer any such examination, information, evidence, bailment or recognizance ought to have been delivered, shall, upon examination and proof of the offence, in a summary manner, impose such fine upon every such justice as the court thinks fit. R.S.C., c. 174, s. 95.

**605. Warrant of deliverance.** — Whenever any justice or justices admit to bail any person who is then in any prison charged with the offence for which he is so admitted to bail, such justice or justices shall send to or cause to be lodged with the keeper of such prison, a warrant of deliverance under his or their hands and seals, requiring the said keeper to discharge the person so admitted to bail if he is detained for no other offence, and upon such warrant of deliverance being delivered to or lodged with such keeper, he shall forthwith obey the same. R.S.C., c. 174, s. 84.

**606. Warrant for arrest of bailed person about to abscond.** — Whenever a person charged with any offence has been bailed in manner aforesaid, it shall be lawful for any justice, if he sees fit, upon the application of the surety or of either of the sureties of such person and upon information being made in writing and on oath by such surety, or by some person on his behalf, that there is reason to believe that the person so bailed is about to abscond for the purpose of evading justice, to issue his warrant for the arrest of the person so bailed, and afterwards, upon being satisfied that the ends of justice would otherwise be defeated, to commit such person when so arrested to gaol until his trial or until he produces another sufficient surety or other sufficient sureties, as the case may be, in like manner as before.

For Forms of Information and complaint of sureties to have accused committed in discharge of their recognizances, and of Warrant to apprehend and of Commitment of the accused thereon, see ADDITIONAL FORMS at the end of this Part XLV.

**607. Delivery of accused to prison.** — The constable or any of the constables, or other person to whom any warrant of commitment authorized by this or any other Act or law is directed, shall convey the accused person therein named or described to the gaol or other prison mentioned in such warrant, and there deliver him, together with the warrant, to the keeper of such gaol or prison, who shall thereupon give the constable or other person delivering the prisoner into custody, a receipt for the prisoner, setting forth the state and condition of the prisoner when delivered into his custody.

2. Such receipt shall be in the FORM DD in SCHEDULE ONE hereto, (135) R.S.C., c. 174, s. 85.

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## FORMS UNDER PART XLV.

FROM SCHEDULE ONE.

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K. — (*Section* 580.)

SUMMONS TO A WITNESS.

Canada,
Province of ,
County of ,

To E. F., of , (*labourer*) :

Whereas information has been laid before the undersigned , a justice of the peace in and for the said county of , that A. B. (*&c., as in the summons or warrant against the accused*), and it has been made to appear to me that you are likely to give material evidence for (*the prosecution* or *for the accused* (136) ; These are therefore to require you to be and to appear before me, on next, at o'clock in the (fore) noon, at , or before such other justice or justices of the peace of the same county of , as shall then be there, to testify what you know concerning the said charge so made against the said A. B. as aforesaid, Herein fail not.

Given under my hand and seal, this day of in the year , at , in the county aforesaid .

J. S., [SEAL.]

*J. P., (Name of County.)*

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(135) For Form DD, see p. 740, *post*.
(136) Amended by 58-59 Vic., c. 40.

L. — (*Section* 582.)

WARRANT WHEN A WITNESS HAS NOT OBEYED THE SUMMONS.

Canada,
Province of ,
County of ,

To all or any of the constables and other peace officers in the said county of

Whereas information having been laid before , a justice of the peace, in and for the said county of , that A. B. (*&c., as in the summons*); and it having been made to appear to (*me*) upon oath that E. F. of , (*labourer*), was likely to give material evidence for (*the prosecution*), (*I*) duly issued (*my*) summons to the said E. F., requiring him to be and appear before (*me*) on , at , or before such other justice or justices of the peace for the same county, as should then be there, to testify what he knows respecting the said charge so made against the said A. B., as aforesaid; and whereas proof has this day been made upon oath before (*me*) of such summons having been duly served upon the said E. F. ; and whereas the said E. F. has neglected to appear at the time and place appointed by the said summons, and no just excuse has been offered for such neglect: These are therefore to command you to bring and have the said E. F. before (*me*) on at o'clock in the (fore) noon, at or before such other justice or justices for the same county, as shall then be there, to testify what he knows concerning the said charge so made against the said A. B. as aforesaid.

Given under (*my*) hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

*J. P., (Name of County).*

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M. — (*Section* 583).

WARRANT FOR A WITNESS IN THE FIRST INSTANCE.

Canada,
Province of ,
County of ,

To all or any of the constables and other peace officers in the said county of

Whereas information has been laid before the undersigned , a justice of the peace, in and for the said county of

that (*&c., as in the summons*); and it having been made to appear to (*me*) upon oath, that E. F. of , (*labourer*), is likely to give material evidence for the prosecution, and that it is probable that the said E. F. will not attend to give evidence unless compelled to do so: These are therefore to command you to bring and have the said E. F. before (*me*) on , at o'clock in the (fore) noon, at , or before such other justice or justices of the peace for the same county, as shall then be there, to testify what he knows concerning the said charge so made against the said A. B. as aforesaid.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

*J. P., (Name of County.)*

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N.—(*Section* 584.)

WARRANT WHEN A WITNESS HAS NOT OBEYED THE SUBPŒNA.

Canada, )
Province of , }
County of . )

To all or any of the constables and other peace officers in the said county of

Whereas information having been laid before , a justice of the peace, in and for the said county, that A. B. (*&c., as in the summons*); and there being reason to believe that E. F., of in the province of , (*labourer*), was likely to give material evidence for (*the prosecution*), a writ of subpœna was issued by order of , judge of (*name of court*) to the said E. F., requiring him to be and appear before (*me*) on , at or before such other justice or justices of the peace for the same county, as should then be there, to testify what he knows respecting the said charge so made against the said A. B., as aforesaid; and whereas proof has this day been made upon oath before (*me*) of such writ of subpœna having been duly served upon the said E. F.; and whereas the said E. F. has neglected to appear at the time and place appointed by the said writ of subpœna, and no just excuse has been offered for such neglect: These are therefore to command you to bring and have the said E. F. before (*me*) on at o'clock in the (fore) noon, at or before such other jus-

tice or justices for the same county as shall then be there, to testify what he knows concerning the said charge so made against the said A. B. as aforesaid.

Given under (*my*) hand and seal, this day of in the year , at , in the county aforesaid.

J. S., [SEAL.]

*J. P., (Name of County).*

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O. — (*Section* 585).

WARRANT OF COMMITMENT OF A WITNESS FOR REFUSING TO BE SWORN OR TO GIVE EVIDENCE.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the county of , and to the keeper of the common gaol at , in the said county of .

Whereas A. B. was lately charged before , a justice of the peace in and for the said county of , for that (*&c., as in the summons*); and it having been made to appear to (*me*) upon oath that E. F. of , was likely to give material evidence for the prosecution (*I*) duly issued (*my*) summons to the said E. F., requiring him to be and appear before me on , at , or before such other justice or justices of the peace for the same county as should then be there, to testify what he knows concerning the said charge so made against the said A. B. as aforesaid; and the said E. F. now appearing before (*me*) (*or* being brought before (*me*) by virtue of a warrant in that behalf), to testify as aforesaid, and being required to make oath or affirmation as a witness in that behalf, now refuses so to do (*or* being duly sworn as a witness now refuses to answer certain questions concerning the premises which are now here put to him, and more particularly the following ) without offering any just excuse for such refusal: These are therefore to command you, the said constables or peace officers, or any one of you, to take the said E. F. and him safely to convey to the common gaol at , in the county aforesaid, and there to deliver him to the keeper thereof, together with this precept: And (*I*) do hereby command you, the said keeper of the said common gaol to receive the said E. F. into your custody in the said common gaol, and him there safely keep for the space of days, for his said contempt unless in the meantime he consents to

be examined, and to answer concerning the premises; and for your so doing, this shall be your sufficient warrant.

Given under (*my*) hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

*J. P., (Name of County.)*

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P. — (*Section* 586).

WARRANT REMANDING A PRISONER.

Canada, }
Province of , }
County of , }

To all or any of the constables and other peace officers in the said county of , and to the keeper of the common gaol at , in the said county.

Whereas A. B. was this day charged before the undersigned , a justice of the peace in and for the said county of , for that (*&c., as in the warrant to apprehend*), and it appears to (*me*) to be necessary to remand the said A. B.: These are therefore to command you, the said constables and peace officers, or any of you, in Her Majesty's name, forthwith to convey the said A. B. to the common gaol at , in the said county, and there to deliver him to the keeper thereof, together with this precept: And I hereby command you the said keeper to receive the said A. B. into your custody in the said common gaol, and there safely keep him until the day of (*instant*), when I hereby command you to have him at , at o'clock in the (fore) noon of the same day before (*me*) or before such other justice or justices of the peace for the said county as shall then be there, to answer further to the said charge, and to be further dealt with according to law, unless you shall be otherwise ordered in the meantime.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

*J. P., (Name of County.)*

Q. — (*Section* 587.)

RECOGNIZANCE OF BAIL INSTEAD OF REMAND ON AN ADJOURNMENT OF EXAMINATION.

Canada,
Province of ,
County of .

Be it remembered that on the day of , in the year , A. B., of , (*labourer*), L. M., of . (*grocer*), and N. O., of , (*butcher*), personally came before me, , a justice of the peace for the said county, and severally acknowledged themselves to owe to our Sovereign Lady the Queen, her heirs and successors, the several sums following, that is to say: the said A. B. the sum of , and the said L. M., and N. O., the sum of , each, of good and lawful current money of Canada, to be made and levied of their several goods and chattels, lands and tenements respectively, to the use of our Lady the Queen, her heirs and successors if he, the said A. B., fails in the condition endorsed (*or* hereunder written.)

Taken and acknowledged the day and year first above mentioned, at before me.

J. S.,

*J. P.*, (*Name of County.*)

CONDITION.

The condition of the within (*or* above) written recognizance is such that whereas the within bounden A. B. was this day (*or* on last past) charged before me for that (*&c., as in the warrant*); and whereas the examination of the witnesses for the prosecution in this behalf is adjourned until the day of (*instant*): If therefore, the said A. B. appears before me on the said day of (*instant*), at o'clock in the (fore) noon, or before such other justice or justices of the peace for the said county as shall then be there, to answer (*further*) to the said charge, and to be further dealt with according to law, the said recognizance to be void, otherwise to stand in full force and virtue.

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R. — (*Section* 589.)

CERTIFICATE OF NON-APPEARANCE TO BE ENDORSED ON THE RECOGNIZANCE.

I hereby certify that the said A. B. has not appeared at the time and place in the above condition mentioned, but therein has made a default, by reason whereof the within written recognizance is forfeited.

J. S.,

*J. P.*, (*Name of County.*)

S. — (*Section* 590.)

DEPOSITION OF A WITNESS.

Canada,
Province of ,
County of .

The deposition of X. Y. of , taken before the undersigned, a justice of the peace for the said county of , this day of , in the year , at (*or* after notice to C. D. who stands committed for ) in the presence and hearing of C. D. who stands charged that (*state the charge*). The said deponent saith on his (*oath or affirmation*) as follows: (*Insert deposition as nearly as possible in words of witness.*)

(*If depositions of several witnesses are taken at the same time, they may be taken and signed as follows:*)

( The depositions of X. of , Y. of , Z. of etc., taken in the presence and hearing of C. D., who stands charged that

The deponent X. (*on his oath or affirmation*) says as follows :

The deponent Y. (*on his oath or affirmation*) says as follows:

The deponent Z. (*on his oath, &c., &c.*)

(*The signature of the justice may be appended as follows:*)

The depositions of X., Y., Z., etc., written on the several sheets of paper, to the last of which my signature is annexed, were taken in the presence and hearing of C. D. and signed by the said X., Y., Z., respectively in his presence. In witness whereof I have in the presence of the said C. D. signed my name.

J. S.,

*J. P.*, (*Name of County.*)

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T. — (*Section* 591.)

STATEMENT OF THE ACCUSED.

Canada,
Province of ,
County of .

A. B. stands charged before the undersigned , a justice of the peace in and for the county aforesaid, this day of , in the year , for that the said A. B., on , at

(*&c., as in the captions of the depositions*); and the said charge being read to the said A. B., and the witnesses for the prosecution, C. D. and E. F., being severally examined in his presence, the said A. B. is now addressed by me as follows: "Having heard the "evidence, do you wish to say anything in answer to the charge? "You are not obliged to say anything unless you desire to do so; "but whatever you say will be taken down in writing, and may be "given in evidence against you at your trial. You must clearly "understand that you have nothing to hope from any promise of "favour, and nothing to fear from any threat which may have "been held out to induce you to make any admission or confession "of guilt, but whatever you now say may be given in evidence "against you upon your trial, notwithstanding such promise or "threat." Whereupon the said A. B. says as follows: (*Here state whatever the prisoner says and in his very words as nearly as possible. Get him to sign it if he will.*)

A. B.

Taken before me, at , the day and year first above mentioned.

J. S., [SEAL.]

*J. P., (Name of County.)*

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U. — (*Section* 595.)

FORM OF RECOGNIZANCE WHERE THE PROSECUTOR REQUIRES THE JUSTICE TO BIND HIM OVER TO PROSECUTE AFTER THE CHARGE IS DISMISSED.

Canada,
Province of ,
County of .

Whereas C. D. was charged before me upon the information of E. F. that C. D. (*state the charge*), and upon the hearing of the said charge I discharged the said C. D., and the said E. F. desires to prefer an indictment against the said C. D. respecting the said charge, and has required me to bind him over to prefer such an indictment at (*here describe the next practicable sitting of the court by which the person discharged would be tried if committed*).

The undersigned E. F. hereby binds himself to perform the following obligation, that is to say, that he will prefer and prosecute an indictment respecting the said charge against the said C. D. at (*as above.*) And the said E. F. acknowledges himself bound to forfeit to the Crown the sum of $ in case he fails to perform the said obligation.

E. F.

Taken before me.

J. S.,

*J. P., (Name of County.)*

V. — (*Section* 596.)

WARRANT OF COMMITMENT.

Canada,
Province of ,
County of .

To the constable of , and to the keeper of the (*common gaol*) at , in the said county of

Whereas A. B. was this day charged before me, J. S., one of Her Majesty's justices of the peace in and for the said county of , on the oath of C. D. of , (*farmer*), and others, for that (*&c., stating shortly the offence*) : These are therefore to command you the said constable to take the said A. B., and him safely to convey to the (*common gaol*) at aforesaid, and there to deliver him to the keeper thereof, together with this precept: And I do hereby command you the said keeper of the said (*common gaol*) to receive the said A. B. into your custody in the said (*common gaol*), and there safely keep him until he shall be thence delivered by due course of law.

Given under my hand and seal, this day of , in the year , at, , in the county aforesaid.

J. S., [SEAL.]

*J. P., (Name of County.)*

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W. — *Section* 598.)

RECOGNIZANCE TO PROSECUTE.

Canada,
Province of ,
County of .

Be it remembered that on the day of , in the year , C. D. of , in the of , in the said county of , ((*farmer*), personally came before me , a justice of the peace in and for the said county of , and acknowledged himself to owe to our Sovereign Lady the Queen, her heirs and successors, the sum of , of good and lawful current money of Canada, to be made

and levied of his goods and chattels, lands and tenements, to the use of our said Sovereign Lady the Queen, her heirs and successors, if the said C. D. fails in the condition endorsed (*or* hereunder written).

Taken and acknowledged the day and year first above mentioned at , before me.

J. S.,

*J. P., (Name of County.)*

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CONDITION TO PROSECUTE.

The condition of the within (*or* above) written recognizance is such that whereas one A. B. was this day charged before me, J. S., a justice of the peace within mentioned, for that (*&c., as in the caption of the depositions*); if, therefore, he the said C. D. appears at the court by which the said A. B. is or shall be tried * and there duly prosecutes such charge then the said recognizance to be void, otherwise to stand in full force and virtue.

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X. — (*Section* 598).

COGNIZANCE TO PROSECUTE AND GIVE EVIDENCE.

(*Same as the last form to the asterisk,* and then thus*): — And there duly prosecutes such charge against the said A. B. for the offence aforesaid and gives evidence thereon, as well to the jurors who shall then inquire into the said offence, as also to them who shall pass upon the trial of the said A. B., then the said recognizance to be void, or else to stand in full force and virtue.

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Y. — (*Section* 598).

COGNIZANCE TO GIVE EVIDENCE.

(*Same as the last form but one, to the asterisk, * and then thus*):— And there gives such evidence as he knows upon the charge to be then and there preferred against the said A. B. for the offence aforesaid, then the said recognizance to be void, otherwise to remain in full force and virtue.

Z. — (*Section* 599.)

COMMITMENT OF A WITNESS FOR REFUSING TO ENTER INTO THE RECOGNIZANCE.

Canada,
Province of ,
County of .

To all or any of the peace officers in the said county of and to the keeper of the common gaol of the said county of , at in the said county of

Whereas A. B., was lately charged before the undersigned (*name of the justice of the peace*), a justice of the peace in and for the said county of , for that (*&c., as in the summons to the witness*), and it having been made to appear to (*me*) upon oath that E. F., of , was likely to give material evidence for the prosecution. (I) duly issued (*my*) summons to the said E. F., requiring him to be and appear before (*me*) on , at or before such other justice or justices of the peace as should then be there, to testify what he knows concerning the said charge so made against the said A. B. as aforesaid; and the said E. F. now appearing before (*me*) (or being brought before (*me*) by virtue of a warrant in that behalf to testify as aforesaid), has been now examined before (*me*) touching the premises, but being by (*me*) required to enter into a recognizance conditioned to give evidence against the said A. B., now refuses so to do : These are therefore to command you the said peace officers, or any one of you, to take the said E. F. and him safely convey to the common gaol at , in the county aforesaid, and there deliver him to the said keeper thereof, together with this precept: And I do hereby command you, the said keeper of the said common gaol, to receive the said E. F. into your custody in the said common gaol, there to imprison and safely keep him until after the trial of the said A. B. for the offence aforesaid, unless in the meantime the said E. F. duly enters into such recognizance as aforesaid, in the sum of before some one justice of the peace for the said county, conditioned in the usual form to appear at the court by which the said A. B. is or shall be tried, and there to give evidence upon the charge which shall then and there be preferred against the said A. B. for the offence aforesaid.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

*J. P., (Name of County.)*

AA. — (*Section* 599.)

SUBSEQUENT ORDER TO DISCHARGE THE WITNESS.

Canada,
Province of ,
County of .

To the keeper of the common gaol at , in the county of , aforesaid.

Whereas by(*my*) order dated the day of (*instant*) reciting that A. B. was lately before then charged before (*me*) for a certain offence therein mentioned, and that E. F. having appeared before (*me*) and being examined as a witness for the prosecution on that behalf, refused to enter into recognizance to give evidence against the said A. B., and I therefore thereby committed the said E. F. to your custody, and required you safely to keep him until after the trial of the said A. B. for the offence aforesaid; unless in the meantime he should enter into such recognizance as aforesaid ; and whereas for want of sufficient evidence against the said A. B., the said A. B. has not been committed or holden to bail for the said offence, but on the contrary thereof has been since discharged, and it is therefore not necessary that the said E. F. should be detained longer in your custody: These are therefore to order and direct you the said keeper to discharge the said E. F. out of your custody, as to the said commitment, and suffer him to go at large.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

*J. P.*, (*Name of County.*)

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BB. — (*Section* 601.)

RECOGNIZANCE OF BAIL.

Canada,
Province of ,
County of .

Be it remembered that on the day of , in the year , A. B. of , (*labourer,*) L. M. of , (*grocer*), and N. O. of , (*butcher*), personally came before (*us*) the undersigned, (*two*) justices of the peace for the county of , and severally acknowledged

themselves to owe to our Sovereign Lady the Queen, her heirs and successors, the several sums following, that is to say: the said A. B. the sum of , and the said L. M. and N. O. the sum of , each, of good and lawful current money of Canada, to be made and levied of their several goods and chattels, lands and tenements respectively, to the use of our said Sovereign Lady the Queen, her heirs and successors, if he, the said A. B., fails in the condition endorsed (*or* hereunder written).

Taken and acknowledged the day and year first above mentioned, at before us.

J. S.,

J. N.,

*J. P.*, (*Name of County.*)

CONDITION.

The condition of the within (*or* above) written recognizance, is such that whereas the said A. B. was this day charged before (*us*), the justices within mentioned for that (*&c., as in the warrant*); if, therefore, the said A. B. appears at the next superior court of criminal jurisdiction (*or* court of General or Quarter Sessions of the Peace) to be holden in and for the county of , and there surrenders himself into the custody of the keeper of the common gaol (*or* lock-up house) there, and pleads to such indictment as may be found against him by the grand jury, for and in respect to the charge aforesaid, and takes his trial upon the same, and does not depart the said court without leave, then the said recognizance to be void, otherwise to stand in full force and virtue. (As amended by the *Criminal Code Amendment Act 1900*).

N. B. — The words "His Majesty" and "Lord the King" should be substituted for "Her Majesty" and "Lady the Queen," in the foregoing forms.

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CC. — *Section* 602.)

WARRANT OF DELIVERANCE ON BAIL BEING GIVEN FOR A PRISONER ALREADY COMMITTED.

Canada,
Province of ,
County of .

To the keeper of the common gaol of the county of at , in the said county.

Whereas A. B. late of , (*labourer*), has before (*us*) (*two*) justices of the peace in and for the said county of , entered into his own recognizance, and found sufficient sureties

for his appearance at the next superior court of criminal jurisdiction (*or* court of General or Quarter Sessions of the Peace), to be holden in and for the county of , to answer our Sovereign Lady the Queen, for that (*&c., as in the commitment*), for which he was taken and committed to your said common gaol : These are therefore to command you, in Her Majesty's name, that if the said A. B. remains in your custody in the said common gaol for the said cause, and for no other, you shall forthwith suffer him to go at large.

Given under our hands and seals, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

J. N., [SEAL.]

*J. P., (Name of County).*

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DD. — (*Section* 607.)

GAOLER'S RECEIPT TO THE CONSTABLE FOR THE PRISONER.

I hereby certify that I have received from W. T., constable, of the county of , the body of A. B., together with a warrant under the hand and seal of J. S., Esquire, justice of the peace for the said county of , and that the said A. B. was sober, (*or as the case may be*), at the time he was delivered into my custody.

P. K.,

Keeper of the common gaol of the said county.

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## ADDITIONAL FORMS UNDER PART XLV.

DEPOSITION THAT A PERSON IS A MATERIAL WITNESS.

Canada,
Province of ,
County (or *District, etc.*) of .

The deposition of A. B., of , taken at , in the said (*county* or *district*) of , this day of , A. D., 190 , before me the undersigned, a justice of the peace (or, *as the case may be*), for the said (*county or district*) of , who, being duly sworn, doth depose and say that of , is likely to give material evidence on

behalf of the prosecution (*or* "accused") touching the matter of the annexed (*or* "within") information (*or* "complaint"); and that he the said A. B. verily believes that the said will not appear voluntarily for the purpose of being examined as a witness without being compelled so to do.

Taken and sworn before me, at this day of , A. D. 190 . } A. B.

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ORDER TO BRING UP ACCUSED BEFORE EXPIRATION OF REMAND.

Canada, Province of , County (or *District, etc.*) of .

To the keeper of the common gaol of the (*county* or *district*) or at , in the said (*county* or *district*)

Whereas A. B. (hereinafter called the "accused") was on the day of committed by (*me*) to your custody in the said (*common gaol*), charged for that (*etc., as in the warrant remanding the prisoner*), and, by the warrant in that behalf,* you were commanded to have him at on the day of now (*next*) at o'clock in the forenoon, before such justice or justices of the peace for the said (*county*) as might then be there, to answer further to the said charge, and to be further dealt with, according to law; ( or, *shortly, from the asterisk,** "he was remanded to the day of next"), unless you should be otherwise ordered in the meantime;

And whereas it appears to me, the undersigned, one of His Majesty's justices of the peace in and for the said (*county*) of , (*or*, "one of the said justices") to be expedient that the said accused should be further examined before the expiration of the said remand;

These are therefore to order you in His Majesty's name to bring and have the said accused at , at o'clock in the (fore) noon of the same day before (*me*) or before such other justice or justices of the peace for the said county (or district) as shall then be there, to answer further to the said charge, and to be further dealt with according to law, unless you shall be otherwise ordered in the meantime.

Given under my hand and seal, this day of in the year , at , in the county (or district) aforesaid.

J. S.,

J. P., (*name of county or district*).

MEMORANDUM TO BE WRITTEN ON DOCUMENTS PRODUCED IN EVIDENCE.

This is the plan (or "letter", or, *as the case may be*) produced to me, the undersigned, one of His Majesty's justices of the peace for the (county or district) of , on the examination of A. B., charged with arson (forgery, etc.), and referred to in the deposition of C. D. touching the said charge taken before me this day of , 190 .

J. S.,

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INFORMATION AND COMPLAINT OF SURETIES FOR A PERSON CHARGED WITH AN INDICTABLE OFFENCE, SO AS TO HAVE HIM COMMITTED IN DISCHARGE OF THEIR RECOGNIZANCES.

Proceed as in form C., at p. 688, *ante*, to the words, "who saith," (*altering it to the plural when the complaint is by two or more sureties, and then continue thus:*) that the said C. D. and E. F. (*names of sureties complaining*) were on the day of now last past, severally and respectively duly bound by recognizance before J. S., Esquire, one of His Majesty's justices of the peace for the said (county or district) of , in the sum of each, upon condition that one A. B., of , should appear at the next term of the Court of King's Bench (Crown side) for the district of , (or Court of Oyer and Terminer and General Gaol Delivery, or Court of General or Quarter Sessions of the Peace) to be holden in and for the (county or district) of , and there surrender himself into the custody of the keeper of the (*common gaol*) there, and plead to such indictment as might be found against him by the Grand Jury for or in respect of the charge of (*stating the charge shortly*), and take his trial upon the same and not depart the said court without leave; and that these complainants have reason to suspect and believe, and do verily suspect and believe, that the said A. B. is about to depart from this part of the country; and therefore they pray of me the said justice that I would issue my warrant of apprehension of the said A. B. in order that he may be surrendered to prison in discharge of them his said bail.

Taken and sworn before me at in the (county or district) of , this day of , 190 . } C. D. E. F.

WARRANT TO APPREHEND THE ACCUSED UPON THE INFORMATION OF HIS SURETIES.

Canada,
Province of ,
County (or *District, etc.*) of .

To all or any of the constables and other peace officers in the said county (or district) of , and to the keeper of the common gaol at , in the said county (or district).

Whereas you the said C. D. and E. F. were, etc. (as in the information and complaint, p. 742, ante to the end): These are therefore to authorize you the said C. D. and E. F., and also to command you the said (*constable or other peace officer*), in His Majesty's name forthwith to apprehend the said A. B., and to bring him before me or some justice or justices of the peace in and for the said (*county* or *district*) to the intent that he may be committed to the (*common gaol*) in and for the said (*county* or *district*) until the next Court of Oyer and Terminer and General Gaol Delivery (*or* Court of General or Quarter Sessions of the Peace), to be holden in and for the said (*county* or *district*) of , (or *etc., as the case may be*), unless he find new and sufficient sureties to become bound for him in such recognizance as aforesaid.

Given under my hand and seal, this day of , in the year of our Lord , at , in the (*county* or *district*) aforesaid.

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COMMITMENT OF THE ACCUSED ON HIS APPREHENSION AT THE INSTANCE OF HIS BAIL.

Canada, ,
Province of .
County (or *District, etc.*) of .

To all or any of the constables and other peace officers in the said county of , and to the keeper of the common gaol at , in the said county (or *district*).

Whereas on the day of , instant, complaint was made to me, the undersigned (or J. S.), one of His Majesty's justices of the peace in and for the said (*county* or *district*) of , by C. D. and E. F. of that (as in the information and complaint, p. 742, ante, to the end) I (or the said justice) thereupon issued my warrant authorizing the said C. D. and E. F., and also commanding the said constables of and all other peace

officers in the said (*county* or *district*) of , in His Majesty's name forthwith to apprehend the said A. B., and to bring him (*follow to end of warrant, supra*); and whereas the said A. B. hath been apprehended under and by virtue of the said warrant, and being now brought before me the said justice (*or,* me the undersigned, one, etc.) and surrendered by the said C. D. and E. F., his said sureties, in discharge of their said recognizances, I have required the said A. B. to find new and sufficient sureties to become bound for him in such recognizances as aforesaid, but the said A. B. hath now refused so to do: These are therefore to command you the said constables (or *other peace officers*) in His Majesty's name forthwith to take and safely to convey the said A. B. to the said (*common gaol*) at , in the said (*county* or *district*), and there deliver him to the keeper thereof, together with this precept; and I hereby command you the said keeper to receive the said A. B. into your custody in the said (*common gaol*), and him there safely to keep until the next Court of Oyer and Terminer and General Gaol Delivery (*or* Court of General or Quarter Sessions of the Peace), to be holden in and for the said (*county*) of , unless in the meantime the said A. B. shall find new and sufficient sureties to become bound for him in such recognizance as aforesaid.

Given under my hand and seal, this day of in the year of our Lord, , at , in the (*county* or *district*) aforesaid.

J. S. [L. S.]

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### IDENTIFICATION OF CRIMINALS.

By section 1 of the *Criminals' Identification Act, Canada, 1898*, (61 Vic., c. 54), it is enacted, that any person in lawful custody, charged with, or under conviction of an INDICTABLE OFFENCE, may be subjected, by or under the direction of those in whose custody he is, to the measurements, processes and operations practised under the system for the identification of criminals commonly known as the Bertillon Signaletic System, or to any measurements, processes or operations sanctioned by the Governor in Council having the like object in view. Such force may be used as is necessary to the effectual carrying out and application of such measurements, processes and operations; and the signaletic cards and other results thereof may be published for the purpose of affording information to officers and others engaged in the execution or administration of the law.

By section 2 of the Act, it is provided that, no one having the custody of any such person, and no one acting in his aid or under his direction, and no one concerned in such publication, shall incur any liability, civil or criminal, for anything lawfully done under the provisions of section 1 of the Act.

## PART XLVI.

## INDICTMENTS.

"The draft Code next deals with the subject of indictments, the object being to reduce them to what is really necessary for the purposes of justice. The law, at present, is in the form of objectionable written rules, qualified by several wide exceptions, which modify some of their defects.

"These general rules require the greatest minuteness in many matters, which need not be referred to here.

"Two rules, however, may be specially mentioned;

"1st. Indictments must not be double and cannot be in the alternative; each count must charge one offence and no more:

"2nd. All material averments must be proved as laid.

"Although these rules have been considerably relaxed in practice, the effect of them is that indictments run to a most inordinate length, and become at once so long and so intricate that it is hardly possible to understand them, and, that practically no one reads them but the counsel who draw and the clerks who copy them.

"The method employed is to take a section of an Act of Parliament and draw a series of counts, each charging one of the offences which the section creates; and as a single section often creates many offences hardly differing from each other, except by very slight shades of meaning, counts are inordinately multiplied in this manner. For instance, in R. v. Sillem, (1) an information, which might have been an indictment), charged certain persons, in substance, with having equipped for the Confederate States, then at war with the United States, a ship called the "Alexandra." The information was framed upon 59 Geo. 3 c. 69, and contained 95 counts. The first count charged an equipping with intent that the ship should be employed by certain foreign states, styling themselves the *Confederate* States, with intent to cruise against the Republic of the United States. The second count, instead of the *Republic* of the United States, mentioned the *citizens of the Republic* of the United States. The third count omitted all mention of the Confederate States, and called the United States the Republic of, etc. The fourth count was like the third, with the exception of returning to the expression "*citizens*", etc. After giving various names to the United States and Confederate States in the first eight counts, eight other counts were added substitut-

(1) R. v. Sillem, 2 H. & C., 431.

ing "*furnish*" for "*equip*". Eight more substituted "*fit out*" for "*furnish*." In short, the indictment contained a number of counts obtained by combining every operative verb of the section on which it was founded with all the other operative words.

"The excessive stringency of the rules on the subject of indictments has been greatly, though somewhat capriciously, relaxed by a variety of statutes, of which 14 and 15 Vict., c. 100 is perhaps the most extensive. By their provisions the necessity for excessive particularity is done away with, in some cases, but is left untouched in others. Thus, for instance, it is sufficient in an indictment for murder to charge that A wilfully, feloniously, and of his his malice aforethought did kill and murder B., instead of setting out, as was formerly necessary, the precise manner in which the murder was committed. If the charge is not murder but obtaining goods by false pretences, the particular false pretence used must be stated, and must be proved as laid, and a proper averment that it was false to the knowledge of the accused must be introduced. It is quite impossible to assign any reason why indictments for murder should be drawn on one principle, and indictments for false pretences on another. The explanation is that the inconvenience of the principle, which used to apply to both cases, happened to attract notice in the one case, and to escape notice in the other. We propose to deal with this matter, not by making any further exceptions to the rules now in force as to indictments, but by altering the rule itself, and substituting for it the rule stated in section 482, the most important part of which is in these words :

"'Every count of an indictment shall contain and shall be sufficient if it contains in substance a statement that the accused has committed some offence therein specified. Such statement may be made in popular language without any technical averment or any allegation of matter not essential to be proved.' (1)

"We make, in other sections, a variety of provisions which we hope will render all future indictments perfectly simple, though sufficient to define the matter to be tried, and to form the basis of a record of the trial." (Eng. Commrs' Rep., pp. 35, 36).

**608. Indictments need not be on parchment.** — It shall not be necessary for any indictment or any record or document relative to any criminal case to be written on parchment. R. S. C., c. 174, s. 103.

An indictment is a written accusation of crime preferred, in the name of His Majesty, to, and found, upon oath, by a Grand Jury competent by law to find it. When first drawn and placed before the Grand Jury, it is called a *Bill*, and is only property termed an indictment, when it has been found by them.

(1) A provision like this isc ontained in section 611, *post*.

The office of the indictment is to inform the accused of the charge which he is called upon to answer; and, subject to the exceptions made by sections 553, 555 and 560, *ante*, it must be preferred in the county, district, or other Magisterial Jurisdiction in which the offence charged by it has been committed.

See comments under sections 553 and 555, *ante*, pp. 663-668.

**609. Statement of venue.** — It shall not be necessary to state any venue in the body of any indictment, and the district, county or place named in the margin thereof, shall be the venue for all the facts stated in the body of the indictment; but if local description is required such local description shall be given in the body thereof. R. S. C., c. 174, s. 104.

The *venue* is the marginal statement, at the commencement of the Indictment, of the County or District in which it is preferred, thus:

"County (*or* District) )
of , to wit," )

It will be seen that this section, 609, contains a clause, as did the Imperial Statute, 14 and 15 Vic., c. 100, section 23, which provides that if *local* description is required, such local description shall be given in the body of the indictment. The following are mentioned by Archbold, (21st Ed., p. 57), as some of the cases in which local description has been held to be required to be inserted in the body of the indictment, namely, burglary; (2) house-breaking; (3) stealing in a dwelling-house; (4) being found by night armed with intent to break into a dwelling-house, etc., and to commit an indictable offence therein; (5) sacrilege; (6) riotously demolishing churches, houses, machinery, etc.; (7) maliciously firing a dwelling-house; (8) forcible entry; (9) poaching; (10) nuisances to highways; (11) malicious injuries to seabanks, mill dams, or other local property. (12)

It will be seen that by section 613 (*g*), no count of an indictment is to be deemed objectionable or insufficient on the ground that it does not name *or* describe, with precision, any person, place, or thing. And section 982, *post*, provides that the several forms in Schedule One, varied to suit the case, or forms to the like effect are to be deemed good and sufficient.

**610. Heading of indictment.** — It shall not be necessary to state in any indictment that the jurors present upon oath or affirmation.

2. It shall be sufficient if an indictment begins in one of the FORMS EE IN SCHEDULE ONE hereto, or to the like effect. (13)

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(2) 2 Russ. Cr. & M., (by Greaves), 4th Ed., 47; R. v. St. John, 9 C. & P., 40.
(3) R. v. Bullock, *cit.*, 1 Moo. C. C., 324.
(4) R. v. Napper, 1 Moo. C. C., 44.
(5) R. v. Jarrald, L. & C., 301; 32 L. J. (M. C.), 258.
(6) Arch. Cr. Pl., 365.
(7) R. v. Richards, 1 M. & Rob., 177.
(8) R. v. Woodward, 1 Moo. C. C., 323
(9) 2 Leon., 186.
(10) R. v. Ridley, R. & R., 515.
(11) R. v. Steventon, 1 C. & K., 55.
(12) 1 Tayl. Ev., 7th Ed., 268.
(13) For Form EE, see p. 769, *post*.

3. Any mistake in the heading shall upon being discovered be forthwith amended, and whether amended or not shall be immaterial.

**611. Form and contents of counts.** — Every count of an indictment shall contain, and shall be sufficient if it contains, in substance a statement that the accused has committed some indictable offence therein specified.

2. Such statement may be made in popular language without any technical averments or any allegations of matter NOT ESSENTIAL TO BE PROVED.

3. Such statement may be in the words of the enactment describing the offence or declaring the matter charged to be an indictable offence, or in any words *sufficient to give the accused notice of the offence with which he is charged.*

4. Every count shall contain so much detail of the circumstances of the alleged offence as is sufficient to give the accused reasonable information as to the act or omission to be proved against him, and to identify the transaction referred to: Provided that the *absence* or *insufficiency* of *such details shall not vitiate the count.*

5. A count may refer to any section or subsection of any statute creating the offence charged therein, and in estimating the sufficiency of such count the court shall have regard to such reference.

6. Every count shall in general apply only to a single transaction.

Form FF in Schedule One gives examples of the manner of stating offences in indictments. (See p. 769, *post.*)

With regard to the first paragraph of this section, 611, — namely, that, "every count of an indictment shall contain, and shall be sufficient if it contains, in substance a statement that the accused has committed some indictable offence therein specified," — the Honorable Mr. Justice Taschereau, has, in his commentaries on the Criminal Code, the following remarks: —

"The first sub-section of this section 611 cannot, probably, bear the construction that the wording of it taken literally would, at first, suggest. The whole Act taken together does not seem to allow of such a construction. Section 614, for instance, as to treason, is directly against it. An indictment for obtaining by false pretences is, perhaps, the only one that can be laid, without an averment of the intent, where the intent is necessary to constitute the offence, and this, because the form FF given in Schedule One, does not aver the intent; section 982, *post; see* R. v. Pierce, 16 Cox C. C., 213. (14) But the same form in all other cases, where the intent is an ingredient of the offence as enacted by statute, does contain an averment of such intent. If it were sufficient, in any indictment, to

(14) R. v. Pierce, 16 Cox C. C., 213.

simply aver in all cases that the defendant has committed an indictable offence therein specified, the Act would not contain section 618, for instance, which specially decrees that in an indictment under section 361, it shall not be necessary to allege or to prove that the act was done with intent to defraud, though section 361 has no mention whatever of an intent to defraud, and sections 618, 619, 620, 621, 622, 623, 624, 625, would be superfluous. Section 733, also provides, for the case where the indictment does not state an indictable offence, and section 723, sub-section 2, likewise assumes that indictments are not always to be so carelessly drawn as section 611 would, at first sight, seem to allow.

"Sub-section 2 of this section 611 may perhaps dispense of, for instance, the word "burglariously" in indictments for burglary, but leaves it necessary to aver all matter *necessary to be proved*." (15)

After citing a number of authorities on the rules recognized, before the Code, in the framing of indictments, Taschereau proceeds thus: — "Such are the rules that have heretofore been recognized in the framing of indictments. How far this Code alters them remains to be settled by the jurisprudence. But it must not be lost sight of that it is technical objections only that the Imperial Commissioners report as being put an end to by the Code. That every indictment must charge an offence and that every accused person is entitled to know what he is accused of, still remains the law, it must be assumed; R. v. Clement, 26 U. C., Q. B., 297; *see* case of R. v. Cummings. (16) Parliament has undoubtedly the right to decree that such shall not be the law any longer, but when they come to that determination the Courts of the country will probably require that such determination be expressed in clear and unequivocal terms. Section 2 of this section 611, assumes negatively that all matters of fact necessary to be proved must be alleged in the indictment. It still remains the rule that an indictment which does not substantially set down all the elements of the offence is void: *see* 1 Bishop. Cr. Proc., 98." (17)

It seems clear that, under this section, 611, taken as a whole, the indictment must contain a statement shewing that the person therein accused has committed some indictable offence. (18)

The manner of stating the crime is of no importance; but, it is absolutely necessary that the indictment should contain, in substance, a statement showing that the person therein accused has committed an indictable offence; and if there be any defect in or any necessary ingredient of the offence omitted from the indictment, the defendant may avail himself of the defect or omission, by demurrer or motion to quash under section 629, *post*, or by motion in arrest of judgment, under section 733, *post*. Thus, in an indictment for assaulting an officer whilst executing process, — without showing that he was an officer of the Court out of which the process issued: (19) for contemptuous or disrespectful words to a Magistrate, — without showing that the Magistrate was in the execution of his duty at the time; (20) against a public officer for nonperformance of a duty, — without showing that he was such an officer as was bound by law to per-

(15) Tasch. Cr. Code, 675.
(16) R. v. Clement, 26 U. C., Q. B., 297; R. v. Cummings, 15 U. C., Q. B., 16.
(17) Tasch. Cr. Code, 677.
(18) See R. v. Hall, 60 L. J., M. C., 124; [1891] 1 Q. B., 747; and *Ex parte* Daisy Hopkins, 61 L. J., Q. B., 240.
(19) R. v. Osmer, 5 East, 304. See R. v. Everett, 8 B. & C., 114.
(20) R. v. Lease Andr., 216.

form that particular duty; (21) the indictment, in all these and the like cases, is bad. (22)

Some of the decisions, which have been rendered since the coming into force of the Code, clearly indicate that the Judges are not all in accord in their construction of the above section, 611. For instance, where a defendant was arraigned for having, in a certain solemn declaration, falsely, wilfully and corruptly declared to a certain effect therein set forth, and the defendant applied to quash the indictment, on the ground that it did not allege, in the language of section 147, *ante*, that the statement dec'ared to was one authorized or required to be made on solemn declaration, and on the ground that it was not alleged that the statement in question was declared with intent to mislead, an application was made by the Counsel for the Crown to amend the indictment, if necessary, by adding the words, "he the said defendant being then duly authorized by law to make statements on solemn dec'aration," and the trial judge,—in refusing the motion to quash,—held that the forms of indictment "F. F.," *post*, are intended to illustrate the provisions of section 611, that the effect of those forms is not confined to the offences stated in them, and that, as an allegation, in the indictment in question, of intent to mis'ead would not have given the defendant any better notice of the offence than he had without it, it was not necessary. (22*a*) On the other hand, where a defendant was indicted for unlawfully writing and publishing a cerain false and defamatory libel of and concerning the prosecutor to the latter's great prejudice and injury, it was held that,—as the indictment merely charged the publication of a defamatory libel, without stating, in the words of section 285, *ante*, that the same was likely to injure the reputation of the libelled person by exposing him to hatred contempt or ridicu'e, or that it was designed to insult him,—it was bad, by reason of the omission of an essential ingredient of the offence, and that it could not be amended but must be set aside and quashed, as the defect was a matter of substance. (22*b*)

An indictment has been held to be sufficient in form when it contained all the allegations essential to constitute the offence, and charged in substance the offence created by the statute; and that it is immaterial in what part of the same the averment is contained, or that words of equivalent import are used instead of the language of the statute. (23)

In that case, it was held that, an indictment charging Bank officials with having made a monthly report, etc., "a wilful, false and deceptive statement," of and concerning the affairs of the Bank, and with intent to deceive, sufficiently charged the offence, under section 99 of the *Bank Act*, of having made "a wilfully false and deceptive statement *in* any return or report" with such intent. (24)

An indictment for neglecting to provide sufficient sustenance for a child of tender years was held to be sufficient, when it averred that it was the duty of the accused to provide and that he unlawfully *neglected* to provide, and that the omission to state that the accused had the ability to provide did not vitiate the indictment, but that the ability to provide was implied, and, therefore, sufficiently averred by the averment of *neglect*. (25)

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(21) 5 T. R., 623.
(22) See R. v. Cheere, 7 D. & R., 461; 8 A & E., 481.
(22*a*) R. v. Skelton, 18 C. L. T., 205.
(22*b*) R. v. Cameron, 2 Can. Cr. Cas., 173. And see R. v. Somers, 1 Can. Cr. Cas., 46.
(23) R. v. Weir, (No. 1), 3 Can. Cr. Cas., 102.
(24) *Ib.*
(25) R. v. Ryland, L. R., 1 C. C. R., 99; 37 L. J. (M. C.), 10.

When there is an exception contained in the same clause of the enactment which creates the offence, the indictment must shew negatively that the defendant does not come within the exception. (26) And the rule is the same although the enactment may be such as to cast upon the defendant the burden of proving that he comes within the exception. (27) It seems, however, that if the exception or proviso be in a subsequent clause or statute, (28) or although in the same section, yet if it be not incorporated with the enacting clause by any words of reference, (29) it is in that case matter of defence for the defendant, and not to be negatived in the indictment.

Where the enactment makes the doing of an act "without lawful authority or excuse" criminal, it is sufficient if the indictment negatives "lawful excuse" without also negativing "lawful authority," inasmuch as there can be no "lawful authority" which would not also be a "lawful excuse," and, therefore, to negative "lawful excuse" is also to negative "lawful authority." (30)

An indictment which is multifarious in that it combines a charge of failure to provide necessaries for a child under 16, (sections 210, 215), with a charge of attempt to murder the child, (section 232), and to which indictment the prisoners pleaded, is sufficient upon which to base a conviction for the latter offence without a formal amendment of the indictment, where the presiding Judge has withdrawn from the jury that portion of the charge based upon sections 210 and 215. (31)

Where a motion was made to quash an indictment "for breaking and entering with intent to steal and for stealing certain goods described," — because, charging statutory offences, it did not conclude with the words, "against the form of the statute in such case made and provided and against the peace and dignity of our Sovereign, Lady the Queen, Her Crown and Dignity," — it was held that this was not necessary, and that the indictment, — which sufficiently described what are indictable offences, under sections 413 and 414, *ante*, — was good. (32)

**612. Offences may be charged in the alternative.** — A count shall not be deemed objectionable on the ground that it charges in the alternative several different matters, acts or omissions *which are stated in the alternative in the enactment describing any indictable offence* or declaring the matters, acts or omissions charged to be an indictable offence, or on the ground that it is double or multifarious: Provided that the accused may at any stage of the trial apply to the court to amend or divide any such count on the ground that it is so framed as to embarrass him in his defence.

2. The court, if satisfied that the ends of justice require it, may

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(26) Spieres v. Parker, 1 T. R., 141; R. v. Earnshaw, 15 East, 456; R. v. Jarvis, 1 East, 643; R. v. Pratten, 6 T. R., 559. See R. v. Baxter, 5 T. R., 83; R. v. Masters, 1 B. & Ald., 362; R. v. Pearce, R. & R., 174; R. v. Robinson, R. & R., 321.

(27) R. v. Harvey, L. R., 1 C. C. R., 284; 40 L. J. (M. C.), 63.

(28) R. v. Hall, 1 T. R., 320.

(29) Steel v. Smith, 1 B. & Ald., 94.

(30) R. v. Harvey, *supra*.

(31) R. v. Lapierre, 1 Can. Cr. Cas., 413.

(32) R. v. Doyle, 15 C. L. T., 371; 27 N. S. R., 294; 2 Can. Cr. Cas., 335.

order any count to be amended or divided into two or more counts, and on such order being made such count shall be so divided or amended, and thereupon a formal commencement may be inserted before each of the counts into which it is divided.

**613. Certain objections not to vitiate a count.** — No count shall be deemed objectionable or insufficient on any of the following grounds; that is to say :

(*a*) that it does not contain the name of the person injured, or intended, or attempted to be injured; or

(*b*) that it does not state who is the owner of any property therein mentioned; or

(*c*) that it charges an intent to defraud without naming or describing the person whom it was intended to defraud ; or

(*d*) that it does not set out any document which may be the subject of the charge; or

(*e*) that it does not set out the words used where words used are the subject of the charge; or

(*f*) that it does not specify the means by which the offence was committed; or

(*g*) that it does not name or describe with precision any person place or thing :

(*h*) or in cases where the consent of any person, official, or authority is required before a prosecution can be instituted, that it does not state that such consent has been obtained. (Added by 56 Vict., c. 32).

Provided that the court may, if satisfied that it is necessary for a fair trial, order that a particular, further describing such document, words, means, person, place or thing be furnished by the prosecutor.

An indictment may be laid under section 431, *ante*, for unlawfully and with intent to defraud signing a promissory note by procuration, although the name signed is the name of a testamentary succession or of an estate in liquidation, (*e. g.*, "Estate John Doe"), but if the indictment does not disclose the particulars, an order will be made against the Crown to furnish particulars of the names and capacities of the persons representing such estate at the time when the offence is alleged to have been committed and and directing that the defendants be not arraigned until after the particulars have been delivered. (32*a*)

An application for particulars is addressed to the judicial discretion of the presiding Judge, who will exercise such discretion upon the facts, as they are made to appear before him, according to established rules and

(32*a*) R. v. Weir, (No. 2), 3 Can. Cr. Cas., 155.

judicial usage; (33) and who, in determining whether such particulars are required or not, may have regard to the depositions. (See section 617, *post*.)

It should be shewn that there is reasonable necessity for more specific information; and, therefore, where, in a case of embezzlement, the defendant had ample time to go over his books, which were to prove his embezzlement, his application for a bill of particulars was denied. (34)

A bill of particulars was deemed proper in the case of an indictment for embezzlement where the prisoner did not know the specific acts of embezzlement intended to be charged against him. (35)

In a case of conspiracy, where the indictment was in general terms, and did not set out the overt acts of the conspiracy, the defendant was held entitled to a bill of particulars. But the limits of the right of a defendant to a bill of particulars has been laid down, in an English Nisi Prius case, to be that, on the one hand, the particulars shall give him the same information which a special count would give; and, on the other hand, that the specific acts, with time and place, need not be stated. (36)

In a later case, before the English Court of King's Bench, this doctrine was indirectly confirmed; and, it was held, that, on a special count alleging overt acts, the Court will not order particulars to be furnished, in the absence of an affidavit by the defendant denying knowledge of the acts charged, and of sufficient information to enable him to meet them. "The general principle," said Lord Coleridge, "applies only to this extent, to give such information as is sufficient to enable the defendant fairly to defend himself when in Court; but, on the other hand, not to fetter the prosecutor in the conduct of his case. (37)

It will be seen, by section 723, *post*, that if at the trial there appears to be any variance between the evidence and the charge as contained either in the indictment or in any amendment or in any particulars, the Court may order an amendment so as to make the indictment or any count in it or any such particulars conformable with the proof.

**614. Indictment for treason or treasonable offences.** — Every indictment for treason or for any offence against Part IV of this Act must state overt acts, and no evidence shall be admitted of any overt act not stated unless it is otherwise relevant as tending to prove some overt act stated.

2. The power of amending indictments herein contained shall not extend to authorize the court to add to the overt acts stated in the indictment.

**615. Indictments for libels.** — No count for publishing a blasphemous, seditious, obscene or defamatory libel, or for selling or exhibiting an obscene book, pamphlet, newspaper or other printed or written matter, shall be deemed insufficient on the ground that

(33) *In re* Taylor, L. R., 4 Ch., 160; Doherty v. Alman, L. R., 3 App., 728.
(34) S. v. Miller, 3 N. J., L. J., 381.
(35) R. v. Hodgson, 3 C. & P., 422; R. v. Bootyman, 5 C. & P., 300.
(36) R. v. Hamilton, 7 C. & P., 448.
(37) R. v. Stapylton, 8 Cox C. C., 69. See, also, P. v. McKinney, 10 Mich., 54.

it does not set out the words thereof : Provided that the court may order that a particular shall be furnished by the prosecutor stating what passages in such book, pamphlet, newspaper, printing or writing are relied on in support of the charge.

2. A count for libel may charge that the matter published was written in a sense which would make the publishing criminal, specifying that sense without any prefatory averment showing how that matter was written in that sense. And on the trial it shall be sufficient to prove that the matter published was criminal either with or without such innuendo.

See full comments on the law of Libel at pp. 307, *et seq.*, *ante*.

For special comments on the sufficiency and insufficiency of indictments for Libel, see special comments and authorities, at p. 327, *ante*.

For Forms of Indictments and Pleadings in Libel cases, see pp. 605-607, *ante*.

See section 634, *post*, as to the plea of justification.

**616. Indictments for perjury, etc.** — No count charging perjury, the making of a false oath, or of a false statement, fabricating evidence or subornation, or procuring the commission of any of these offences, shall be deemed insufficient on the ground that it does not state the nature of the authority of the tribunal before which the oath or statement was taken or made, or the subject of the inquiry, or the words used or the evidence fabricated, or on the ground that it does not expressly negative the truth of the words used : Provided that the court may, if satisfied that it is necessary for a fair trial, order that the prosecutor shall furnish a particular of what is relied on in support of the charge.

2. No count which charges any false pretense, or any fraud, or any attempt or conspiracy by fraudulent means, shall be deemed insufficient because it does not set out in detail in what the false pretenses or the fraud or fraudulent means consisted: Provided that the court may, if satisfied as aforesaid, order that the prosecutor shall furnish a particular of the above matters or any of them.

3. No provision hereinbefore contained in this part as to matters which are not to render any count objectionable or insufficient shall be construed as restricting or limiting in any way the general provisions of section six hundred and eleven. R. S. C., c. 174, s. 107.

For Forms of Indictment for Perjury, see pp. 589 and 590, *ante*.

**617. Copy particulars to be supplied to the accused.** — When any such particular as aforesaid is delivered a copy shall be given without charge to the accused or his solicitor, and it shall be en-

tered in the record and the trial shall proceed in all respects as if the indictment had been amended in conformity with such particular.

2. In determining whether a particular is required or not, and whether a defect in the indictment is material to the substantial justice of the case or not, the court may have regard to the depositions.

See, as to applications for particulars, comments, under section 613, *ante*.

**618. Indictment for pretending to send money, etc., by post.**— It shall not be necessary to allege, in any indictment against any person for wrongfully and wilfully pretending or alleging that he inclosed and sent, or caused to be inclosed and sent, in any post letter, any money, valuable security or chattel, or to prove on the trial, that the act was done with intent to defraud. R.S.C., c. 174, s. 113.

**619. Sufficiency of indictments.** — An indictment shall be deemed sufficient in the cases following:

(*a*) If it be necessary to name the joint owners of any real or personal property, whether the same be partners, joint tenants, parceners, tenants in common, joint stock companies or trustees, and it is alleged that the property belongs to one who is named, and another or others as the case may be;

(*b*) If it is necessary for any purpose to mention such persons and one only is named;

(*c*) If the property in a turnpike road is laid in the trustees or commissioners thereof without specifying the names of such trustees or commissioners;

(*d*) If the offence is committed in respect to any property in the occupation or under the management of any public officer or commissioner, and the property is alleged to belong to such officer or commissioner without naming him;

(*e*) If, for an offence under section three hundred and thirty-four, the oyster bed, laying or fishery is described by name or otherwise, without stating the same to be in any particular county or place. R. S. C., c. 174, ss. 118, 119, 120, 121 and 123.

Section 613, *ante*, provides that no count shall be insufficient for not naming the person injured, for not stating who is the owner of any property therein mentioned, nor for omitting to name or describe any person, place or thing.

See section 723, *post*, as to amendment of variances so as to conform to the proof.

**620. Property of a body corporate.** — All property, real and personal, whereof any body corporate has, by law, the manage-

ment, control or custody, shall, for the purpose of any indictment or proceeding against any other person for any offence committed on or in respect thereof, be deemed to be the property of such body corporate. R. S. C., c. 174, s. 122.

**621. Indictment for stealing ores or minerals.** — In any indictment for any offence mentioned in sections three hundred and forty-three or three hundred and seventy-five of this Act, it shall be sufficient to lay the property in Her Majesty, or in any person or corporation, in different counts in such indictment; and any variance in the latter case, between the statement in the indictment and the evidence adduced, may be amended at the trial; and if no owner is proved the indictment may be amended by laying the property in Her Majesty. R. S. C., c. 174, s. 124.

**622. Indictments in respect to postal-cards, etc.** — In any indictment for any offence committed in respect of any postal card, postage stamp or other stamp issued or prepared for issue by the authority of the Parliament of Canada, or of the legislature of any province of Canada, or by, or by the authority of, any corporate body for the payment of any fee, rate or duty whatsoever, the property therein may be laid in the person in whose possession, as the owner thereof, it was when the offence was committed, or in Her Majesty if it was then unissued or in the possession of any officer or agent of the Government of Canada or of the province by authority of the legislature whereof it was issued or prepared for issue. R. S. C., c. 174, s. 125.

See section 3 (*v*), par. (*iii*), *ante*, which includes, in the meaning of the word property, any postage stamp, etc.

**623. Indictments for thefts, etc., by public employees.** — In every case of theft or fraudulent application or disposition of any chattel, money or valuable security under sections three hundred and nineteen (*c*) and three hundred and twenty-one of this Act, the property in any such chattel, money or valuable security may, in any warrant by the justice of the peace before whom the offender is charged, and in the indictment preferred against such offender, be laid in Her Majesty, or in the municipality, as the case may be. R. S. C., c. 174, s. 126.

For Form of Indictment, see p. 609, *ante*.

**624. Indictments for offences respecting mailable matter, etc.** — When an offence is committed in respect of a post letter bag, or a post letter, or other mailable matter, chattel, money or valuable security sent by post, the property of such post letter bag, post letter, or other mailable matter, chattel, money or valuable security may, in the indictment preferred against the offender, be

laid in the Postmaster-General; and it shall not be necessary to allege in the indictment, or to prove upon the trial, or otherwise, that the post letter bag, post letter or other mailable matter, chattel or valuable security was of any value.

2. The property of any chattel or thing used or employed in the service of the post office, or of moneys arising from duties of postage, shall, except in the cases aforesaid, be laid in Her Majesty, if the same is the property of Her Majesty, or if the loss thereof would be borne by Her Majesty, and not by any person in his private capacity.

3. In any indictment against any person employed in the post office of Canada for any offence against this Act, or against any person for an offence committed in respect of any person so employed it shall be sufficient to allege that such offender or such other person was employed in the post office of Canada at the time of the commission of such offence, without stating further the nature or particulars of his employment. R. S. C., c. 35, s. 111.

For Form of Indictment, see p. 610, *ante*.

For meaning of "Post-letter bag," etc., see section 4, *ante*, p. 8.

**625. Indictment for theft by tenant or lodger.** — An indictment may be preferred against any person who steals any chattel let to be used by him in or with any house or lodging, or who steals any fixture so let to be used, in the same form as if the offender was not a tenant or lodger, and in either case the property may be laid in the owner or person letting to hire. R.S.C., c. 174, s. 127.

For form of indictment, see p. 609, *ante*.

**626. Joinder of counts.** — Any number of counts for any offences whatever may be joined in the same indictment, and shall be distinguished in the manner shown in the FORM EE IN SCHEDULE ONE hereto, (39) or to like effect: Provided that to a count charging murder no count charging any offence other than murder shall be joined.

2. When there are more counts than one in an indictment each count may be treated as a separate indictment.

3. If the Court thinks it conducive to the ends of justice to do so, it may direct that the accused shall be tried upon any one or more of such counts separately. Such order may be made either before or in the course of the trial, and if it is made in the course of the trial the jury shall be discharged from giving a verdict on the counts on which the trial is not to proceed. The counts in the indictment which are not then tried shall be proceeded upon in all respects as if they had been found in a separate indictment.

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(39) For Form EE, see p. 769, *post*.

4. Provided that, unless there be special reasons, no order shall be made preventing the trial at the same time of any number of distinct charges of theft *not exceeding three*, alleged to have been committed *within six months* from the first to the last of such offences, whether against the same person or not.

5. If one sentence is passed upon any verdict of guilty on more counts than one, the sentence shall be good if any of such counts would have justified it.

It will be seen by this section and by section 612, *ante*, that it is entirely in the discretion of the Court, when satisfied that the ends of justice require it, to either order a count, (when it charges several different acts), to be divided into two or more counts, or to direct, when the indictment contains several counts, that the accused be tried on one or more counts separately.

By sub-section 2 of section 713, *post*, it is provided that if, on the trial of an indictment for murder, the evidence proves manslaughter and not murder, the jury may acquit the prisoner of murder, and render a verdict of guilty of manslaughter. And if upon the trial of an indictment for child murder, the jury find the accused not guilty of the murder, they may, under section 714, render a verdict of concealment of birth, if the evidence is such as to warrant it.

Sub-section 3 of the above section, 626, conforms to a number of decisions rendered, in England, on the subject of the joinder of several offences in separate counts of an indictment. (40)

**Joinder of defendants.** — Where an offence has been committed by more persons than one, all or any number of them may be jointly indicted and jointly tried for it; or each of them may be indicted and tried separately.

For instance, if several persons commit a robbery, a burglary, or a murder, they may be indicted for it either jointly, or separately; and the same where two or more commit an assault, or are guilty of extortion, or the like. (41) And, although they may have acted separately, yet if the grievance or injury is the result of the acts of all jointly, all may be jointly indicted for the offence. (42)

Where money was obtained by false pretences spoken by one defendant in the presence of others, acting with him in concert together, it was held that they might all be indicted jointly. (43) So, where two persons joined in singing a libellous song, it was held that they might be indicted jointly. (44) But, if the publications of a libel by two different persons be distinct, — as if two different booksellers, not being partners, sell the libel, at their respective shops, they must, in that case, be indicted separately; for each has committed a separate act of publication. And two or more persons cannot be indicted jointly, for perjury, or for seditious or blasphe-

(40) See R. v. Jones, 1 Camp., 131; R. v. Benfield, 2 Burr., 980; R. v. Young, 1 Leach, 511; R. v. Heywood, L. & C., 451; R. v. Ferguson, Dears., 427; R. v. Strange, 8 C. & P., 172; R. v. Ward, 10 Cox C. C., 42; R. v. Orton, 14 Cox C. C., 546; R. v. Bradlaugh, 15 Cox C. C., 217; R. v. Abrahams, 24 L. C. J., 325.

(41) 2 Hale, 173; R. v. Atkinson, 1 Salk., 382.

(42) R. v. Trafford, 1 B. & Ad., 874.

(43) Young v. R., 3 T. R., 98.

(44) R. v. Benfield, 2 Burr., 985.

mous words, or the like; because such offences are in their nature several. (45)

Even, where several commit a joint act, which act, however, is not of itself illegal, but becomes illegal merely by reason of some circumstances applicable to each individual, severally, and not jointly, they must be indicted separately. (46) Thus, several persons, who are partners, cannot be indicted jointly for the offence of exercising their trade without having served an apprenticeship. (47)

**Joint and separate trials.** — When several persons are indicted jointly, the prosecution have the option to try them either together, or separately. (48) The prisoners, when several of them are indicted jointly, cannot as a matter of right, demand to be tried separately; but when the trial of the defendants jointly would work any injustice to any of them, the presiding judge may, in his discretion, grant them separate trials, upon good cause being shewn for a severance. (49)

Where two persons are indicted jointly, a separate trial will not be allowed on the ground that the depositions disclose statements made by one of the prisoners implicating the other, and on the ground that there is no legal evidence against such other prisoner. (50)

An indictment in which several prisoners are charged, may contain counts charging offences against individual prisoners as well as counts charging all the prisoners jointly; but, if it is likely that injustice may be caused by trying all the prisoners together, the Court may order them to be tried separately. (50*a*)

**627. Accessories after the fact, and receivers.** — Every one charged with being an accessory after the fact to any offence, or with receiving any property knowing it to have been stolen, may be indicted, whether the principal offender or other party to the offence or person by whom such property was so obtained has or has not been indicted or convicted, or is or is not amenable to justice and such accessory may be indicted either alone as for a substantive offence or jointly with such principal or other offender or person.

2. When any property has been stolen any number of receivers at different times of such property, or of any part or parts thereof, may be charged with substantive offences in the same indictment, and may be tried together, whether the person by whom the property was so obtained is or is not indicted with them, or is or is not in custody or amenable to justice. R.S.C., c. 174, ss. 133, 136 and 138.

See sections 715, 716 and 717, as to trial of receivers. And see, also, comments at pp. 370 and 371, *ante*.

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(45) R. v. Philips, 2 Str., 921.
(46) 2 Hawk., c. 25, s. 89.
(47) R. v. Weston, 1 Str., 623. See R. v. Tucker, 4 Burr., 2016.
(48) 2 Hawk. P. C., c. 41, s. 8.
(49) 1 Bish. Cr. Pro., s. 1034; R. v. Littlechild, 6 Q. B., 293; R. v. Payne, 12 Cox C. C., 118; O'Connell v. R., 11 Cl. & F., 155; R. v. Bradlaugh, 15 Cox C. C., 217; R. v. Weir, (No. 4), 3 Can. Cr. Cas., 351.
(50) R. v. Blackburn, 6 Cox C. C., 333.
(50*a*) R. v. Cox, 18 Cox C. C., 672.

**628. Indictment charging previous conviction.** — In any indictment for any indictable offence, committed after a previous conviction or convictions for any indictable offence or offences or for any offence or offences (and for which a greater punishment may be inflicted on that account), it shall be sufficient, after charging the subsequent offence to state that the offender was at a certain time and place, or at certain times and places, convicted of an indictable offence, or of an offence or offences, as the case may be, and to state the substance and effect only, omitting the formal part of the indictment and conviction, or of the summary conviction, as the case may be, for the previous offence, without otherwise describing the previous offence or offences. R. S. C., c. 174, s. 139.

A second offence must, in order to be punishable as such, be one which has been committed after a conviction for a previous offence. In providing a heavier punishment for again committing an offence after being already convicted, the law proceeds upon the principle that the offender in repeating the offence is treating his previous conviction with contempt; but, if the repetition of the offence takes place without his having been convicted he cannot be said to treat with contempt a conviction which has had no existence; so that each repetition of an offence before any actual conviction is dealt with as a first offence. (51)

See section 676, *post*, as to procedure. And see section 694, *post*, as to proof of previous conviction.

For Forms of Indictment in such cases, see pp. 611, 612, *ante*.

**629. Objections to an indictment.** — Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer, or motion to quash the indictment, before the defendant has pleaded and not afterwards, except by leave of the court or judge before whom the trial takes place, and every Court before which any such objection is taken may, if it is 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; and no motion in arrest of judgment shall be allowed for any defect in the indictment which might have been taken advantage of by demurrer, or amended under the authority of this Act.

In the Imperial Act (14 and 15 Vict., c. 100, section 25), from which this provision is derived, the word "*defect*" is qualified by the adjective "*formal;*" and although the word is not so qualified in the above section, there can be no doubt that it has reference only to *formal* defects, and *imperfect* averments, and not to matters of *substance*, or to *entire omissions* of *essential* allegations. It does not mean, that, — upon the defendant demurring or moving to quash, — amendments may be made so as to

(51) See Lambe v. Hall, and Hall, Petitioner, and other cases, *cit.* at p. 536, *ante*.

cure defects or supply omissions in an indictment which does not charge any indictable offence, (52) or which charges an act that is no offence at all; (53) as, for instance, an indictment for attending a prize fight, (54) which, though an offence, is not indictable, or an indictment meant for a charge of rape, but alleging only the carnal knowledge, and omitting to state that it was *without the woman's consent*, or an indictment, — for seduction of an unmarried woman under twenty one, under promise of marriage, — omitting to state that the defendant was above the age of twenty one. (55)

If the defendant wishes to attack the indictment for defects apparent on its face, and amendable under the above section, he must do so by demurrer or petition to quash, before pleading to the merits. He cannot do so afterwards, except by leave of the Court. Not only is he precluded by the above section from doing so; but, under section 734, *post*, all formal defects are cured by the verdict.

When the defects are matters of substance, the defendant may either attack them at once by demurrer or petition to quash, or he may wait till after verdict and attack them by motion in arrest of judgment under section 733, *post*, clause 2 of which provides that the accused may, at any time before sentence, move in arrest of judgment, on the ground that the indictment does not state any indictable offence.

When an indictment is attacked for formal defects, by demurrer, or motion to quash, it may, under the above section 629, be amended; but, when so attacked for defects in matters of substance, the granting of the motion to quash or the maintaining of the demurrer has the effect of setting the indictment aside; (56) in which case, however, the prosecution may prefer a new indictment.

When there are defects in matters of substance, the defendant, instead of demurring or moving to quash, may plead to the merits, and then after standing the chance of an acquittal, he may still, in case of a conviction, move in arrest of judgment, unless the defects, — though in matters of substance, — are such as are cured by the verdict, either under the provisions of section 734, *post*, (57) or under the general rule of pleading by which, when an essential averment is not wholly omitted but imperfectly stated, it will, — though so defective as to be bad on demurrer, — be cured by a verdict found upon an issue involving that averment, if the verdict is such as could only be found upon actual proof of the averment, (58) or unless the defects in the indictment have been amended by order of the Court in the course of the trial. For, although defects in matters of substance cannot be ordered to be amended, when attacked by demurrer or motion to quash, it will be seen by clause 2 of section 723, that, "If there is in the indictment or in any count in it an omission to state or a defective statement of anything requisite to constitute the offence, or an omission to negative any exception which ought to have been negatived, but that the matter omitted is proved by the evidence, the Court before which the trial takes place, if of opinion that the accused has not been misled or preju-

(52) R. v. Bainton, 2 Str., 1088; R. v. Hewitt, R. & R., 158. R. v. Rigby, 8 C. & P., 770.

(53) R. v. Philpotts, 1 C. & K., 112.

(54) Being present at a prize fight is a non-indictable offence, punishable summarily. (See section 95, *ante*.)

(55) See section 182, *ante*.

(56) R. v. Burkett, Andr., 230; R. v. Sermon, 1 Burr., 516, 543.

(57) See Nash v. R., 4 B. & S., 535; 33 L. J. (M. C.), 94.

(58) Heymann v. R., L. R., 8 Q. B., 105; R. v. Goldsmith, L. R., 2 C. C. R., 74; R. v. Stroulger, 17 Q. B. D., 327; 55 L. J. (M. C.), 137.

diced in his defence by such error or omission, shall amend the indictment or count as may be necessary.

When defects in substance have not been amended at the trial, under section 723, and when they are not cured by verdict, the indictment must be set aside.

The rule, with regard to defects in substance being cured by verdict, will only apply to an averment *imperfectly* stated, that is, an averment which is stated, but which though stated is defective. The rule will not apply to the total *omission* of an *essential* averment.

If there is a total omission, so that the indictment charges no offence in law, the verdict is no cure. (59)

On this subject, the Honorable Mr. Justice Taschereau says: "If the indictment charges no offence there can be no waiver of the objection to it. It is void. * * * * Defects in matters of substance are not amendable. So, if a material averment is omitted, the Court cannot allow the amendment of the indictment by inserting it, for the very good reason that, if there is an omission of a material averment, — of an averment without which there is no offence known to the law charged against the defendant, — then, strictly speaking, there is no indictment; there is nothing to amend. * * * * The Court cannot look to what the prosecutor intended to charge the defendant with; it can only look to what he has charged him with. And this charge, fully and clearly defined of a crime or offence known to the law, the indictment, as returned by the Grand Jury, must contain." (60)

**630. Time to plead to indictment.** — No person prosecuted shall be entitled as of right to traverse or postpone the trial of any indictment preferred against him in any court, or to imparl, or to have time allowed him to plead or demur to any such indictment: Provided always, that if the court before which any person is so indicted, upon the application of such person or otherwise, is of opinion that he ought to be allowed a further time to plead or demur or to prepare for his defence, or otherwise, such court may grant such further time and may adjourn the trial of such person to a future time of the sittings of the court or to the next or any subsequent session or sittings of the court, and upon such terms, as to bail or otherwise, as to the court seem meet, and may, in the case of adjournment to another session or sitting, respite the recognizances of the prosecutor and witnesses accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence at such subsequent session or sittings without entering into any fresh recognizances for that purpose. R. S. C., c. 174, s 141.

The trial of an indictment will generally be postponed by the Court, upon the application of the prosecution or of the defendant, supported by affidavits shewing sufficient cause for the delay, such as the illness or un-

(59) R. v. Aspinall, 2 Q. B. D., 58; 46 L. J. (M. C.), 149. See R. v. Gray, L. & C., 365; R. v. Lynch, 20 L. C. J., 187; R. v. Carr., 26 L. C. J., 61; R. v. Norton, 16 Cox C. C., 59; R. v. Waters, 1 Den., 356.

(60) Tasch. Cr. Code, 703.

avoidable absence of a necessary and material witness, the existence of a prejudice in the jury, and the like. (61)

The production by the prosecution of evidence additional to that adduced before the Magistrate, and not communicated to the prisoner before the trial, may be a ground for postponement of the trial. (62)

The trial may be postponed, on the defendant's application, after the jury have been charged with the indictment, and before any evidence has been given in the case. (63)

Where a defendant was indicted for having carnal knowledge of a girl under ten years of age, an application by the prosecution for the postponement of the trial, with a view to the instruction of the girl, was refused. (64)

Where the application is made by the prosecutor, it is in the discretion of the Court either to detain the defendant in custody or admit him to bail, or to discharge him on his own recognizance. (65) But, after a bill for a serious offence has been found, the Court will not admit the prisoner to bail. (66)

The judges of the Central Criminal Court postponed until the next session the presentment to the Grand Jury of a bill of indictment for a capital offence, upon the ground of the illness of a witness sworn to be material. (67)

In one case it was held by Lush, J., that the presentment of a bill to the Grand Jury could not be postponed to the next Assizes, on the ground that other and like charges might, before that time, be brought against the prisoner. (68)

Baggally, J., postponed, to the next assizes, the presentment of a bill, on the ground that the witnesses were resident in a workhouse where there was smallpox, and that the attendance at the Assizes of such witnesses would be dangerous to the public, inasmuch as they might carry infection; and the prisoner was admitted to bail on his own recognizance to appear at the next Assizes. (69)

See sections 757-759, *post*, for special provisions, as to the province of Ontario with regard to time for pleading, etc.

**631. Special pleas.** — The following special pleas and no others may be pleaded according to the provisions hereinafter contained,

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(61) See, R. v. Chevalier D'Eon, 2 Burr., 1514; R. v. Jolliffe, 4 T. R., 285; R. v. Morphew, 2 M. & Sel., 602; R. v. Streak, 2 C. & P., 413; R. v. Hunter, 3 C. & P., 591; R. v. Stevenson, 2 Leach, 546; R. v. Bolam, 2 M. & Rob., 192; R. v. Macarthy, C. & Mar., 625; R. v. Savage, 1 C. & K., 75; R. v. Mobbs, 2 F. & F., 18; R. v. Lawrence, 4 F. & F., 901; R. v. Langhurst, 10 Cox C. C., 353; R. v. Taylor, 11 Cox C. C., 340; R. v. Dripps, 13 Cox C. C., 25; *cit. in* Arch. Cr. Pl. & Ev., 21st Ed., 105.

(62) R. v. Flannagan, 15 Cox C. C., 403.

(63) R. v. Fitzgerald, 1 C. & K., 201.

(64) R. v. Nicholas, 2 C. & K., 246.

(65) R. v. Beardmore, 7 C. & P., 497; R. v. Parish, 7 C. & P., 782; R. v. Osborne, 7 C. & P., 799; R. v. Bridgeman, C. & Mar., 271.

(66) R. v. Chapman, 8 C. & P., 558; R. v. Owen, 9 C. & P., 83; R. v. Guttridge, 9 C. & P., 228; R. v. Bowen, 9 C. & P., 509.

(67) R. v. Palmer, 6 C. & P., 652.

(68) R. v. Heeson, 14 Cox C. C., 40.

(69) R. v. Taylor, 15 Cox C. C., 8.

that is to say, a plea of *autrefois acquit*, a plea of *autrefois convict*, a plea of pardon, and such pleas, in cases of defamatory libel, as are hereinafter mentioned.

2. All other grounds of defence may be relied on under the plea of not guilty.

3. The pleas of *autrefois acquit*, *autrefois convict* and *pardon* may be pleaded together, and, if pleaded, shall be disposed of before the accused is called on to plead further; and, if every such plea is disposed of against the accused, he shall be allowed to plead not guilty.

4. In any plea of *autrefois acquit* or *autrefois convict*, it shall be sufficient for the accused to state that he has been lawfully acquitted or convicted, as the case may be, of the offence charged in the count or counts to which such plea is pleaded, indicating the time and place of such acquittal, or conviction: R. S. C., c. 174, s. 146.

5. On the trial of an issue on a plea of *autrefois acquit* or *autrefois convict* to any count or counts, if it appear that the matter on which the accused was given in charge on the former trial is the same in whole or in part as that on which it is proposed to give him in charge, and that he might on the former trial, if all proper amendments had been made which might then have been made, have been convicted of all the offences of which he may be convicted on the count or counts to which such plea is pleaded, the court shall give judgment that he be discharged from such count or counts.

6. If it appear that the accused might on the former trial have been convicted of any offence of which he might be convicted on the count or counts to which such plea is pleaded, but that he may be convicted on any such count or counts of some offence or offences of which he could not have been convicted on the former trial, the court shall direct that he shall not be convicted on any such count or counts of any offence of which he might have been convicted on the former trial, but that he shall plead over as to the other offence or offences charged.

Under this section, a plea of *autrefois convict* or of *autrefois acquit* may be proved by shewing either that the offence, of which the defendant was previously convicted or acquitted, was the *same* offence as that which is charged against him in the indictment pleaded to, or that he was convicted or acquitted as the case may be, of *some* offence of which he might be convicted upon the indictment pleaded to. For instance, suppose A, — having been indicted, tried and convicted of the *manslaughter* of B, or of *concealing the birth* of B, — is afterwards indicted for the *murder* of B, a plea of *autrefois convict*, setting up such previous conviction, would be a good plea, because, although it was not a conviction for murder, and, therefore, not the identical offence charged in the indictment pleaded to, it was a conviction for an offence of which she might be again convicted under the new indictment; for a person charged with murder may be found guilty,

under section 713, *post*, of manslaughter, or under section 714, of concealment of birth; and section 633, *post*, expressly declares that a previous conviction or acquittal for murder shall be a bar to a second indictment for the same homicide, charging it as manslaughter, and *vice versa*.

It is said that the true test of whether such a plea is a sufficient bar, in any particular case, is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction on the first. (70)

It is a well established principle of our criminal law that a series of charges shall not be preferred, and, whether a person accused of a minor offence be acquitted or convicted, he shall not be charged again on the same facts in a more aggravated form. (71)

The rule is equally applicable though the first indictment be against the defendant jointly with others, and the second against him alone, for upon such second indictment he may be convicted of an offence committed by him *separately* or jointly with the others. (72)

There must have been a former conviction or acquittal upon trial; and, therefore, where a Coroner's jury returned a verdict of accidental death, a defendant who was afterwards indicted for the homicide was not entitled to plead *autrefois acquit*, on the strength of the verdict of the Coroner's jury. (73)

It appears also, that, as a general rule, the previous conviction or acquittal must have been valid, and that if there was any defect or insufficiency in the first indictment, or trial, so that the defendant was not *legally* liable to suffer judgment for the offence charged in the indictment, as it stood when the verdict was rendered, and was, therefore, never really placed in jeopardy, the previous conviction or acquittal will be no bar to a second indictment. (74) But, this rule seems, now, to be greatly modified by the above section, 631, which expressly declares, (see clause 5), that the defendant shall succeed on his plea of *autrefois acquit* or *autrefois convict*, "if it appear that the matter on which the accused was given in charge on the former trial is the same, *in whole or in part*, as that on which it is proposed to give him in charge, and that he might, on the former trial,—if all proper amendments *had* been made,—have been convicted of all the offences of which he may be convicted on the count or counts," pleaded to.

So, that, even if the former indictment were too defective and insufficient in law to sustain a conviction, yet, if the defects were such as might have been amended, for instance, under section 723, *post*, although not actually amended, it seems that, under clause 3 of the above section, 631, it would be a bar to a second indictment for the same offence.

A plea of *autrefois convict* or *autrefois acquit*, has been held to be sustained by proof of a previous conviction or acquittal by a competent tribunal in a foreign country. (75) In such a case, the defendant should

(70) R. v. Clark, 1 Brod. & B., 473. See, also, R. v. Emden, 9 East, 437; R. v. Sheen, 2 C. & P., 634; R. v. Bird, 2 Den., 94; R. v. Miles, 24 Q. B. D., 423; 59 L. J. (M. C.), 56.

(71) *Per* Cockburn, C. J., in R. v. Elrington, 1 B. & S., 688.

(72) R. v. Dann, 1 Mood. C. C., 424.

(73) R. v. Labelle, (Q. B., Montreal, 1892), 1 Mon. Law Dig, 433; 16 L. N., 187.

(74) R. v. Drury, 3 C. & K., 190; R. v. Green, Dears. & B., 113; 26 L. J. (M. C.), 17. See, also, R. v. Coogan, 1 Leach, 448; R. v. Taylor, 3 B. & C., 502; R. v. Champneys, 2 M. & Rob., 26; and other cases *cit. in* Arch. Cr. Pl. & Ev., 21st Ed., 149, 150.

(75) R. v. Hutchison, 1 Leach, 135; Bull, N. P., 245.

produce an exemplification of the record of his conviction or acquittal from the court of the State or Kingdom where he was tried. (76)

As to proof of proceedings or records of foreign courts, see section 10 of the Canada Evidence Act, 1893, *post*.

For form of plea of *autrefois acquit*, see p. 770, *post*.

According to clause 3 of the above section, 631, pleas of *autrefois acquit*, *autrefois convict*, and pardon, may be pleaded together, and, if pleaded, must be disposed of before the accused is called on to plead further; and, when these pleas are disposed of against the defendant he may then plead not guilty.

As the jury are sworn, at once, to try the issue raised by the plea of *autrefois acquit*, or *autrefois convict*, it appears that, no replication is actually pleaded on the part of the Crown; although a replication and *similiter* must be entered upon the record, when afterwards made up. (77)

For form of replication, see p. 770, *post*.

Where, in an English case, the former record was at the Quarter Sessions, the Queen's Bench Division of the High Court granted a *mandamus* to the justices to make up the record. (78)

A verdict for the defendant upon a plea of *autrefois acquit* or *convict* cannot, it seems, be set aside, and a new trial had, although rendered without evidence and against the opinion of the judge. (79)

**Plea of summary conviction or dismissal.**—Analagous to the defences of *autrefois acquit* and *autrefois convict* is the defence that the defendant has been before convicted or discharged under the provisions relating to summary trials. By sections 797, 798 and 799, it is provided, in reference to summary trials, of certain indictable offences that, "whenever the magistrate finds the offence not proved, he shall dismiss the charge and make out, and deliver to the person charged, a certificate under his hand stating the fact of such dismissal," that, "every conviction under this Part shall have the same effect as a conviction upon indictment for the same offence;" and, that, "every person who obtains a certificate of dismissal, or is convicted under the provisions of this Part, shall be released from all further or other criminal proceedings *for the same cause*." And by sections 865 and 866, *post*, relating to the summary trial of assaults, it is provided, that, "if the justice, upon the hearing of any case of assault or battery *upon the merits* where the complaint is preferred by or on behalf of the person aggrieved, under the next preceding section, deems the offence not to be proved, or finds the assault or battery to have been justified, or so trifling as not to merit any punishment, and accordingly dismisses the complaint, he shall *forthwith* make out a certificate under his hand stating the fact of such dismissal, and shall deliver such certificate to the person against whom the complaint was preferred and that if the person, against whom any such complaint has been preferred, by or on the behalf of the person aggrieved, obtains such certificate, or, having been convicted, pays the whole amount adjudged to be paid or suffers the imprisonment, or imprisonment with hard labour, awarded, he shall be released from all further or other proceedings, civil or criminal, *for the same cause*."

The certificate of dismissal can only be granted when there has been a

(76) Hutchison's Case, 3 Keb., 785. And, see, Beak v. Thyrwhit, 3 Mod., 194; R. v. Roche, 1 Leach, 134.
(77) Arch. Cr. Pl. & Ev., 21st Ed., 151.
(78) R. v. Justices of Middlesex, 5 B. & Ad., 1113; 3 L. J. (M. C.), 32.
(79) R. v. Lea, 2 Mood. C. C., 9.

full hearing *upon the merits*. If the certificate is granted on a withdrawal of the charge, before hearing, it will be no bar to subsequent proceedings for the same assault. (80)

The effect of the certificate of dismissal, when granted, on an acquittal, or of payment of the penalty or suffering the punishment imposed on a conviction, as the case may be, is to release the defendant from all other proceedings *for the same cause*.

A defence under these provisions must be specially pleaded.

For form of plea, see p. 771, *post*.

A plea of *autrefois convict* based upon a summary conviction for assault has been held to be a bar to a subsequent indictment for stabbing, based on the same transaction; (81) and, it has also been held, a bar to an indictment for unlawful wounding, and an assault occasioning actual bodily harm, based on the same circumstances. (82)

A summary conviction for assault has, however, been held not to be a bar to a subsequent indictment for manslaughter in a case where the person assaulted, afterwards died, in consequence of the assault. (83)

It appears that the production of the certificate of dismissal is of itself sufficient evidence of such dismissal, without proof of the signature of the Magistrate or justice. (84)

**Plea of pardon.** — With regard to the plea of pardon, it should be pleaded at the first opportunity the defendant has of doing so. If, for instance, he have obtained a pardon before being arraigned, and, instead of then pleading it in bar, he plead the general issue he will be deemed to have waived the benefit of the pardon, and will not be able to avail himself of it in arrest of judgment. (85)

This, however, relates to the Crown's pardon only; for a pardon by statute need not be pleaded, unless there be exceptions in it; (86) nor can the defendant lose the benefit of it by his *laches* or negligence.

If the Crown's pardon be obtained after the defendant has been tried, he may plead it after verdict in arrest of judgment, or, if it has been granted after sentence, he may plead it in bar of execution.

See section 966, *post*, as to pardons by the Crown.

**632. Depositions and judge's notes on former trial.** — On the trial of an issue on a plea of *autrefois acquit* or *convict* the depositions transmitted to the court on the former trial, together with the judge's and official stenographer's notes if available, and the depositions transmitted to the court on the subsequent charge, shall be admissible in evidence to prove or disprove the identity of the charges.

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(80) Reed v. Nutt, 24 Q. B. D., 669.

(81) R. v. Stanton, 5 Cox C. C., 324; R. v. Walker, 2 M. & Rob., 446.

(82) R. v. Elrington, 31 L. J. (M. C.), 14; R. v. Miles, 24 Q. B. D., 423; 59 L. J. (M. C.), 56.

(83) R. v. Morris, L. R., 1 C. C. R., 90; 36 L. J. (M. C.), 84; 10 Cox C. C., 480. See, also, R. v. Friel, 17 Cox C. C., 325.

(84) See the Canada Evidence Act, 1893, section 10, *post*.

(85) R. v. Norris, 1 Roll. Rep., 297; 2 Keb., 25.

(86) Fost., 43; 3 Inst., 234, 334; 2 Hale, 252.

**633. Indictment substantially charging an offence previously tried.** — When an indictment charges substantially the same offence as that charged in the indictment on which the accused was given in charge on a former trial, but adds a statement of intention or circumstances of aggravation tending if proved to increase the punishment, the previous acquittal or conviction shall be a bar to such subsequent indictment.

2. A previous conviction or acquittal on an indictment for murder shall be a bar to a second indictment for the same homicide charging it as manslaughter; and a previous conviction or acquittal on an indictment for manslaughter shall be a bar to a second indictment for the same homicide charging it as murder.

**634. Plea of justification to indictment for libel.** (As amended by 56 Viet., c. 32). — Every one accused of publishing a defamatory libel may plead that the defamatory matter published by him was true, and that it was for the public benefit that the matters charged should be published in the manner and at the time when they were published. Such plea may justify the defamatory matter in the sense specified, if any, in the count, or in the sense which the defamatory matter bears without any such specification; or separate pleas justifying the defamatory matter in each sense may be pleaded separately to each as if two libels had been charged in separate counts.

2. Every such plea must be in writing, and must set forth the particular fact or facts by reason of which it was for the public good that such matters should be so published. The prosecutor may reply generally denying the truth thereof.

3. The truth of the matters charged in an alleged libel shall in no case be inquired into without such plea of justification unless the accused is put upon his trial upon any indictment or information charging him with publishing the libel knowing the same to be false, in which case evidence of the truth may be given in order to negative the allegation that the accused knew the libel to be false.

4. The accused may, in addition to such plea, plead not guilty, and such pleas shall be inquired of together.

5. If, when such plea of justification is pleaded, the accused is convicted, the court may, in pronouncing sentence, consider whether his guilt is aggravated or mitigated by the plea. R. S. C., c. 174, ss. 148, 149, 150 and 151.

See comments and authorities on this subject at pp. 327 and 328, *ante*, and comments and authorities on matters of public interest at pp. 314-316, *ante*.

For Forms of pleadings in libel cases, see sections 605 and 606, *ante*.

A plea of justification must not contain the evidence by which it is proposed to prove it, nor any statements merely of comment or argument; and a plea of justification which embodied a number of letters proposed to be used as evidence, and contained paragraphs of mere comment and argument, was held irregular and illegal, and it was ordered that the illegal averments be struck out or that the plea itself be rejected and the defendant, in the latter case, allowed to plead anew. (87)

## FORMS UNDER PART XLVI.

### FROM SCHEDULE ONE.

EE. — (*Sections* 610 and 626).

HEADING OF INDICTMENT.

In the (*Name of the Court in which the indictment is found*).

The jurors for our Lady the Queen (88) present that

(*Where there are more counts than one, add, at the beginning of each count*):

"The said jurors further present that "

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FF. — (*Section* 611).

EXAMPLES OF THE MANNER OF STATING OFFENCES.

(*a*) A. murdered B. at , on

(*b*) A. stole a sack of flour from a ship called the at , on .

(*c*) A. obtained by false pretenses from B., a horse, a cart and the harness of a horse at , on .

(*d*) A. committed perjury with intent to procure the conviction of B. for an offence punishable with penal servitude, namely robbery, by swearing on the trial of B. for the robbery of C. at the Court of Quarter Sessions for the county of Carleton, held at Ottawa, on the day of , 1879; first, that he, A. saw B. at Ottawa, on the day of ; secondly, that B. asked A. to lend B. money on a watch belonging to C.; thirdly, etc.

(*e*) The said A committed perjury on the trial of B. at a Court of Quarter Sessions held at Ottawa, on for an

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(87) R. v. Grenier, 1 Can. Cr. Cas., 55.

(88) Subtitute the words "Our Lord the King."

assault alleged to have been committed by the said B. on C. at Ottawa, on the day of by swearing to the effect that the said B. could not have been at Ottawa, at the time of the alleged assault, inasmuch as the said A. had seen him at that time in Kingston.

(*f*) A., with intent to maim, disfigure, disable or do grievous bodily harm to B. or with intent to resist the lawful apprehension or detainer of A. (*or* C.), did actual bodily harm to B. (*or* D).

(*g*) A., with intent to injure or endanger the safety of persons on the Canadian Pacific Railway, did an act calculated to interfere with an engine, a tender, and certain carriages on the said railway on at by (*describe with so much detail as is sufficient to give the accused reasonable information as to the acts or omissions relied on against him and to identify the transaction*).

(*h*) A. published a defamatory libel on B. in a certain newspaper, called the , on the day of A. D. , which libel was contained in an article headed or commencing (*describe with so much detail as is sufficient to give the accused reasonable information as to the part of the publication to be relied on against him*), and which libel was written in the sense of imputing that the said B. was (*as the case may be*).

For Forms of Indictment, under Title II, see pp. 587-589, *ante*.

For Forms of Indictment, under Title III, see pp. 589-590, *ante*.

For Forms of Indictment, under Title IV, see pp. 590-594, *ante*.

For Forms of Indictment, under Title V, see pp. 595-607, *ante*.

For Forms of Indictment, under Title VI, see pp. 607-632, *ante*.

## ADDITIONAL FORMS UNDER PART XLVI.

### PLEA OF AUTREFOIS ACQUIT.

And, having heard the said indictment read here in Court, the said A. B. saith that our said Lord the King ought not further to prosecute the said indictment against him the said A. B.; because he saith that, heretofore, to wit, on the day of at the (*describe the Court*), he the said A. B. was lawfully acquitted of the said offence charged in the said indictment. Wherefore he the said A. B. prays judgment and that he may be discharged from the said premises in the said indictment specified.

### REPLICATION.

And hereupon J. N. (*the Clerk of the Peace, or Clerk of Arraigns*), who prosecutes for our said Lord the King in this be-

half, says that by reason of any thing in the said plea of the said A. B. above pleaded in bar alleged, our said Lord the King ought not to be precluded from prosecuting the said indictment against the said A. B.; because he says that the said A. B. was not lawfully acquitted of the said offence charged in the said indictment, in manner and form as the said A. B. hath above in his said plea alleged; And this he the said J. N. prays may be enquired of by the country.

SIMILITER.

(*The following form of similiter is added in making up the record:*)

And the said A. B. doth the like. Therefore, let a jury come.

PLEA OF CONVICTION BEFORE JUSTICES.

And, having heard the said indictment read in court, the said A. B. saith that our said Lord the King ought not further to prosecute the said indictment against him the said A. B., in respect of the offence in the said indictment mentioned; because he saith that heretofore to wit, on the day of at in the County (or "District" etc.) of , he the said A. B. was upon the complaint of the said C. D., etc., (*Reciting the information before the magistrates, in the past tense*), convicted before the said (*Names of the magistrates*) two of His Majesty's justices of the peace in and for the said County (or "District" etc.), for that he the said A. B. did on at unlawfully assault and beat the said C. D. And the said justices did then and there adjudge the said A. B. for his said offence to forfeit and pay the sum of and in default of immediate payment of the said sum of by the said A. B., they the said justices did adjudge him the said A. B. to be imprisoned for the space of two calendar months unless the said sum of should be sooner paid, the whole as more fully appears by the record of the said conviction; And the said assault and battery of the said C. D. of which the said A. B. was so convicted as aforesaid, and the wounding of the said C. D. mentioned and alleged in the said indictment are one and the same assault and battery, and not other and different. And he the said A. B. further saith that he the said A. B. hath duly paid the said sum of so adjudged by the said justices to be paid under the said conviction. Wherefore the said A. B. prays judgment, and that he may be discharged from the said premises in the said indictment mentioned.

[*If the complaint before the justices was dismissed, frame the plea accordingly*].

REPLICATION.

And hereupon J. N. (*the Clerk of the Peace, or Clerk of Arraigns*) who prosecutes for our said Lord the King, in this behalf, says that, by reason of anything in the said plea of the said A. B., above pleaded, in bar alleged, our said Lord the King ought not to be precluded from prosecuting the said indictment against the said A. B.; because he says that there is not any record of the said alleged conviction in manner and form as the said A. B. hath above in his said plea alleged: And this he the said J. N. prays may be enquired of by the country.

[*If the plea is based upon admissal of the complaint before the justices, the replication should traverse the fact of the granting of the certificate of dismissal*].

PART XLVII.

## CORPORATIONS.

**635. Corporations may appear by attorney.** — Every corporation against which a bill of indictment is found at any court having criminal jurisdiction shall appear by attorney in the court in which such indictment is found, and plead or demur thereto. R. S. C., c. 174, s. 155.

**636. Certiorari, etc., not necessay.** — No writ of *certiorari* shall be necessary to remove any such indictment into any Superior Court with the view of compelling the defendant to plead thereto; nor shall it be necessary to issue any writ of *distringas*, or other process to compel the defendant to appear and plead to such indictment. R. S. C., c. 174, s. 156.

**637. Notice to be served on corporation.** — The prosecutor, when any such indictment is found against a corporation, or the clerk of the court when such indictment is founded on a presentment of the grand jury, may cause a notice thereof to be served on the mayor or chief officer of such corporation, or upon the clerk or secretary thereof, stating the nature and purport of such indictment, and that, unless such corporation appears and pleads thereto in two days after the service of such notice, a plea of not guilty will be entered thereto for the defendant by the court, and that the trial thereof will be proceeded with in like manner as if the said corporation had appeared and pleaded thereto. R. S. C., c. 174, s. 157.

**638. Proceedings on default.** — If such corporation does not appear in the court in which the indictment has been found, and plead or demur thereto within the time specified in the said

notice, the judge presiding at such court may, on proof to him by affidavit of the due service of such notice, order the clerk or proper officer of the court to enter a plea of "not guilty" on behalf of such corporation and such plea shall have the same force and effect as if such corporation had appeared by its attorney and pleaded such plea. R.S.C., c. 174, s. 158.

**639. Trial may proceed in the absence of a corporation defendant.** — The court may — whether such corporation appears and pleads to the indictment, or whether a plea of "not guilty" is entered by order of the court — proceed with the trial of the indictment in the absence of the defendant in the same manner as if the corporation had appeared at the trial and defended the same; and in case of conviction, may award such judgment and take such other and subsequent proceedings to enforce the same as are applicable to convictions against corporations. R. S. C., c. 124, s. 159.

Although a corporation may, in certain cases be held amenable to the criminal law, (1) it cannot, as the law stands, be made criminally liable and punishable for crimes of which the essence is a personal criminal intent or malice. Thus, it has been held that, an indictment will not lie against a Corporation for manslaughter, and that, even if a Corporation could be indicted for and convicted of such an offence, the conviction would be futile, inasmuch as there is no provision of law under which a punishment could be imposed upon a corporation, the punishment for manslaughter being, under section 236, *ante*, imprisonment for life, and there being no authority for the substitution of a fine. (2)

It has, however, been held that, although a corporation cannot be guilty of manslaughter, it may be indicted under sections 213 and 252, *ante*, for having caused grievous bodily injury by omitting to maintain, in a safe condition, a bridge which it was its duty to maintain, and this, notwithstanding that death ensued at once to the person injured, and that, as section 213 provides no punishment for the offence, a corporation indicted under it, is liable to the common law punishment of a fine. (3)

With regard to the question of whether a Corporation can be prosecuted summarily as well as by indictment, there are two conflicting decisions. In Ontario, it was held by Rose, J., (and confirmed by a Divisional Court of the High Court of Justice), that the procedure under the Code as to summary convictions applies as well to Corporations as to natural persons, that the fact, that a portion of the remedy provided for the recovery of the penalty and costs is personal imprisonment, does not prevent the application of the summary procedure in other respects, to corporations, and that notice of a summons by justices under the Summary Convictions Clauses, *post*, may be given in a manner similar to a notice of indictment under the above section, 637. (4) On the other hand, it has been held by

(1) R. v. Great North of Eng. Ry. Co., 9 Q. B., 315; R. v. Birmingham & Gloucester Ry. Co., 9 C. & P., 469.

(2) R. v. Great West Laundry Co., 20 C. L. T., 217; 13 Man. L. R., 66.

(3) R. v. Union Colliery Co., 3 Can. Cr. Cas., 523; 20 C. L. T., 289; 21 C. L. T., 153.

(4) R. v. Toronto Ry. Co., 30 O. R., 214; 21 C. L. T., 120; 2 Can. Cr. Cas., 471. (*Re Chapman and the Corporation of the City of London*, [19 O. R., 33], commented on).

the Supreme Court of New Brunswick, that the procedure of the Criminal Code, as to summary convictions, does not apply to corporations. (5)

Where the offence charged against a Corporation is an indictable offence, — such, for instance, as a charge of neglecting to keep in repair one of its public streets, thereby committing a public nuisance, — the proceedings should be by indictment, without any preliminary examination before a magistrate; and where, in such a case, a preliminary enquiry was instituted, a writ of prohibition was granted restraining the preliminary enquiry. (6)

## PART XLVIII.

## PREFERRING INDICTMENT.

**640. Jurisdiction of Courts.** — Every Court of Criminal Jurisdiction in Canada is, *subject to the provisions of Part XLII*, competent to try all offences *wherever committed*, if the accused is found or apprehended or is in custody within the jurisdiction of such court or if he has been committed for trial to such court or ordered to be tried before such court, or before any other court, the jurisdiction of which has by lawful authority been transferred to such first mentioned court under any Act for the time being in force: Provided that nothing in this Act authorizes any court in one province of Canada to try any person for any offence committed entirely in another province, except in the following case:

2. Every proprietor, publisher, editor or other person charged with the publication in a newspaper of any defamatory libel, shall be dealt with, indicted, tried and punished in the province in which he resides, or in which such newspaper is printed.

The words "*all offences wherever committed*" used in this section, must be interpreted to mean offences committed wherever the crimina' law of Canada extends. See comments under section 542, *ante*. And see, also, comments, at pp. 297, 298, *ante*.

**641. Sending bill before Grand Jury.** — Any one who is bound over to prosecute any person, whether committed for trial or not, may prefer a bill of indictment for the charge on which the accused has been committed, or in respect of which the prosecutor is so bound over, or for any charge founded upon the facts or evidence disclosed on the depositions taken before the justice. The accused may at any time before he is given in charge to the jury apply to the court to quash any count in the indictment on the ground that it is not founded on such facts or evidence, and the court shall quash such count if satisfied that it is not so

(5) *Ex parte* Woodstock Electric Light Co., 4 Can. Cr. Cas., 107. (*Re Chapman and Corporation of London*, referred to.)

(6) R. v. Corporation of the City of London, 32 O. R., 326; 21 C. L. T., 71.

founded. And if at any time during the trial it appears to the court that any count is not so founded, and that injustice has been or is likely to be done to the accused in consequence of such count remaining in the indictment, the court may then quash such count and discharge the jury from finding any verdict upon it.

2. The counsel acting on behalf of the Crown at any court of criminal jurisdiction may prefer against any person who has been committed for trial at such court a bill of indictment for the charge on which the accused has been so committed or for any charge founded on the facts or evidence disclosed in the depositions taken before the justice. (Added by the *Criminal Code Amendment Act 1900*).

3. The Attorney-General or any one by his direction or any one with the written consent of a judge of any Court of Criminal Jurisdiction or of the Attorney-General, may prefer a bill of indictment for any offence before the Grand Jury of any court specified in such consent; and any person may prefer any bill of indictment before any Court of Criminal Jurisdiction by order of such court.

4. It shall not be necessary to state such consent or order in the indictment. An objection to an indictment for want of such consent or order must be taken by motion to quash the indictment before the accused person is given in charge.

5. Save as aforesaid, no bill of indictment shall after the commencement of this Act be preferred in any province of Canada.

See the remarks, set out at pp. 659-663, *ante*, of the Royal Commissioners with regard to the changes to be made by the English Draft Code in the modes of proceeding against a person accused of having committed a criminal offence.

The above section, 641, makes it clear, that no one, but the Attorney-General can prefer an indictment which is not preceded by and based upon a preliminary examination of witnesses before a magistrate, unless such preliminary examination is dispensed with by an order of the Court or by the written consent of the Attorney-General or of a judge of any Court of Criminal Jurisdiction; and it gives the defendant the right to move the Court to quash any indictment, or any count of an indictment not founded upon the facts or evidence disclosed in the depositions taken before the Magistrate.

The expressions "entitled to cross-examine" and "full opportunity to cross-examine" as used in sections 590, *ante*, and 687, *post*, imply for the accused the right to hear the evidence delivered in his presence, to catch the words as they fall from the lips of each of the witnesses and to mark his expression and demeanor while testifying, and, where the depositions before the magistrate have not been taken according to law,—for instance, in the accused's absence, or in such a manner as to interfere with his right to hear the evidence as it is given,—the indictment may, at any time before the accused is given in charge to the jury, be quashed upon motion under the above section, 641. (1)

(1) R. v. Lepine and others, 4 Can. Cr. Cas., 145.

An accused person cannot be said to have been "given in charge" to the jury until the jury are sworn; and his arraignment and the pleading of Not Guilty to the indictment do not constitute a "giving in charge."(2)

A prisoner was committed for trial on a charge of *stealing* 2680 bushels of beans; and an indictment was afterwards laid against him for obtaining by false pretences two cheques, the false pretence being that "there was then a large quantity of beans, to wit, 2680 bushels," in the prisoner's warehouse. What the evidence taken before the committing magistrate disclosed, was that the prisoner obtained the cheques on the false pretence that "there were 2680 bushels of beans in his warehouse. *Held*, that there was no such variance as prevented an indictment for a charge "founded upon the facts or evidence disclosed," within the meaning of the above section, 641. (3)

Where, in the province of Quebec, a person was committed for trial for an offence and was admitted to bail, and two terms were allowed to pass after his commitment without a bill of indictment being laid against him before the Grand Jury, it was held that, he was entitled under chapter 95 of the Consolidated Statutes of Lower Canada, to be discharged from custody under bail and to have the recognizances vacated. (4)

A Superior Court should not make an order to prefer an indictment against a party accused of an offence if the two justices before whom the preliminary investigation was held, signed a declaration to the effect that they were unable to agree. In such a case, the prosecutor should be left to his recourse to an application to the Attorney-General, who can either prefer an indictment himself or direct one to be preferred. (5)

Where the preferring of an indictment, under section 2 of the above section, 641, takes place solely upon the ground that, a direction of the Attorney-General has been given therefor, the Attorney-General's written consent or direction must be one with regard to each particular case. A general authority from the Attorney-General to a King's Counsel to prefer indictments, and conduct the trials of criminals at the sittings or term of a criminal court, will not be sufficient. (6)

An accused was committed for trial on charges of perjury and conspiracy to commit perjury; and, to counts embodying these charges, there was added in the indictment another count charging him with conspiracy to defraud. There was, in the depositions taken at the preliminary enquiry, evidence to support the added charge; but, the Court, being of opinion that the accused would be embarrassed by this additional count, refused to allow the prosecution to give evidence in support of it. (7)

A prisoner was committed for trial in one county on a charge of perjury, alleging the offence to have been committed in that county. The venue was changed to another county, where the prisoner was tried and found guilty upon an indictment containing two counts alleging two offences of perjury arising out of the same matter. The facts relating to both charges appeared in the depositions taken by the committing magistrate. *Held*, that there was jurisdiction to try for both offences in the county to which the venue had been changed. (8)

In Nova Scotia, a defendant was, by a justice of the peace, committed for trial on a charge of assaulting wounding and doing grievous bodily

(2) *Ib.*
(3) R. v. Patterson, 15 C. L. T., 291; 26 O. R., 656; 2 Can. Cr. Cas., 339.
(4) R. v. Cameron, 1 Can. Cr. Cas., 169; Que. Jud. Rep., 6 Q. B., 158.
(5) *Ex parte* Hanning, 4 Can. Cr. Cas., 203.
(6) R. v. Townsend, 28 N. S. R., 468; 3 Can. Cr. Cas., 29.
(7) R. v. Harris, 64 J. P., 360.
(8) R. v. Coleman, 30 O. R., 93; 2 Can. Cr. Cas., 93.

harm to one James Wilson, who was bound over in due form to prosecute. At the next term of the Supreme Court, the Grand Jury found an indictment against the defendant, the prosecutor Wilson not being present and not being examined as a witness. The Attorney-General was not present and no one had any special direction from the Attorney-General to prefer the indictment. No one had the written consent of a judge, and no order of the Court was given to prefer an indictment. At the trial, before Henry, J., the learned judge reserved, for the opinion of the Supreme Court, *in banco*, the question whether the indictment should not be quashed and the conviction thereon declared to be illegal, on the ground that it was not preferred by any of the persons authorized by section 641. *Held*, by McDonald, C. J., Ritchie and Townsend, JJ., that a party bound over by recognizance to prosecute need not personally attend, at the sittings of the Court, to prefer an indictment before the Grand Jury, unless required to give evidence, and that an indictment found in his absence is valid, although no order of the Court, judge's consent or special direction of the Attorney-General was given to prefer the same. *Held*, by Ritchie, J., that the Crown prosecutor or counsel appointed for the sittings of the Court sufficiently represents a prosecutor so bound over to validate the preferring of the indictment by such officer, and that the same is to be considered as preferred on behalf of the prosecutor. *Held*, by Weatherbee, J., Graham, E. J., and Henry, J., that the preferring of an indictment by an agent of the Attorney-General acting under a general appointment to attend to all criminal cases at a session of the Court, without having obtained the special direction of the Attorney-General or an order or consent, under clause 2 of section 641, is not a compliance with the provision requiring the indictment to be preferred by the person bound over by recognizance to prefer the same, and, that, if the person so bound over fails to appear, the indictment should be quashed. (8*a*)

An endorsement made and signed by the judge upon an indictment, by which endorsement he "directs" that the indictment be submitted to the Grand Jury, is a sufficient "consent" of the judge, under clause 2 of section 641, to the preferring of the indictment; and an accused, against whom an indictment is preferred under the authority of a judge's consent, is not entitled to have the indictment quashed by reason of the fact that a preliminary enquiry in regard to the same charge was at the same time pending before a justice of the peace, who had not given his decision for or against a committal for trial. (8*b*)

**Grand Jury.**— In England, it requires the assent of at least twelve Grand Jurors to find an indictment and put the accused on his trial; and it is usual, there, (as was formerly the case, here, before the change hereinafter mentioned), to summon twenty four Grand Jurors, and to empanel and swear not less than twelve and not more than twenty three. (9)

Since the coming into force of the Criminal Code of Canada, a change has been made by the 57-58 Vic., c. 57, which provides that seven Grand Jurors, — instead of twelve, — may find a true bill, in any province where the panel of Grand Jurors is not more than thirteen. (See section 662, *post*, as thus amended.)

A majority of the provinces have since passed legislation reducing the panel of Grand Jurors to a number not exceeding thirteen. (10)

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(8*a*) R. v. Hamilton, 2 Can. Cr. Cas., 178.

(8*b*) R. v. Weir, (No. 2), 3 Can. Cr. Cas., 155.

(9) R. v. Marsh, 6 A. & E., 242; Woolrych Cr. L., 42; Browne's Blackstone, 685; 1 Chit. Cr. L., 306.

(10) See R. S. Ont., (1897), c. 61, section 66, sub-sec. 3; 59 Vic. (Que.), c. 25, section 3; 62 Vic., (Nova Scotia), c. 25, section 33; Statutes of Brit. Col., (1899), c. 35, section 2.

See comments, under section 662, *post*.

After the Grand Jury are assembled, the following oath is administered to the foreman: —

"You as foreman of this Grand Inquest, for Our Sovereign Lord the King, and the body of this county (*or* "district," etc.) of , shall diligently enquire, and true presentment make of all such matters and things as shall be given you in charge. The King's counsel, your fellows', and your own, you shall keep secret. You shall present no one through envy, hatred, or malice; neither shall you leave any one unpresented through fear, favor, affection, or hope of reward or gain; but you shall present all things truly and indifferently as they come to your knowledge, according to the best of your understanding: So help you God!"

The rest of the Grand Jury, by three at a time, are then sworn, as follows: —

"The same oath which your foreman hath taken on his part, you and every one of you shall well and truly observe and keep on your part: So help you God!"

When the Grand Jury have been sworn, they receive a charge from the presiding Judge, and are instructed generally in the duties which they have to perform; and, where any of the cases to be brought before them involve difficult points of law, these are explained to them.

The Grand Jury then retire to the grand-jury room to receive the bills of indictment to be submitted to them. As each case comes up for the Grand Jury's consideration, the witnesses are called into the Grand Jury room, in the order in which their names appear endorsed on the indictment, and, after being sworn by the foreman ,they give their evidence; and, if, after the evidence has been considered, the requisite number of the Grand Jury think that the evidence makes out a sufficient case to put the accused on his trial, the foreman endorses on the indictment, "A true bill," and signs his name to it; but, if otherwise, he endorses on the indictment, "No bill," and signs his name to it.

**Objections to Grand Jury.** — Objections to the constitution of a Grand Jury cannot be taken by way of challenge. Thus, in a case tried at Quebec, in October 1892, where the defendants objected to the Grand Jury, as a whole, by a challenge to the array, and, to some individual members, by way of challenge to the polls, it was contended, on behalf of the Crown that there was no such right of challenge, and Bosse, J., after fully reviewing and ably discussing the authorities on the subject, came to the following conclusions: — 1. That, although both English and Canadian Statutes contain provisions for challenging the petty jury, they contain none for challenging the Grand Jury; 2. That, we have in Canada, no known precedent giving the right to challenge the Grand Jury or any of the Grand Jurors; 3. That, in England, it was admitted, in 1811, notwithstanding the opinions of Hawkins and Hale, (11) that, for two hundred years, objections to the Grand Jury were always taken by way of plea to the indictment, and not by way of challenge; and, 4. That since 1811, the matter had not been controverted, and that, in 1848, in the case of R. v. Duffy, (12) the only case reported on the subject, since 1811, objections to the Grand Jury were taken by way of plea.

To shew the reason of the difference of procedure in objecting to the Grand Jury, and in objecting to the Petit Jury, Bossé, J., quoted, from the case of R. v. Sheridan, the following remarks of Solicitor-General Bushe:—

(11) See Hawk, P. C., c. 25, p. 16; Hale, P. C., 126-225.
(12) R. v. Duffy, 4 Cox C. C., 172.

"It is a mistake of the nature of a challenge to suppose that it lies to a Grand Juror. A challenge is an objection by a man about to be tried, to the man who is about to try him, but the Grand Jury are not to try any man; they are not brought into contact with any accused person. Their oath merely binds them to enquire into the offences brought before them and pronounce whether there be sufficient reason for putting those offences into a state for further investigation.

"Until they be found, no man can tell who they are; when he, against whom they find a bill, sees their name in the caption of the indictment, if he discover a legal objection to any of them, he may, by plea, urge that objection as a reason for not answering to the indictment, but the notion of a previous challenge would not only be against principle, but induce absurdities and injustice in practice." (13)

The learned Judge also quoted the following remarks of Chief Justice Downes: —

"The objection to such a challenge is founded upon good reason. The party who comes to urge it may or may not be present — may or may not be indicted; and, if it were open to him to make an objection by challenge, because informations have been sworn against him, so must it, in all cases, be open to every person against whom informations have been sworn; and if so, besides the great inconvenience it must create in the administration of justice, many persons must be precluded from availing themselves of the objection afterwards; because the rule of pleading is, that to take advantage of a disqualification, it must be alleged, in the first instance, and if afterwards urged, it must be disallowed, because the party has lost his opportunity — and if he were absent, it was his own fault, — he might have been present.

"Now, although we have no instance, from the oldest books in the law to those of our own time, where a *challenge* to a Grand Jury has been taken, there are abundant instances, in which the party has availed himself of objections to the Grand Jurors by plea; and these instances demonstrate the mode by which the party is to avail himself of such objections.

"It would be monstrous to say that an illegal Grand Jury should find an indictment, and that the man accused should have no mode to avoid it. If it were a question unsettled, and the accused had no other mode of availing himself of the objection, save by challenge, there is no doubt that he must have the right. But, if there be no instance to be found of a challenge, for hundreds of years, and there be abundant instances of pleas, it cannot be doubted that the latter is the only mode by which a party can avail himself of an objection." (14)

The judgment of Bossé, J., was concurred in by Blanchet, J., and the challenges were rejected. (15)

Section 656, *post*, now provides that any objection to the constitution of the Grand Jury may be taken by motion to quash the indictment.

It is no ground for quashing an indictment that some of the Grand Jurors are related to the officer who arrested the prisoner; nor is a sheriff disqualified from summoning the jury, because he has directed the arrest. (16)

Where three persons were committed for trial on a charge of conspiracy

(13) R. v. Sheridan, 31 St. Tr., 552.
(14) R. v. Sheridan, 31 St. Tr., 572.
(15) R. v. Mercier *et al*, Que. Jud. Rep., 1 Q. B., 54.
(16) R. v. Mailloux, 3 Pugsley, N. B. R., 493.

and the Solicitor-General, afterwards, directed a bill to be preferred against a fourth person who was not committed, and all four were indicted together for the same conspiracy, such a course was held to be unobjectionable. (17)

**642. No trial upon any Coroner's Inquisition.**— After the commencement of this Act no one shall be tried upon any coroner's inquisition.

As no person can now be put upon trial, upon the verdict of a Coroner's jury, the only object of holding a Coroner's inquest is to obtain information as to when, where, how and by what means the deceased came to his death; and if, upon any inquisition taken before a coroner, a person is charged with manslaughter or murder, the Coroner is, by section 568, *ante*, directed to issue his warrant to arrest and convey the person affected by the verdict before a magistrate, for preliminary examination into the charge.

A Coroner, who was a physician, and was, as such, in professional attendance upon two men at the time of their death, proceeded to hold an inquest upon their bodies, whereupon a writ of prohibition was applied for, and granted, prohibiting him from proceeding further with the inquest. (18)

**643. Oath in open Court not required.** — It shall not be necessary for any person to take an oath in open court in order to qualify him to give evidence before any Grand Jury. R. S. C., c. 174, s. 173.

**644. Oath may be administered by Foreman of Grand Jury.** — The foreman of the Grand Jury or any member of the Grand Jury who may, for the time being, act on behalf of the foreman in the examination of witnesses, may administer an oath to every person who appears before such Grand Jury to give evidence in support of any bill of indictment; and every such person may be sworn and examined upon oath by such Grand Jury touching the matters in question. R. S. C., c. 174, s. 174.

**645. Names of witnesses to be endorsed on bill of indictment.** —The name of every witness examined, or intended to be examined, shall be endorsed on the bill of indictment; and the foreman of the Grand Jury, or any member of the Grand Jury so acting for him, shall write his initials against the name of each witness sworn by him and examined touching such bill of indictment. R. S. C., c. 174, s. 175.

Where a defendant moved to quash an indictment on the ground that the foreman of the Grand Jury had not initialled the names of the witnesses sworn and examined before the Grand Jury, the Judge rejected the motion and directed the trial to proceed, but reserved the question; and, in Appeal, it was held that, the foreman's omission was not fatal, but that

(17) Knowlden v. R., 5 B. & S., 532; 33 L. J. (M. C.), 219.
(18) Haney v. Mead, 34 C. L. J., 330.

the provisions of the above section, 645, — which are similar to the provisions of the Imperial Act, 1 and 2 Vic., c. 37, — are merely directory, and that, notwithstanding sub-section 4 of section 7 of the *Interpretation Act*, (see p. 9, *ante*), the word "shall" in the above section, 645, is not imperative. (19)

**646. Names of witnesses to be submitted to Grand Jury.** — The name of every witness intended to be examined on any bill of indictment shall be submitted to the Grand Jury by the officer prosecuting on behalf of the Crown, and no others shall be examined by or before such Grand Jury unless upon the written order of the presiding judge. R. S. C., c. 174, s. 176.

Although the Grand Jury are not, usually, very strict as to documentary evidence, and will often admit copies instead of requiring the production of originals, and sometimes even receive parol proof of matters which, according to strict rules of evidence, should be in writing, they may, if they think fit, insist upon the same evidence, written and verbal, as may be necessary at the trial. It is, therefore, prudent in all cases, to be provided, at the time of the bill being preferred, with the same evidence with which you intend, afterwards, to support the indictment, at the trial.

The deposition of a witness who is so ill as not to be able to travel, which, under section 687, *post*, may be given in evidence before a petty Jury on the trial, may also be read in evidence before the Grand Jury. (20) But, before the deposition is read before the Grand Jury, the presiding Judge should, by evidence *taken in the presence of the accused*, satisfy himself of the existence of the facts required, by section 687, to make such deposition admissible in evidence. (21)

It is no objection that, at the trial, witnesses, — whose names are not endorsed on the indictment, — are called and examined; and, in strictness, it is not necessary for the prosecution to call every witness whose name is on the back of the indictment, although, it is usual to do so, in order that the defendant may have the benefit of cross-examination. (22) And, if the prosecution will not call them, the Judge, in his discretion, may do so. (23)

A witness, who gives false evidence before a Grand Jury, is indictable for perjury; and the other witnesses examined on the same bill are good witnesses to prove it. (24)

Although the Grand Jury have been formally discharged, yet, if they have not left the precincts of the Court, nor separated, they may be recalled and charged with other bills. (25)

**647. Fees for swearing witnesses.** — Nothing in this Act shall affect any fees by law payable to any officer of any court for

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(19) R. v. Buchanan, 18 C. L. T., 293; 12 Man. L. R., 190. See O'Connell v. R., 11 Cl. & F., 155; and R. v. Townsend, 3 Can. Cr. Cas., 29.

(20) R. v. Clements, 2 Den., 251; 20 L. J. (M. C.), 193.

(21) R. v. Beaver, 10 Cox C. C., 274. See, also, R. v. Bullard, 12 Cox C. C., 353; and R. v. Gerrans, 13 Cox C. C., 158.

(22) R. v. Simmonds, 1 C. & P., 84; R. v. Beezley, 4 C. & P., 220; R. v. Vincent, 9 C. & P., 91.

(23) R. v. Whitehead, 4 C. & P., 322, *n*; R. v. Holden, 8 C. & P., 610.

(24) R. v. Hughes, 1 C. & K., 519.

(25) R. v. Holloway, 9 C. & P., 43.

swearing witnesses, but such fees shall be payable as if the witnesses had been sworn in open court. R. S. C., c. 174, s. 177.

**648. Bench warrant and certificate.** — When any one against whom an indictment has been duly preferred and has been found, and who is then at large, does not appear to plead to such indictment, whether he is under recognizances to appear or not —

(*a*) the Court before which the accused ought to have been tried may issue a warrant for his apprehension which may be executed in any part of Canada ;

(*b*) the officer of the court at which the said indictment is found or (if the place or trial has been changed) the officer of the court before which the trial is to take place, shall, at any time after the time at which the accused ought to have appeared and pleaded, grant to the prosecutor, upon application made on his behalf and upon payment of twenty cents, a certificate of such indictment having been found. The certificate may be in the form GG in schedule one hereto, (26) or to the like effect. Upon production of such certificate to any justice for the county or place in which the indictment was found, or in which the accused is or resides or is suspected to be or reside, such justice shall issue his warrant to apprehend him, and to cause him to be brought before such justice, or before any other justice for the same county or place, to be dealt with according to law. The warrant may be in the form HH in schedule one hereto, (27) or to the like effect.

2. If it is proved upon oath before such justice that any one apprehended and brought before him on such warrant is the person charged and named in such indictment, such justice shall, without further inquiry or examination, either commit him to prison by a warrant which may be in the form II in schedule one hereto, (28) or to the like effect, or admit him to bail as in other cases provided; but if it appears that the accused has without reasonable excuse broken his recognizance to appear he shall not in any case be bailable as of right.

3. If it is proved before the justice upon oath that any such accused person is at the time of such application and production of the said certificate as aforesaid confined in any prison for any other offence than that charged in the said indictment, such justice shall issue his warrant directed to the warden or gaoler of the prison in which such person is then confined as aforesaid, commanding him to detain him in his custody until by lawful authority he is removed therefrom. Such warrant may be in the form JJ in schedule one hereto, (29) or to the like effect. R. S. C., c. 174, ss. 33, 34 and 35.

(26) See p. 783, *post*, for Form GG.
(27) See p. 783, *post*, for Form HH.
(28) For Form II, see p. 784, *post*.
(29) For Form JJ, see p. 785, *post*.

## FORMS UNDER PART XLVIII.

FROM SCHEDULE ONE.

GG. — (*Section* 648.)

CERTIFICATE OF INDICTMENT BEING FOUND.

Canada,
Province of ,
County of .

I hereby certify that at a Court of (Oyer and Terminer, *or* General Gaol Delivery, *or* General Sessions of the Peace) holden in and for the county of , at , in the said (county), on , a bill of indictment was found by the Grand Jury against A. B., therein described as A. B., late of (*labourer*), for that he (*&c., stating shortly the offence*), and that the said A. B. has not appeared or pleaded to the said indictment.

Dated this day of , in the year .

Z. X.

(*Title of officer.*)

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HH. — (*Section* 648.)

WARRANT TO APPREHEND A PERSON INDICTED.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of

Whereas it has been duly certified by J. D., clerk of the (*name the court*) *or* E. G., deputy clerk of the Crown *or* clerk of the peace, *or as the case may be*, in and for the county of , that (*&c., stating the certificate*). These are therefore to command you in Her Majesty's name forthwith to apprehend the said A. B., and to bring him before (*me*) or some other justice or justices of the peace in and for the said county to be dealt with according to law.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL].

J. P., (*Name of county*).

II. — (*Section* 648.)

WARRANT OF COMMITMENT OF A PERSON INDICTED.

Canada,
Province of ,
County of .

To all or any of the constables and other peace officers in the said county of , and the keeper of the common gaol, at , in the said county of

Whereas by a warrant under the hand and seal of , (*a*) justice of the peace in and for the said county of , dated , after reciting that it had been certified by J. D., (*&c., as in the certificate*), the said justice of the peace commanded all or any of the constables or peace officers of the said county, in Her Majesty's name, forthwith to apprehend the said A. B., and to bring him before (*him*) the said justice of the peace or before some other justice or justices in and for the said county, to be dealt with according to law; and whereas the said A. B. has been apprehended under and by virtue of the said warrant, and being now brought before (*me*) it is hereupon duly proved to (*me*) upon oath that the said A. B. is the same person who is named and charged as aforesaid in the said indictment: These are therefore to command you, the said constables and peace officers, or any of you, in Her Majesty's name, forthwith to take and convey the said A. B. to the said common gaol at in the said county of and there to deliver him to the keeper thereof, together with this precept; and (*I*) hereby command you the said keeper to receive the said A. B., into your custody in the said gaol, and him there safely to keep until he shall thence be delivered by due course of law.

Given under (*my*) hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL].

J. P., (*Name of county*).

JJ. — (*Section* 648.)

WARRANT TO DETAIN A PERSON INDICTED WHO IS ALREADY IN CUSTODY FOR ANOTHER OFFENCE.

Canada,
Province of ,
County of .

To the keeper of the common gaol at in the said county of

Whereas it has been duly certified by J. D., clerk of the (*name the court*) (*or* deputy clerk of the Crown *or* clerk of the peace of and for the county of , or *as the case may be*) that (*&c., stating the certificate*); And whereas (*I am*) informed that the said A. B. is in your custody in the said common gaol at aforesaid, charged with some offence, or other matter; and it being now duly proved upon oath before (*me*) that the said A. B., so indicted as aforesaid, and the said A. B., in your custody are one and the same person: These are therefore to command you, in Her Majesty's name, to detain the said A. B. in your custody in the common gaol aforesaid, until by a writ of *habeas corpus* he shall be removed therefrom, for the purpose of being tried upon the said indictment, or until he shall otherwise be removed or discharged out of your custody by due course of law.

Given under (*my*) hand and seal, this day of in the year , at , in the county aforesaid.

J. S., [SEAL].

J. P., (*Name of county*).

## PART XLIX.

## REMOVAL OF PRISONERS — CHANGE OF VENUE.

**649. Removal of prisoners.** — The Governor in Council or the Lieutenant-Governor in Council of any province may, if, from the insecurity or unfitness of any gaol of any county or district for the safe custody of prisoners, or for any other cause, he deems it expedient so to do, order any person charged with an indictable offence confined in such gaol or for whose arrest a warrant has been issued, to be removed to any other place for safe keeping or to any gaol, which place or gaol shall be named in such order, there to be detained until discharged in due course of law, or removed for the purpose of trial to the gaol of the county or district in which the trial is to take place; and a copy of such order,

certified by the clerk of the Queen's Privy Council for Canada, or the clerk of the Executive Council, or by any person acting as such clerk of the Privy Council or Executive Council shall be sufficient authority to the sheriffs and gaolers of the counties or districts respectively named in such order to deliver over and to receive the body of any person named in such order. R.S.C., c. 174, s. 97.

2. The Governor in Council or a Lieutenant-Governor in Council may, in any such order, direct the sheriff in whose custody the person to be removed then is, to convey the said person to the place or gaol in which he is to be confined, and in case of removal to another county or district shall direct the sheriff or gaoler of such county or district to receive the said person and to detain him until he is discharged in due course of law, or is removed for the purpose of trial to any other county or district. R. S.C., c. 174, s. 98.

3. The Governor in Council or a Lieutenant-Governor in Council may make an order as hereinbefore provided in respect of any person under sentence of imprisonment or under sentence of death, — and, in the latter case, the sheriff to whose gaol the prisoner is removed shall obey any direction given by the said order or by any subsequent order in council, for the return of such prisoner to the custody of the sheriff by whom the sentence is to be executed. R.S.C., c. 174, s. 100.

**650. Indictment after removal.** — If after such removal a true bill for any indictable offence is returned by any Grand Jury of the county or district from which any such person is removed, against any such person, the court into which such true bill is returned, may make an order for the removal of such person, from the gaol in which he is then confined, to the gaol of the county or district in which such court is sitting, for the purpose of his being tried in such county or district. R.S.C., c. 174, s. 99.

**651. Change of venue.** — *Whenever it appears to the satisfaction of the Court or Judge* hereinafter mentioned, that it is expedient to the ends of justice that the trial of any person charged with an indictable offence should be held in some district, county or place other than that in which the offence is supposed to have been committed, or would otherwise be triable, the court before which such person is or is liable to be indicted may, at any term or sitting thereof, and any judge who might hold or sit in such court may, at any other time either *before* or *after* the presentation of a bill of indictment, order that the trial shall be proceeded with in some other district, county or place within the same province, named by the Court or Judge in such order; but such order shall be made upon such conditions as to the payment of any additional expense thereby caused to the accused, as the Court or Judge thinks proper to prescribe.

2. Forthwith upon the order of removal being made by the Court or Judge, the indictment, if any has been found against the prisoner, and all inquisitions, informations, depositions, recognizances and other documents relating to the prosecution against him, shall be transmitted by the officer having the custody thereof to the proper officer of the court at the place where the trial is to be had, and all proceedings in the case shall be had, or, if previously commenced, shall be continued in such district, county or place, as if the case had arisen or the offence had been committed therein.

3. The order of the Court or of the Judge, made under this section, shall be a sufficient warrant, justification and authority, to all sheriffs, gaolers and peace officers, for the removal, disposal and reception of the prisoner, in conformity with the terms of such order; and the sheriff may appoint and empower any constable to convey the prisoner to the gaol in the district, county or place in which the trial is ordered to be had.

4. Every recognizance entered into for the prosecution of any person, and every recognizance, as well of any witness to give evidence, as of any person for any offence, shall, in case any such order, as provided by this section, is made, be obligatory on each of the persons bound by such recognizance as to all things therein mentioned with reference to the said trial, at the place where such trial is so ordered to be had, in like manner as if such recognizance had been originally entered into for the doing of such things at such last mentioned place: Provided that notice in writing shall be given either personally or by leaving the same at the place of residence of the persons bound by such recognizance, as therein described, to appear before the Court, at the place where such trial is ordered to be had. R.S.C., c. 174, s. 102.

5. (Added by 57-58 Vict. c. 57). Whenever, in the province of Quebec, it has been decided by competent authority that no term of the Court of Queen's Bench, holding criminal pleas, is to be held, at the appointed time, in any district in the said province within which a term of the said court should be then held, any person charged with an indictable offence whose trial should by law be held in the said district, may in the manner hereinbefore provided obtain an order that his trial be proceeded with in some other district within the said province, named by the court or judge; and all the provisions contained in this section shall apply to the case of a person so applying for and obtaining a change of venue as aforesaid.

The principle ground upon which a change of venue has hitherto been granted and upon which the Court or Judge, in the exercise of the discretionary power conferred by this section, will no doubt in future order the place of trial to be changed, is that there is a fair and reasonable probability of partiality and prejudice in the district, county, or place within

which the indictment would otherwise be tried. (1) For instance, the place of trial was changed in a case in which the Court of Magistrates was interested in the result of the trial. (2) And, where a magistrate, in the commission for the county, was indicted at the Quarter Sessions, and circulated among the other magistrates a printed account of the charges, an order was made changing the place of trial, (3) as, also, where the prosecutor or his attorney was the sheriff or under-sheriff. (4)

In some cases, writs of *certiorari* (5) have been granted by the English Courts to remove the indictment and so change the place of trial in prosecutions for conspiracy, even where one only of several defendants made the application without the consent of the others. (6) But the removal, in each of these cases, appears to have been allowed on the application of a defendant, who was a responsible person, he entering into a recognizance to pay costs in case of the conviction of himself or of any of the other defendants, in accordance with the Rules of the English Crown Office.

As a rule, applications on the part of the defendant to change the place of trial upon an indictment for perjury, forgery, murder or other heinous offence, have been refused, where the delay tended to defeat the prosecution. (7)

A change of venue should not be made whereby the trial would be transferred from the county in which the crime is alleged to have been committed, except upon proof of *facts*, — as distinguished from sworn *opinions*,— plainly indicating that a fair and impartial trial cannot be had in that county. (8)

A change of venue should not be made on the application of the Crown, on the ground of popular sympathy with the prisoner and prejudice against the prosecution, where there is nothing to shew that the class of citizens from whom the jury would be drawn are likely to be prejudiced otherwise than by those feelings which arise from the nature of the offence and which are common to all counties. (9)

A change of venue may be ordered, on the application of the Crown, where at an abortive trial, at which the jury disagreed, a hostile demonstration was made against the judge by a mob assembled in the streets during a short adjournment of the trial; it being held that the change was "expedient to the ends of justice," because the conduct of the mob tended to bring the administration of justice into contempt, and because of its possible influence on a jury at the next trial. (10)

In a case of criminal libel, in order to obtain a change of venue, it is not

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(1) R. v. Lewis, 1 Str., 704; R. v. Fowle, 2 Ld. Raym., 1452; R. v. Waddington, 1 East, 107; R. v. Hunt, 3 B. & Ald., 444; R. v. Palmer, 5 E. & B., 1024.

(2) R. v. Jones, Har. & W., 293.

(3) R. v. Grover, 8 Dowl., 325.

(4) R. v. Webb, 2 Str., 1068; R. v. Knatchbull, 1 Salk., 150.

(5) A writ of *certiorari* is the usual means, in England, of removing an indictment, although, under the Judicature Act, it may in some cases be done by means of an order.

(6) R. v. Wilks, 25 L. J. (Q. B.), 47; R. v. Rowlands, 2 Den., 364; 21 L. J. (M. C.), 81; R. v. Foulkes, 20 L. J. (M. C.), 196; R. v. Jewell, 26 L. J. (Q. B.), 177.

(7) 2 Hawk., c. 27, section 28; R. v. Mead, 3 D. & R., 301; R. v. Thomas, 4 M. & Sel., 442.

(8) R. v. Ponton, 2 Can. Cr. Cas., 192; 18 C. L. T., 365.

(9) *Ib.*

(10) R. v. Ponton, (No. 2), 2 Can. Cr. Cas., 417; 19 C. L. T., 175.

sufficient to allege that the prosecutor is interested in politics in the place where the libel is alleged to have been committed, and that in consequence, the defendant cannot obtain a fair trial there, and the fact that two abortive trials have taken place is not *per se* a reason for changing the venue. (11)

Where, after a committal for trial, an order is made changing the place of trial to another county, an indictment may be preferred in the latter county not only for the offence for which the accused was committed for trial, but for any other offence disclosed in the depositions taken before the committing magistrate. (12)

An order for change of the place of trial is not open to objection on the ground that it makes no provision for the additional expense to which the accused might be put by the change, if the judge making the order was not asked to make provision as to such additional expense, and if it was not shewn to such judge that additional expense would be occasioned. (13)

## PART L.

## ARRAIGNMENT.

**652. Bringing prisoner up for arraignment.** — If any person against whom any indictment is found is at the time confined for some other cause in the prison belonging to the jurisdiction of the Court by which he is to be tried, the Court may by order in writing, without a writ of *habeas corpus*, direct the warden or gaoler of the prison or sheriff or other person having the custody of the prisoner to bring up the body of such person as often as may be required for the purposes of the trial, and such warden, gaoler, sheriff or other person shall obey such order. R.S.C., c. 174, s. 101.

**653. Right of accused to inspect depositions and hear indictment.** — Every accused person shall be entitled at the time of his trial to inspect, without fee or reward, all depositions, or copies thereof, taken against him and returned into the Court before which such trial is had, and to have the indictment on which he is to be tried read over to him if he so requires. R.S.C., c. 174, s. 180.

**654. Copy of indictment.** — Every person indicted for any offence shall, before being arraigned on the indictment, be entitled to a copy thereof on paying the clerk five cents per folio of one hundred words for the same, if the Court is of opinion that the same can be made without delay to the trial, but not otherwise. R.S.C., c. 174, s. 181.

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(11) R. v. Nicol, 20 C. L. T., 319; 4 Can. Cr. Cas., 1.
(12) R. v. Coleman, 2 Can. Cr. Cas., 523.
(13) *Ib.*

**655. Copy of depositions.** — Every person indicted shall be entitled to a copy of the depositions returned into Court on payment of five cents per folio of one hundred words for the same, provided, if the same are not demanded before the opening of the assizes, term, sittings or sessions, the Court is of opinion that the same can be made without delay to the trial but not otherwise; but the Court may, if it sees fit, postpone the trial on account of such copy of the depositions not having been previously had by the person charged. R.S.C., c. 174, s. 182.

**656. Pleas in abatement abolished.** — No plea in abatement shall be allowed after the commencement of this Act. Any objection to the constitution of the Grand Jury may be taken by motion to the Court, and the indictment shall be quashed if the Court is of opinion both that such objection is well founded and that the accused has suffered or may suffer prejudice thereby, but not otherwise.

An order of the Court to a coroner to summon a Grand Jury, need not shew on its face all the facts which made it necessary that a coroner, instead of the sheriff, should be directed to summon the jury. Where a Grand Jury had been summoned by a sheriff who, as it transpired, was disqualified from acting on account of his being the brother of the prosecutor, the indictment found by this Grand Jury was quashed, and an order was given to the coroner to summon a new Grand Jury, among whom were several men who had been on the sheriff's jury. A true bill being again found, the prisoner was tried and convicted. *Held*, on a case reserved, that the Court had the power inherent in itself to order the summoning of a second Grand Jury, and that the fact of several of the jurors of the last panel having served on the previous Grand Jury in the same case would not invalidate the indictment. (1)

The arraignment of prisoners against whom true bills for indictable offences have been found by the Grand Jury, consists of three parts: — 1st, calling the prisoner to the bar, by name; 2nd, reading the indictment to him; and 3rd, asking him whether he is guilty or not of the offence charged.

The practice of requiring the prisoner, at the time of his arraignment, to hold up his right hand is a ceremony which was never essentially necessary, and is not now generally used, except when two or more prisoners are arraigned together, upon the same indictment, for the purpose of ascertaining which of them is A B, C D, and so forth; and the ancient form of asking the prisoner how he will be tried is obsolete. (2)

At his arraignment, the prisoner is to be brought to the bar, without shackles or other restraint, unless there be special circumstances shewing danger of escape. (3) In Layer's case, (4) a distinction was taken between the time of arraignment and the time of trial, and the prisoner in that case was compelled, during his arraignment, to stand at the bar, in irons; but, the ruling in that case does not seem to be in accord with the general

(1) R v. McGuire, 4 Can. Cr. Cas., 12.
(2) 2 Hawk., c. 28, section 2.
(3) 2 Hawk., c. 28, section 1.
(4) R. v. Layer, 16 How. St. Tr., 94.

authority of the expositors of the common law. The *Mirror* says, "It is an abuse that a prisoner is laden with irons or put to pain before attainted of felony." (5)

The usual form of question put to the defendant, after the reading of the indictment, is as follows: — "*How say you?* Are you *guilty or not guilty?*"

**657. Plea. — Refusal to plead.** — When the accused is called upon to plead he may plead either guilty or not guilty, or such special plea as is hereinbefore provided for.

2. If the accused wilfully refuses to plead, or will not answer directly, the Court may order the proper officer to enter a plea of not guilty. R.S.C., c. 174, s. 145.

Where it is a matter of doubt whether or not a prisoner is *wilful* in his refusal to plead or omission to answer directly, the proper course is for the Court to direct a Jury to be forthwith empanelled and sworn to try the question. (6)

The form of the oath to the jury in such a case is as follows: — You shall well and truly try whether A B, the prisoner at the bar who stands charged with an indictable offence, refuses to plead (*or* "omits to give a direct answer") *wilfully* or by the visitation of God, and a true verdict give according to the evidence: So help you God."

If a person be found to be mute *ex visitatione Dei*, the Court, in its discretion, will use such means as may be sufficient to enable the prisoner to understand the charge, and make his answer; and if this be found impracticable a plea of *not guilty* should be entered, and the trial proceed. (7)

Where a prisoner appeared to be deaf, dumb, and also of non-sane mind, Alderson, B., put three distinct issues to the Jury, directing the jury to be sworn severally as to each: — 1. Whether the prisoner was mute of malice, or by the visitation of God; 2. Whether he was able to plead; 3. Whether he was sane or not. And, on the last issue, they were directed to enquire whether the prisoner was of sufficient intellect to comprehend the course of the proceedings on the trial, so as to make a proper defence, to challenge a juror whom he might wish to object to, and to understand the details of the evidence. (8)

A deaf and dumb person should not be tried for a crime, where it is impossible to communicate to him or make him understand the nature and incidents of a trial. (9)

On the trial of a deaf mute for felony, he was found guilty, but the Jury also found that he was incapable of understanding and did not understand the proceedings at the trial; upon which finding it was held that, the prisoner could not be convicted, but must be detained as a non-sane person during the King's pleasure. (10)

In another case, where the prisoner was indicted at the Central Criminal Court, for the murder of his mother, and, on his arraignment, said he

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(5) The *Mirror*, c. 5, section 1; 3 Inst., 34; and Staundf. P. C., 78.
(6) R. v. Israel, 2 Cox C. C., 263.
(7) 1 Chit. Cr. L., 417.
(8) R. v. Pritchard, 7 C. & P., 303.
(9) R. v. Dyson, R. & R., 523.
(10) R. v. Berry, 1 Q. B. D., 447; 45 L. J. (M. C.), 123.

was *not guilty*, Platt, B., on the motion of the prisoner's counsel, directed the Jury to be sworn to enquire whether the prisoner was in a fit state of mind to plead to the indictment, and, it appearing, from the evidence, that the prisoner seemed to understand the nature of the crime for which he was indicted, but that he seemed unable to understand the distinction between a plea of "guilty" and of "not guilty," the Jury, at the suggestion of the learned Judge, returned a verdict that the prisoner was of unsound mind and incompetent to plead. (10*a*)

From the earliest times it has been the law that, when a prisoner, though he may have been perfectly sane when he committed the offence for which he was indicted, was found to be insane at the time of arraignment, he shall not be arraigned for it; for he is not in full possession of his senses, so as to be capable of pleading to the indictment with due caution, or doing what is necessary for his defence. (11)

Section 737, *post*, makes provision for the trial of any person who appears, at any time after the finding of an indictment against him, to be incapable, on account of insanity, of conducting his defence.

If the defendant pleads "not guilty," his plea is recorded by the officer of the Court, — either by writing "*po. se.*," an abbreviation of the words, *ponit se super patriam*, or, as at the Central Criminal Court, by the word, "*puts*," and by an entry in the minute book of the Court. (12)

**658. Special provisions in cases of treason.** — When any one is indicted for treason, or for being accessory after the fact to treason, the following documents shall be delivered to him after the indictment has been found, and at least ten days before his arraignment; that is to say:

(*a*) a copy of the indictment;

(*b*) a list of the witnesses to be produced on the trial to prove the indictment; and

(*c*) a copy of the panel of the jurors who are to try him returned by the sheriff.

2. The list of the witnesses and the copy of the panel of the jurors must mention the names, occupations, and places of abode of the said witnesses and jurors.

3. The documents aforesaid must all be given to the accused at the same time and in the presence of two witnesses.

4. This section shall not apply to cases of treason by killing Her Majesty, or to cases where the overt act alleged is any attempt to injure her person in any manner whatever, or to the offence of being accessory after the fact to any such treason.

Substitute "His Majesty" for "Her Majesty."

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(10*a*) R. v. Wheeler, Arch. Cr. Pl. & Ev., 21st Ed., 161.
(11) 4 Bl. Com., 24.
(12) See R. v. Newman, 2 Den., 392; 21 L. J. (M. C.), 75, 76

## PART LI.

## TRIAL.

With regard to the Part of the English Draft Code, which deals with trial, the English Commissioners make, in their Report, (at pp. 36 and 37), the following remarks: —

"It does not go into minute detail through every part of it; but notices those parts only on which the law appears to require statement or alteration.

"Sections 518, 519 and 520 (1) state the law as to going through the panel, introducing into England some of the provisions of 39 and 40 Vict. c. 78 (as to Ireland), and providing that the number of jurors to be peremptorily challenged shall henceforth be thirty-five in cases of treason, twenty in cases where the accused might upon conviction be sentenced to penal servitude for life, and six in all other cases. Some alteration is made necessary by the abolition of the distinction between felony and misdemeanour; and what we suggest is something between the present English and the present Irish system. In England there are twenty peremptory challenges in all felonies, and none in any misdemeanor. In Ireland there are twenty in felony, and six in misdemeanor. Section 531 (2) abolishes juries of matrons, where pregnacy is pleaded, and substitutes a medical examination; section 525 enables the court to adjourn or postpone the trial in order to obtain the attendance of any witness whose testimony appears material. This alteration is one of considerable importance.

"Section 526 (3) permits admissions to be made in a criminal trial. At present if the accused is proved before his trial to have made an admission, it is evidence against him; but though he offers to make the same admission in Court, it is thought that in cases of felony the judge is obliged to refuse to let him do so.

"Section 532 (4) gives the Court a discretion as to allowing the jury to separate on an adjournment, except in capital cases. At present the practice is that they may separate in cases of misdemeanor, but not in cases of felony. Section 535 allows the court to direct that the jury should have a view, (5) which is already permitted by statute in Ireland (39 and 40 Vict. c. 78, s. 111).

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(1) Sections 666 and 667, *post*, are identical with sections 518 and 519 of the English Draft Code; but section 668 differs from section 520 of the English Draft as to the number of challenges.
(2) See section 731, *post*.
(3) See section 690, *post*.
(4) See section 673, *post*.
(5) See section 722, *post*.

Section 536 enables the Court to take a verdict on Sunday. (6) This provision was suggested by the case of Winsor v. R., (7) in which it was stated, as one reason for discharging the jury late on a Saturday night, that, if they agreed to their verdict on Sunday, the verdict could not be taken till the Monday.

"Section 537 preserves the power of staying proceedings, always hitherto possessed by the Attorney General, and at present exercised by entering a *nolle prosequi* on the record. (8)

"We have passed over section 523, which enables the accused to offer himself as a witness. The bill contained a clause (section 368) enabling the accused to make an unsworn statement on his own behalf, and subjecting him to cross-examination of a restricted character. For this we have substituted section 523, which renders the accused and the husband or wife of the accused competent witnesses for the defence. (9) As regards the policy of a change in the law so important, we are divided in opinion. The considerations in favour of and against the change have been frequently discussed and are well known. On the whole, we are of opinion that, if the accused is to be admitted to give evidence on his own behalf, he should do so on the same conditions as other witnesses, subject to some special protection in regard to cross-examination."

**659. Right to full defence.** — Every person tried for any indictable offence shall be admitted, after the close of the case for the prosecution, to make full answer and defence thereto by counsel learned in the law. R.S.C., c. 174, s. 178.

**660. Presence of accused at trial.** — Every accused person shall be entitled to be present in Court during the whole of his trial unless he misconducts himself by so interrupting the proceedings as to render their continuance in his presence impracticable.

2. The Court may permit the accused to be out of Court during the whole or any part of any trial on such terms as it thinks proper.

**661. Right of prosecutor to sum up.** — If an accused person, or any one of several accused persons being tried together, is defended by counsel, such counsel shall, at the end of the case for the prosecution, declare whether he intends to adduce evidence or not on behalf of the accused person for whom he appears; and if

(6) See section 729, *post*.
(7) Winsor v. R., L. R., 1 Q. B., 317, 322; 35 L. J. (M. C.), 121.
(8) See section 732, *post*.
(9) This provision is contained in section 4 of the Canada Evidence Act, 1893, *post*.

he does not thereupon announce his intention to adduce evidence, the counsel for the prosecution may address the Jury by way of summing up.

2. Upon every trial for an indictable offence, whether the accused person is defended by counsel or not, he or his counsel shall be allowed, if he thinks fit, to open his case, and after the conclusion of such opening, to examine such witnesses as he thinks fit, and when all the evidence is concluded to sum up the evidence. If no witnesses are examined for the defence, the counsel for the accused shall have the privilege of addressing the Jury last, otherwise such right shall belong to the counsel for the prosecution: Provided, that the right of reply shall be always allowed to the Attorney-General or Solicitor-General, or to any counsel acting on behalf of either of them. R.S.C., c. 174, s. 179.

In opening the case to the Jury, the counsel for the prosecution should state *all* that it is proposed to prove, as well declarations of the prisoner as facts; (10) unless the declarations of the prisoner amount to a *confession*, when it would be improper for counsel to open them to the Jury; (11) because the circumstances under which the confession was made may render it inadmissible in evidence. The *general effect* only of any confession said to have been made by a prisoner may be mentioned in the opening address of the prosecuting counsel. When any additional evidence not mentioned in the opening speech of counsel is discovered in the course of a trial, counsel is not allowed to state it in a second address to the Jury. (12)

In opening a case for murder, it has been held that the counsel for the prosecution may put hypothetically the case of an attack upon the character of any particular witness for the Crown, and say that should any such attack be made he shall be prepared to meet it, (13) and that he may read to the Jury the observations of a Judge in a former case, as to the nature and effect of circumstantial evidence, provided he adopts them as his own opinions, and makes them part of his address to the Jury. (14)

In a case at the Central Criminal Court in 1848, the Attorney-General having, in his opening address to the Jury, made reference to disturbances in Ireland, Erle, J., held, on objection made, that such reference was not irregular, it being laid down in books of evidence that allusion might be made in Courts of Justice to notorious matters even of contemporaneous history. (15)

The counsel for the prosecution states his case before he calls the witnesses, and, when the evidence for the prosecution is all in, he closes his case, either by announcing that he has nothing further to say, or, he says to the jury, "I have already told you what would be the substance of the evidence, and you see the statement which I made is correct;" or, in ex-

(10) Per Parke, B., R. v. Hartel, 7 C. & P., 773; R. v. Davis, 7 C. & P., 785.

(11) Per Bosanquet, J., and Patteson, J., 4 C. & P., 548. Per Parke, B., 7 C. & P., 786.

(12) R. v. Courvoisier, 9 C. & P., 362.

(13) Per Tindal, C. J., and Parke, B., 9 C. & P., 362.

(14) *Id.*

(15) R. v. Dowling, Arch. Cr. Pl. & Ev., 21st Ed., 179.

ceptional cases, "Something is proved different to what I expected," and adds any suitable explanation that may be required. (16)

**Defence.** — Where a prisoner is unrepresented by counsel, he cross examines the witnesses for the prosecution, if he thinks fit, or the judge does so on his behalf.

It may be mentioned, also, that, where the defendant himself wishes to address the jury, and to personally examine and cross-examine witnesses, he will be allowed to do so; and he may at the same time have counsel to argue any points of law that may arise in the course of the trial, and to suggest questions to him (the prisoner) for the cross-examination of the witnesses. (17) But, he cannot have counsel to examine and cross-examine the witnesses, and reserve to himself the right of addressing the jury. (18)

Where two prisoners are jointly indicted and are defended by different counsel, each counsel, in the order of seniority at the bar, cross-examines and addresses the jury for his client; but, where the judge thinks it desirable, he will permit the counsel to cross-examine and address the jury not in the order of seniority, but in that in which the names of the defendants stand on the indictment. (19)

A prisoner defended by counsel would not, formerly, unless under some very special circumstances, be allowed to make his statement to the jury before his counsel addressed them. (20) Where, however, the prisoners, who were indicted for robbery, with violence, were defended by counsel, but called no witnesses, Hawkins, J., after consultation with Lush, J., allowed the prisoners to give their own account of the matter to the jury, *after* their counsel had addressed the jury. (21) And, where a prisoner who was indicted for murder, was defended by counsel, but called no witnesses, Bowen, J., allowed the prisoner to read a statement of his account of the matter to the jury, *before* counsel addressed them. (22)

Under similar circumstances, Stephen, J., allowed the prisoner to make a statement to the jury, *before* his counsel addressed them, at the same time warning the prisoner that his making such statement would give the counsel for the prosecution a right to reply. (23)

Whether the prisoner's Counsel might state to the jury alleged facts which he had learned from the prisoner, but which he was not in a position to prove, was much doubted, and was ultimately settled in the negative.

At a meeting of all the judges liable to try prisoners, held 26 Nov. 1881, it was resolved; "That, in the opinion of the judges it is contrary to the administration and practice of the criminal law as hitherto allowed, that counsel for prisoners should state to the jury, matters which they have been told in their instructions, on the authority of the prisoner, as being alleged existing facts, but which they do not propose to prove in evidence."

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(16) R. v. Holchester, 10 Cox C. C., 226, per Blackburn, J.; R. v. Berens, 4 F. & F., 842, S. C. See, also, R. v. Webb, 4 F. & F., 862.

(17) R. v. Parkins, R. & M., 166.

(18) R. v. White, 3 Camp., 98.

(19) Per Rolfe, B., 2 M. & Rob., 617. See, also, R. v. Barber, 1 C. & K., 434.

(20) R. v. Rider, 8 C. & P., 539; R. v. Mallins, 8 C. & P., 242; R. v. Mansano, 2 F. & F., 64; R. v. Stephens, 11 Cox C. C., 669.

(21) R. v. Hall & Smith, Yorkshire Winter Assizes, at Leeds, 3rd Feb., 1880.

(22) R. v. Blades, Yorkshire Summer Assizes, 2nd Aug. 1880.

(23) R. v. Doherty, 16 Cox C. C., 306.

The question of the propriety of laying down a rule as to the practice of allowing prisoners to address the jury before the summing up of the judge, when their counsel have addressed the jury, was then discussed and adjourned for further consideration. (24)

In a case subsequent to the above mentioned resolution of the judges, Cave, J., refused to allow the prisoner's counsel to give the prisoner's version of the facts of the case, which he was unprepared to support by evidence, but allowed the prisoner himself to give his own version of the facts of the case, after his counsel had addressed the Jury, subject, however, to a right of reply, on the part of the prosecution, on the new matter thus laid before the jury. His Lordship said that this was the rule of practice intended to be followed, in future. (25)

A prisoner is, now, under section 4 of the Canada Evidence Act, 1893, *post*, a competent witness on his own behalf.

**Reply.** — If the defendant calls no witnesses, his counsel has the right, under clause 2 of the above section, 661, of addressing the jury *last*. But, if the defendant calls witnesses, the right to address the jury *last* belongs to the counsel for the prosecution. Even if the evidence for the defendant be only to his character, it gives, in strictness, a right of reply; although it appears, that, in such a case, the right is, in England, seldom exercised. (26)

If two prisoners are indicted jointly for the same offence, and one calls witnesses, it seems that the counsel for the prosecution is entitled to a general reply, but, if the offences are separate, and the prisoners might have been separately indicted, counsel for the prosecution can reply only on the case of the prisoner who called witnesses. (27)

Where four prisoners were indicted for aggravated assault, and only three of them were defended by counsel, and the prisoner who was undefended called witnesses to prove an *alibi*, but no witnesses were called on behalf of the other three prisoners, it was held that counsel for the prosecution had no general right of reply, but that it was the proper course for him to sum up his evidence generally, and reply upon the evidence called by the unrepresented prisoner, before the counsel for the other three prisoners addressed the jury. (28)

Where several prisoners were jointly indicted, and defended by several counsel, and witnesses were called for some of the prisoners but not for the others, it was held that, the counsel for the prosecution should first reply to the counsel of those prisoners who called witnesses, but that the counsel for the prisoners who called no witnesses had the right to address the jury last. (29)

If, on an indictment against several defendants one of them calls evidence which is applicable to the cases of all, it seems that the prosecution has a general right of reply, although the other defendants call no witnesses; but, where such evidence is applicable only to the case of the defendant who calls it and does not apply to the cases of the other defendants ,the right of the prosecution to reply is restricted to the case of the defendant calling the evidence.

In a murder trial in Manitoba, (Chief Justice Taylor presiding), the

(24) 47 J. P., 777. (8th Dec. 1883.)
(25) R. v. Shimmin, 15 Cox C. C., 122.
(26) R. v. Dowse, 4 F. & F., 492.
(27) R. v. Hayes, 2 M. & R., 155; R. v. Jordan, 9 C. & P., 118.
(28) R. v. Kain, 15 Cox C. C., 388.
(29) R. v. Burns, 16 Cox C. C., 195.

prisoner's counsel, at the close of the case for the Crown, announced that he would call no witnesses for the defence. The Counsel for the Crown then asked for the ruling of the Court as to whether, under clause 3 of the above section, 661, Counsel for the Crown acting for the Attorney-General should not have the right of reply in all cases. *Held*, that, in spite of the proviso at the end of sub-section 2, the meaning of the section was that in such a case as the present, the Counsel for the Crown should, at the close of the case for the Crown, address the jury first, and that the Counsel for the defence should address the jury last. (30)

The rule in England seems to be that, in the first place, the Crown Counsel addresses the jury in opening the case, that, when the accused calls no witnesses for the defence, the Crown Counsel addresses the jury upon the evidence which he has adduced for the prosecution, and that, then, the prisoner's Counsel addresses the jury *last*. But, if the accused calls witnesses for his defence, his counsel, after the case for the Crown is closed, addresses the jury, giving an outline of the evidence he proposes to adduce for the defence; that, after having examined the witnesses for the defence, the prisoner's Counsel then addresses the jury again; and that, after this, the Counsel for the Crown addresses the jury, *last*. (31)

**Rebuttal.** — Whenever the defendant, by way of defence, calls evidence proving new matter, which the Crown could not foresee, the counsel for the prosecution is entitled to call witnesses in reply, to contradict it. (32)

**Judge's charge or summing up.** — After all the evidence is in, and the speeches of counsel for and against the prisoner are delivered, the Judge addresses to the Jury his charge or summing up. The chief object of it is to explain to the Jury the law of the case, to point out the essentials to be proved on the one side and on the other, and to bring to view the relations of the evidence adduced to the issues involved.

On this subject, Sir James F. Stephen, says; — "I think that a judge who merely states to the Jury certain propositions of law, and then reads over his notes, does not discharge his duty. I also think that a judge who forms a decided opinion before he has heard the whole case, or who allows himself to be, in any degree, actuated by an advocate's feelings, in regulating the proceedings, altogether fails to discharge his duty; but, I further think that he ought not to conceal his opinion from the Jury, nor do I see how it is possible for him to do so, if he arranges the evidence in the order in which it strikes his mind. The mere effort to see what is essential to a story, in what order the important events happened, and in what relation they stand to each other, must of necessity point to some conclusion. The act of stating for the Jury the questions which they have to answer and of stating the evidence bearing on those questions and shewing in what respects it is important, generally goes a considerable way towards suggesting an answer to them; and, if a Judge does not do as much at least as this, he does almost nothing.

"The judge's position is thus one of great delicacy and it is not, I think, too much to say that to discharge the duties which it involves as well as they are capable of being discharged, demands the strenuous use of uncommon faculties, both intellectual and moral. It is not easy to form and suggest to others an opinion founded upon the whole of the evidence, without on the one hand shrinking from it, or, on the other, closing the mind to considerations which make against it. It is not easy to treat fairly arguments urged in an unwelcome or unskilful manner. It is not easy for a

(30) R. v. LeBlanc, 13 C. L. T., 441; 29 C. L. J., 729.
(31) See R. v. Berens and others, 4 F. & F., 842.
(32) See R. v. Frost, 9 C. & P., 159.

man to do his best, and yet to avoid the temptation to choose that view of a subject which enables him to shew off his special gifts. In short, it is not easy to be true and just. That the problem is capable of an eminently satisfactory solution there can, I think, be no doubt. Speaking only of those who are long since dead, it may be truly said that, to hear, in their happiest moments, the summing up of such judges as Lord Campbell, Lord Chief Justice Erle, or Baron Parke, was like listening not only (to use Hobbes's famous expression), to '*law living and armed,*' but to the voice of Justice itself." (33)

**662. Qualifications of Jurors.** — Every person qualified and summoned as a Grand or Petit Juror, according to the laws in force for the time being in any province of Canada, shall be duly qualified to serve as such Juror in criminal cases in that province. R.S.C., c. 174, s. 160.

2. Notwithstanding any law, usage or custom to the contrary, seven grand jurors, instead of twelve as heretofore, may find a true bill in any province where the panel of grand jurors is not more than thirteen: Provided, that this subsection shall not come into force until a day to be named by the Governor by his proclamation. (Added by 57-58 Vic., c. 57).

By a proclamation of the Governor General, made on the 28th day of December 1894, — and published in the *Canada Gazette*, vol. 28, p. 1172, — it was ordained that this sub-section, 2, should come into force on the first day January 1895; and, since then, legislation has been passed, by a majority of the provinces, reducing the panel of Grand Jurors to a number not exceeding thirteen. (34)

Since the coming into force of the above amendment to section 662, it has been held, — in the province of Quebec, where the number of Grand Jurors to be summoned has been reduced to twelve, — that if any of the Grand Jurors summoned fail to appear, the ones who appear may be sworn to act as a Grand Jury and find a "true bill," provided that seven at least of them agree to the finding. (35)

It is within the power of a provincial legislature to fix what number of Grand Jurors shall compose the panel, — that being part of the organization or constitution of the Court, — but, a provincial legislature has no power to fix the number of Grand Jurors necessary to find a bill of indictment, that being a matter of criminal procedure and exclusively within the power of the Dominion Parliament. (36)

Where, in the province of Quebec, a sheriff, by error, had, — since the alteration of the law with regard to the panel of Grand Jurors, — summoned twenty four Grand Jurors instead of twelve, and, on the first twelve of them being called, one of them was sick, eleven only were sworn, and afterwards returned a true bill against an accused indicted for murder, — *Held*, that the finding of the Grand Jury was valid. (37)

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(33) Steph. Gen. V. Cr. L., 2nd Ed., 170.
(34) See Note (10), under section 641, at p. 777, *ante*.
(35) R. v. Girard, Que. Jud. Rep., 7 Q. B., 575; 2 Can. Cr. Cas., 216.
(36) R. v. Cox, 31 N. S. R., 311; 2 Can. Cr. Cas., 207.
(37) R. v. Poirier, Que. Jud. Rep., 7 Q. B., 483.

**663. Jury de medietate linguae abolished.** — No alien shall be entitled to be tried by a jury *de medietate linguae*, but shall be tried as if he was a natural born subject. R.S.C., c. 174, s. 161.

See clause 4 (*d*) of section 668, *post*, as to right to challenge a juror on the ground of his being an alien.

**664. Mixed Juries in Province of Quebec.** — In those districts in the province of Quebec in which the sheriff is required by law to return a panel of Petit Jurors composed one half of persons speaking the English language, and one half of persons speaking the French language, he shall in his return specify separately those Jurors whom he returns as speaking the English language, and those whom he returns as speaking the French language respectively; and the names of the Jurors so summoned shall be called alternately from such lists. R.S.C., c. 174, s. 166.

Article 2652, R. S. Que., (as amended by the 59 Vic. (Que.), c. 25, section 3), provides that, "In the districts of Quebec and Montreal, there shall be twelve Grand Jurors and sixty petit jurors summoned to serve before any court holding criminal jurisdiction, one half of whom shall be composed of persons speaking the French language and the other half of persons speaking the English language;" and that this provision "may be extended to any other district, by an order of the Lieutenant-Governor in Council, upon the presentment of the Grand Jury of such district, approved by the presiding judge, declaring the expediency of such extension."

By Article 2653, R. S. Que., it is provided that, "In districts other than those of Quebec and Montreal and in those to which the provisions of the preceding Article are made to apply, when application for a jury *de medietate linguæ* is made to the judge of the district in which the court is to sit, the court may, if it deem it expedient, authorize the sheriff of the district to summon a petit jury composed one half of persons speaking the French language and one half of persons speaking the English language."

On the trial of an indictment, in the province of Quebec, a prisoner who is either English or French is entitled, as a matter of right, to claim a jury for one half at least of persons speaking his own language; but, having obtained an order for a mixed jury, he cannot, of right, abandon it, and claim a trial by the ordinary jury; though the judge may, in his discretion, revoke the order. (38)

The right to a mixed jury in the province of Quebec, in criminal cases, is essentially a matter of criminal procedure, and, as such, is within the legislative authority of the Dominion Parliament, only, and not within the scope of provincial legislation. (39)

The words "language of the defence" used in sub-section 2 of section 7 of the 27-28 Vic., (Can.), c. 41, — which is still in force in the province of Quebec, — mean the *language of the prisoner*, and not the language in which his defence is to be conducted; the right of the prisoner being to claim a jury composed for one half at least of jurors speaking or skilled in his, (the prisoner's), own language. (40)

(38) R. v. Sheehan, Que. Jud. Rep., 6 Q. B., 139; 1 Can. Cr. Cas., 402.
(39) *Ib.*
(40) R. v. Yancey, Que. Jud. Rep., 8 Q. B., 252; 2 Can. Cr. Cas., 320.

The 27-28 Vic., c. 41, of the Statutes of Canada, conferring the right to a mixed jury still exists, in criminal cases, notwithstanding the Quebec Statute 46 Vic., c. 16, purporting to repeal the former Act, such former Act being in force at the time of Confederation, and, therefore, remaining in force, thereafter, as a matter of criminal procedure as to that province, and being subject to variation or repeal by the Dominion Parliament, only. (41)

**665. Mixed juries in Manitoba.** — Whenever any person who is arraigned before the Court of Queen's Bench for Manitoba demands a jury composed, for the one half at least, of persons skilled in the language of the defence, if such language is either English or French, he shall be tried by a jury composed for the one half at least of the persons whose names stand first in succession upon the general panel and who, on appearing and not being lawfully challenged, are found, in the judgment of the court, to be skilled in the language of the defence.

2. Whenever, from the number of challenges or any other cause, there is in any such case a deficiency of persons skilled in the language of the defence the court shall fix another day for the trial of such case, and the sheriff shall supply the deficiency by summoning, for the day so fixed, such additional number of jurors skilled in the language of the defence as the court orders, and as are found inscribed next in succession on the list of petit jurors. R.S.C., c. 174, s. 167.

**666. Challenging the array.** — Either the accused or the prosecutor may challenge the array on the ground of partiality, fraud, or wilful misconduct on the part of the sheriff or his deputies by whom the panel was returned, but on no other ground. The objection shall be made in writing, and shall state that the person returning the panel was partial, or was fraudulent, or wilfully misconducted himself, as the case may be. Such objection may be in form KK in schedule one hereto, or to the like effect.

2. If partiality, fraud or wilful misconduct, as the case may be, is denied, the court shall appoint any two indifferent persons to try whether the alleged ground of challenge is true or not. If the triers find that the alleged ground of challenge is true in fact, or if the party who has not challenged the array admits that the ground of challenge is true in fact, the court shall direct a new panel to be returned.

For Form of Challenge to the Array, (Form KK), see p. 851, *post*.

The challenge ought to specify the grounds of objection. A challenge merely stating that the sheriff had not chosen the panel, indifferently and impartially, as he ought to have done, has been held too general. (42)

(41) *Ib.*
(42) R. v. Hughes, 1 C. & K., 235.

A challenge to the array attacks the whole panel of jurors, with a view to its being quashed and a new panel returned; and, under this section, it may be based upon two kinds of grounds, namely: — 1. PARTIALITY on the part of the Sheriff, or his Deputies, by whom the panel has been returned; and, 2. FRAUD or WILFUL MISCONDUCT on their part.

A challenge to the array may also be, either, a *principal* challenge, or, a challenge *for favor*.

A *principal* challenge to the array is where the *partiality* is manifest,— when there is some fact, whose existence is *inconsistent* with the impartiality of the sheriff or other officer returning the panel, that is, some fact whose existence *makes it certain* that he cannot be impartial; (43) as where the sheriff is the actual prosecutor, or the party aggrieved, in connection with the charge against the prisoner; (44) or, where, at the time of returning the panel, he was of actual affinity to the prosecutor or party aggrieved, (45) or, if he have returned some jurors at the prosecutor's request, or if the sheriff or the bailiff who made the return be in litigation with the prisoner, or with the prisoner's husband; (46) or if the sheriff be a subscriber to a society who are the prosecutors in the case against the prisoner. (47)

Where the prosecutor or party aggrieved was the uncle of the sheriff of the district, it was held that, the sheriff was incompetent to make the jury panel and that this objection gave rise to a challenge to the array, the nullity of the panel, under such circumstances, being held to be absolute and not relative. (48)

In the case of a challenge to the array *for favor*, the ground of partiality is not so apparent and direct as in the case of a *principal* challenge, but consists of some fact whose existence is *likely* to interfere with the impartiality of the sheriff or other officer returning the Jury panel, or renders it *improbable* that he should be impartial and unbiassed; (49) as, where the sheriff and the prosecutor are united in the same office, or where the prosecutor is a tenant of the sheriff, or where a relationship exists between the children of the prosecutor and the sheriff, as in the case of a son of the sheriff having married the daughter of the prosecutor. (50)

If the Court holds that the fact alleged as a ground for a *principal* challenge is a good ground, and if the fact so alleged is denied, or if the Court holds that the fact alleged as a ground for a challenge *for favor* is a good ground of challenge for favor, and either the fact so alleged or the partiality sought to be inferred from it, or both, are denied, the question is decided by triers as provided by clause 2 of the above section 666.

In the case of a *principal* challenge to the array, the only question for the triers to try is whether the fact alleged as the ground of challenge is true or not; but, in the case of a challenge to the array *for favor*, there are two questions to be submitted to them: 1. Is the alleged fact true? And, 2. Has the existence of that fact rendered the sheriff partial? For instance, suppose the fact alleged be that the prosecutor is a tenant of the sheriff, the triers must find, 1st, whether, as a matter of fact, the pros-

(43) Steph. Dig. Cr. Proc., 184.
(44) R. v. Sheppard, 1 Leach, 101; Arch. Cr. Pl. & Ev., 21st Ed., 173.
(45) See R. v. Rouleau, *post*.
(46) Co. Litt., 156*a*; R. v. Rose Mi'ne, 4 P. & B., (N. B.), 394.
(47) R. v. Dolby, 1 C. & K., 238.
(48) R. v. Rouleau, 14 L. N., 140.
(49) Steph. Dig. Cr. Proc., 184.
(50) Co. Litt. 156*a*; 3 Dyer, 367*a*; Arch. Cr. Pl. & Ev., 21st Ed., 174.

ecutor is a tenant of the sheriff, and 2nd, whether, on account of the prosecutor being his tenant, the sheriff is partial.

The triers may be two of the Jurors returned. But the Court in its discretion may appoint any other two indifferent persons. (51)

If the triers decide in favor of the challenge, and the array is quashed, the *venire* for the empanelling of a new Jury is awarded to the Coroner, who, in this, as in some other instances, acts as substitute for the sheriff, where exception is taken to the latter; and, if the Coroner be interested or be otherwise incapable of acting, or be, for some good cause, objected to, the Jury, will be arrayed by two persons named by the Court, and sworn to the discharge of their duty. (52) These persons have been called *elisors* or *electors;* and no challenge has been allowed to their array. (53)

Where cause exists for a challenge to the array the party liable to the objection may and ought, himself, to suggest it to the Court, in order to prevent the delay which the challenge would occasion, so that the *venire* may be at once awarded to the Coroner, or to elisors, as the case may be. (54)

The inclusion of the names of unqualified persons in the petit jury is not a ground of challenge to the array; (55) but only a ground of challenge to the polls. (56)

**667. Calling the Panel.** — If the array is not challenged, or if the triers find against the challenge, the officer of the court shall proceed to call the names of the jurors in the following manner: The name of each Juror on the panel returned, with his number on the panel and the place of his abode, shall be written on a distinct piece of card, such cards being all as nearly as may be of an equal size. The cards shall be delivered to the officer of the court by the sheriff or other officer returning the panel, and shall, under the direction and care of the officer of the Court, be put together in a box to be provided for that purpose, and shall be shaken together.

2. The officer of the Court shall in open court draw out the said cards, one after another, and shall call out the name and number upon each such card as it is drawn, until such a number of persons have answered to their names as in the opinion of the Court will probably be sufficient to provide a full jury after allowing for challenges of jurors and directions to stand by.

3. The officer of the court shall then proceed to swear the Jury, each Juror being called to swear in the order in which his name is so drawn, until, after subtracting all challenges allowed and Jurors directed to stand by, twelve jurors are sworn. If the number so answering is not sufficient to provide a full jury such

(51) 2 Hale, 275; 4 Bl. Com., 353.
(52) See 1 Inst., 158; R. v. Dolby, 2 B. & C., 104.
(53) 3 Bl. Com., 355.
(54) Arch. Cr. Pl. & Ev., 21st Ed., 174.
(55) R. v. Mailloux, 3 Pugs., 493.
(56) Dow v. Dibblee, 1 Hun., 553.

officer shall proceed to draw further names from the box, and call the same in manner aforesaid, until after challenges allowed and directions to stand by, twelve Jurors are sworn.

4. If by challenges and directions to stand by the panel is exhausted without leaving a sufficient number to form a jury those who have been directed to stand by shall be again called in the order in which they were drawn, and shall be sworn, unless challenged by the accused, or unless the prosecutor challenges them and shows cause why they would not be sworn: Provided that if before any such juror is sworn other jurymen in the panel become available the prosecutor may require the names of such Jurymen to be put into and drawn from the box in the manner hereinbefore prescribed, and such Jurors shall be sworn, challenged, or ordered to stand by, as the case may be, before the Jurors originally ordered to stand by are again called.

5. The twelve men who in manner aforesaid are ultimately sworn shall be the Jury to try the issues on the indictment, and the names of the men so drawn and sworn shall be kept apart by themselves until such jury give in their verdict or until they are discharged; and then the names shall be returned to the box, there to be kept with the other names remaining at that time undrawn, and so *toties quoties* as long as any issue remains to be tried.

6. Provided that when the prosecutor and accused do not object thereto the Court may try any issue with the same Jury that has previously tried or been drawn to try any other issue, without their names being returned to the box and redrawn, or if the parties or either of them object to some one or more of the Jurors forming such jury, or the Court excuses any one or more of them, then the Court may order such persons to withdraw and may direct the requisite number of names to make up a complete Jury to be drawn, and the persons whose names are so drawn shall be sworn.

7. Provided also, that an omission to follow the directions in this section shall not affect the validity of the proceedings.

It has been held that, the fact that the jurors have been, — one by one, — set aside, rejected or sworn, as they were drawn, without the full number required for a jury being first called, does not invalidate the trial nor constitute a deprivation of the full right of challenge, — the provisions of paragraph 2 of the above section, 667, on the subject, being only directory. (57)

**668. Challenges and directions to stand by.** — Every one indicted for treason or any offence punishable with death is entitled to challenge twenty Jurors peremptorily.

(57) R. v. Weir. (No. 3), 3 Can. Cr. Cas., 262.

2. Every one indicted for any offence other than treason, or an offence punishable with death, for which he may be sentenced to imprisonment for more than five years, is entitled to challenge twelve Jurors peremptorily.

3. Every one indicted for any other offence is entitled to challenge four Jurors peremptorily.

4. Every prosecutor and every accused person is entitled to any number of challenges on any of the following grounds; that is to say;

(*a*) that any Juror's name does not appear in the panel: Provided that no misnomer or misdescription shall be a ground of challenge if it appears to the Court that the description given in the panel sufficiently designates the persons referred to; or

(*b*) that any Juror is not indifferent between the Queen and the accused; or

(*c*) that any Juror has been convicted of any offence for which he was sentenced to death or to any term of imprisonment with hard labour or exceeding twelve months; or

(*d*) that any Juror is an alien.

5. No other ground of challenge than those above mentioned shall be allowed.

6. If any such challenge is made the Court may in its discretion require the party challenging to put his challenge in writing. The challenge may be in the form LL in schedule one hereto, or to the like effect. The other party may deny that the ground of challenge is true.

7. If the ground of challenge is that the Jurors' names do not appear in the panel, the issue shall be tried by the Court on the *voir dire* by the inspection of the panel, and such other evidence as the Court thinks fit to receive.

8. If the ground of challenge be other than as last aforesaid the two Jurors last sworn, or if no Jurors have then been sworn then two persons present whom the court may appoint for that purpose shall be sworn to try whether the Juror objected to stands indifferent between the Queen and the accused, or has been convicted, or is an alien as aforesaid, as the case may be. If the court or the triers find against the challenge the Juror shall be sworn. If they find for the challenge he shall not be sworn. If after what the court considers a reasonable time the triers are unable to agree the court may discharge them from giving a verdict, and may direct other persons to be sworn in their place.

9. The Crown shall have power to challenge four Jurors peremptorily, and may direct any number of Jurors not peremptorily challenged by the accused to stand by until all the Jurors

have been called who are available for the purpose of trying that indictment.

10. The accused may be called upon to declare whether he challenges any Jurors peremptorily or otherwise, before the prosecutor is called upon to declare whether he requires such Juror to stand by, or challenges him either for cause or peremptorily. R. S.C., c. 174, ss. 163 and 164.

By this section, challenges to the polls, (*capita*), or exceptions to particular Jurors, are divided, as formerly, into *peremptory* challenges, and challenges *for cause;* the accused, under clauses 1, 2 and 3, being allowed peremptory challenges, to the number of twenty, in treason, and in capital offences, to the number of twelve, in other lesser offences punishable with more than five years imprisonment, and to the number of four in offences punishable with five years imprisonment or less; and the Crown being, under clause 9, allowed, in all cases, four peremptory challenges and the right to stand aside any number of Jurors.

The challenges for cause are unrestricted in number either as to the prosecutor or the accused. The grounds of such challenges are enumerated in clause 4, and may be placed under three heads, as follows: — 1st, that the Juror is (*a*) an alien, or (*b*) a person whose name is not on the panel, (either of which would, under the old law, have come under the head of *propter defectum*); 2nd, that the Juror is one who has been convicted either of a capital offence, or of an offence for which he has been sentenced to any term of imprisonment with hard labor, or any term exceeding twelve months, (which, under the old law, would have come under the head of *propter delictum*); and 3rd, that the Juror is not indifferent, (which, under the old law, would have come under the head of *propter affectum*).

Challenges to the polls on the ground of the Juror being *un-indifferent*, that is to say, on the ground of some *presumed* or *actual* partiality in the Juror, seem to answer to the *recusatio judicis* in the civil and canon law, by the constitution of which a *judex* might be refused upon any suspicion of partiality; (58) and such challenges, like those to the array, may be either *principal* or *for favor;* it being laid down as a principal cause of challenge for un-indifference or partiality that the Juror is of kin to either party within the ninth degree. (59)

Challenges to the polls *for favor* are where, although the Juror is not so manifestly partial as to render him liable to a principal challenge, there are, nevertheless, reasonable grounds for suspicion that he will act under some prejudice, bias, or undue influence; as, where he has said that he would hang the prisoner, if on his Jury, (60) or, where he has been entertained in the house of the party, or has been arbitrator in the same matter; or where the Juror and the party are fellow servants, or where there exists any other cause, such as would, in the case of the sheriff, constitute a ground of challenge *for favor* to the whole panel. (61)

A challenge to the polls *for cause* may be made orally, unless the Court, as provided by clause 6 of the above section, requires it to be in writing.

For form of Challenge to the polls, (Form LL), see p. 852, *post*.

(58) 3 Bl. Com., 361; Cod. 3, 1, 16.
(59) Onions v. Nash, 7 Price, 263; Hewitt v. Feenely, Ib., 234.
(60) Whelan v. R., 28 U. C. Q. B., 29.
(61) Co. Litt., 157*b*.

In the case of a principal challenge for partiality, if the partiality be made apparent to the satisfaction of the Court, the challenge, it appears, may be at once allowed, and the Juror set aside. (62) But, in the case of a challenge for partiality *not* a principal one but *for favor*, or where it is a challenge for cause of alienage or of being a convicted offender, it is tried by triers as directed by clause 8 of the above section.

It may be observed that no challenge of triers is admissible. (63)

If a challenge be made to the first Juror called, the Court may, as provided by clause 8 of the above section, appoint as triers, any two persons present. If they find against the challenge, the Juror will be sworn, and be joined with the two triers in determining the next challenge. (64) unless before another challenge is made, another Juror be sworn; for as soon as two or more Jurors are sworn the two triers selected by the Court are dispensed with; and if after more than two Jurors are sworn there are any further challenges they will, according to clause 8 of the above section, be referred to the two Jurors last sworn.

The trial of a challenge proceeds by witnesses called to support or defeat it. The Juror objected to may also be examined on the *voir dire* as to his partiality, or his alienage, etc., as the case may be.

The form of Oath to a trier is as follows: —

"You shall well and truly try whether A B, one of the Jurors, stands indifferent between Our Sovereign Lord the King and the prisoner at the bar (*or* "is an alien," etc.), and a true verdict give according to the evidence. — So help you God."

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."

The form of Oath to be administered to the challenged Juror, when examined on the *voir dire* is as follows : —

"You shall true answers make to all such questions as the Court shall demand of you. — So help you God."

Besides the objections which may be taken to particular jurors by way challenge, for the purpose of excluding them from serving, there are also other causes which may be invoked by the jurors themselves, but which are matters of exemption, whereby they are not *excluded* but *excused*.(65)

There is a clear distinction between disqualification and exemption. So, that, where a juror was returned whose age exceeded sixty years, that fact operated in his favor as an exemption, but was not a ground of challenge as a personal disqualification. (66)

There may also be cases in which the Court, without challenge taken, may and ought to excuse a juryman when called, if the latter is obviously unfit to perform his duty, from physical or mental infirmity, or, *semble*, from expressed unindifferency. (67)

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(62) Arch. Cr. Pl. & Ev., 21st Ed., 177.
(63) *Ib.*
(64) 2 Hale, 275; Co. Litt., 158*a*.
(65) 3 Steph. Com., 7th Ed., 525.
(66) Mulcahy v. R., 3 H. of L. Cas., 306.
(67) Mansell v. R., 27 L. J., M. C., 4; Dears. & B., 375.

Where, in the province of Manitoba, one of the twelve jurors sworn to try and who tried a case of rape was a Frenchman who did not, thoroughly, understand English, it was held after conviction, on a motion for a reserved case, that the objection was not a ground of challenge, that even if it had been a ground of challenge it was too late to raise it after conviction, and that the utmost that the accused could have asked after the swearing of the juror was to have had the proceedings interpreted into French. (68)

A juror must be challenged before he is sworn, and cannot be afterwards withdrawn, except by consent. (69)

A challenge must be made before the juror has taken hold of the book to be sworn. If made after the juror has taken hold of the book to be sworn, it will be too late.

In a case in which the officer of the Court had given the book into the hands of a juror and recited to him the oath, the juror, before kissing the book, stated that he had an objection to serve; but, Channell, B., ruled that the objection came too late. (70)

A peremptory challenge when once taken must be counted against the party making it, and cannot be withdrawn, when the panel is being called over a second time. (71)

Where several persons are jointly indicted and jointly tried, the Crown is restricted to the number of peremptory challenges allowed on the trial of one person. (72)

If a defendant omit to challenge a juror for cause of hostile feeling against him, (the defendant), he cannot, after verdict of guilty, ask, on that ground, for the quashing of the verdict and to have a new trial.(72*a*)

Under clause 9 of the above section 668, the Crown can direct any number of jurors to stand by, until all the jurors are called; but when the panel is exhausted, they cannot be stood by a second time. (73)

**669. Right to stand Jurors aside in libel cases.** — The right of the Crown to cause any Juror to stand aside until the panel has been gone through shall not be exercised on the trial of any indictment or information by a private prosecutor for the publication of a defamatory libel. R.S.C., c. 174, s. 165.

**670. Peremptory challenges in case of a mixed Jury.** — Whenever a person accused of an offence for which he would be entitled to twenty or twelve peremptory challenges as hereinbefore provided elects to be tried by a Jury composed of one half of persons skilled in the language of the defence under sections six hundred and sixty-four or six hundred and sixty-five, the number of peremptory challenges to which he is entitled shall be divided, so that he shall only have the right to challenge one half of such

(68) R. v. Earl, 15 C. L. T., 14; 10 Man. L. R., 303.
(69) R. v. Coulter, 13 U. C., C. P., 301.
(70) R. v. Giorgetti, 4 F. & F., 546. And see R. v. Frost, 9 C. & P., 137.
(71) R. v. Lalonde, 2 Can. Cr. Cas., 188.
(72) *Ib.*
(72*a*) R. v. Harris, 2 Can. Cr. Cas., 75.
(73) R. v. Boyd & Somerville, Que. Jud. Rep., 5 Q. B., 1.

number from among the English speaking Jurors, and one half from among the French speaking Jurors. R.S.C., c. 174, ss. 166 and 167.

See cases cited under section 664, *post*.

**671. Prisoners joining and severing in challenges.** — If several accused persons are jointly indicted and it is proposed to try them together, they or any of them may either join in their challenges, in which case the persons who so join shall have only as many challenges as a single person would be entitled to, or each may make his challenges in the same manner as if he were intended to be tried alone.

**672. Ordering a tales.** — Whenever after the proceedings hereinbefore provided the panel has been exhausted, and a complete Jury cannot be had by reason thereof, then, upon request made on behalf of the Crown, the court may order the sheriff or other proper officer forthwith to summon such number of persons whether qualified Jurors or not as the Court deems necessary and directs in order to make a full Jury; and such Jurors may, if necessary, be summoned by word of mouth.

2. The names of the persons so summoned shall be added to the general panel, for the purposes of the trial, and the same proceedings shall be taken as to calling and challenging such persons and as to directing them to stand by as are hereinbefore provided for with respect to the persons named in the original panel. R.S.C., c. 174, s. 168.

**673. Jurors not to separate in capital cases.** — (As amended by 58-59 Vic., c. 40). The trial shall proceed continuously, subject to the power of the Court to adjourn it.

2. The court may adjourn the trial from day to day, and if in its opinion the ends of justice so require, to any other day in the same sittings.

3. Upon every adjournment of a trial under this section, or under any other section of this Act, the court may, if it thinks fit, direct that during the adjournment the jury shall be kept together, and proper provision made for preventing the jury from holding communication with any one on the subject of the trial. Such direction shall be given in all cases in which the accused may upon conviction be sentenced to death. In other cases, if no such direction is given, the jury shall be permitted to separate.

4. No formal adjournment of the court shall hereafter be required, and no entry thereof in the Crown book shall be necessary.

On a trial for murder, before Maule, J., it was, after the opening address of the counsel, discovered that, in consequence of the detention of the railway train, the witnesses for the prosecution had not arrived in the City, and therefore, the trial was adjourned, the Jury were locked up, a fresh Jury was called into the Jury box, and another case was proceeded with. (74)

Where, before verdict an objection was taken that a Juror had been sworn in a wrong name, the same learned Judge intimated that the proper course was to discharge the Jury, and try the prisoners again. (75)

Where, in the course of the proceedings at a trial, it was discovered that one of the Jurors was related to the prisoner, it was held that the trial must proceed, as the fact of such relationship was only a ground of challenge. (76)

Where a private prosecutor and one of the jurors have, during an adjournment in the course of a trial, had an unpremeditated and innocent conversation which could not bias the juror's mind, — although such conversation is improper, — it cannot have the effect of avoiding the verdict of guilty afterwards rendered by the jury and of constituting a ground for allowing a new trial. (76*a*)

A prisoner on trial was, by sudden illness, rendered incapable of remaining at the bar, whereupon the Jury were discharged, and the prisoner on recovering was tried before another Jury; (77) and, in another case, where the prisoner became ill and was carried out of Court, the Judge discharged the Jury, and was of opinion that, if the prisoner so taken ill should recover during the Assizes, he might be put on trial again, the proceedings, of course, being begun *de novo*. (78)

A trial for murder was postponed until the next Assizes upon an application made on the part of the prosecution on the ground of the inability of a material witness to attend she having met with an accident, although she was a witness who had not been examined before the magistrate; and this even after the trial had been appointed for a particular day, and although the prisoner had already been in gaol three months and the postponement would keep her in imprisonment for some months longer. (79)

A trial may be postponed on application by the prisoner on sufficient ground shewn by affidavit, even after the jury have been charged with the indictment. (80)

In general, as regards the absence of a material witness, this is a ground considered sufficient whether made on the part of the prosecution or on the part of the accused. But, as in either case, it is an application to the discretion of the Court, where the witness has not been examined before the magistrate, an affidavit is necessary in support of the application, as well to shew that the evidence is material as to shew the inability of the witness to attend; and if the latter is rested upon illness or bodily injury the affidavit must be that of a medical man. (81)

Where on the trial of an indictment for perjury the defendant was taken

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(74) R. v. Foster, 3 C. & K., 201.
(75) R. v. Metcalf, MS., Arch. Cr. Pl. & Ev., 21st Ed., 185.
(76) R. v. Wardle, C. & Mar., 647.
(76*a*) R. v. Harris, 2 Can. Cr. Cas., 75.
(77) R. v. Stevenson, 2 Leach, 546.
(78) R. v. Streek, 2 C. & P., 413.
(79) R. v. Lawrence, 4 F. & F., 901.
(80) R. v. Fitzgerald, 1 C. & K., 201.
(81) R. v. Savage, 1 C. & K., 75; R. v. Birch, 6 Cox C. C., 10.

ill during the trial, he was allowed to absent himself from the Court until his recovery, and the trial proceeded in his absence. (82)

**674. Jurors may have Fire and Refreshments.** — Jurors, after having been sworn, shall be allowed at any time before giving their verdict the use of fire and light when out of Court, and shall also be allowed reasonable refreshment. 53 V., c. 37, s. 21.

**675. Saving of Power of Court.** — Nothing in this Act shall alter, abridge or affect any power or authority which any Court or Judge has when this Act takes effect, or any practice or form in regard to trials by Jury, Jury process, Juries or Jurors, except in cases where such power or authority is expressly altered by or is inconsistent with the provisions of this Act. R.S.C., c. 174, s. 170.

Where, in the course of a trial, one of the Jurors without obtaining leave, left the Jury box, and also went out of the Court, whereupon the Jury was discharged, and a fresh one empanelled for the trial of the prisoner, it was held that, this was the only course that could have been adopted. (83) And, so, where in the course of a trial, it was discovered that there was on the Jury a person who was not on the Jury panel, and who had by mistake been summoned as a Juryman, the Jury were discharged and a fresh Jury constituted by taking another Juryman in the place of the one who had served in mistake. (84)

If one of the Jury die before the delivery of the verdict, the remaining eleven will be discharged, and a new Jury may be at once sworn, or a new Juror may be added to the eleven and the defendant tried by them, or (if necessary) he may be remanded to the next Assizes. (85) So, also, if one of the Jurors be taken so ill that he is not able to proceed with the trial. (86)

In case of another Juror being so added to the eleven, they must be sworn anew; and the prisoner must again have his challenges. (87)

In the course of a trial for murder the Jury was discharged, because it was discovered that one of them had come from a house where there was small pox. On the case being resumed, next day, before another Jury, it was contended on behalf of the prisoner that he had already been put in jeopardy and could not be tried again; but the objection was overruled, and the trial proceeded with. (88)

See section 728, *post*, as to discharging Jury, when they are unable to agree.

**676. Proceedings when previous offence charged.** — The proceedings upon any indictment for committing any offence after a previous conviction or convictions, shall be as follows, that is to say: the offender shall, in the first instance, be arraigned upon so

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(82) R. v. Orton, *alias* Castro, Queen's Bench, July 1873, MS.; Arch. Cr. Pl. & Ev., 21st Ed., 163.
(83) R. v. Ward, 10 Cox C. C., 573.
(84) R. v. Philips, 11 Cox C. C., 142.
(85) R. v. Gould, 3 Burn's, J., 30th Ed., 98.
(86) R. v. Scalbert, 2 Leach, 620.
(87) R. v. Edwards, R. & R., 224; 4 Taunt., 309.
(88) R. v. Considine, 8 L. N., 307.

much only of the indictment as charges the subsequent offence, and if he pleads not guilty, or if the Court orders a plea of not guilty to be entered on his behalf, the Jury shall be charged, in the first instance, to inquire concerning such subsequent offence only; and if the Jury finds him guilty, or if, on arraignment he pleads guilty, he shall then, and not before, be asked whether he was so previously convicted as alleged in the indictment; and if he answers that he was so previously convicted the Court may proceed to sentence him accordingly, but if he denies that he was so previously convicted, or stands mute of malice, or will not answer directly to such question the Jury shall then be charged to inquire concerning such previous conviction or convictions, and in such case it shall not be necessary to swear the Jury again, but the oath already taken by them shall, for all purposes, be deemed to extend to such last mentioned inquiry: Provided, that if upon the trial of any person for any such subsequent offence, such person gives evidence of his good character, the prosecutor may, in answer thereto, give evidence of the conviction of such person for the previous offence or offences, before such verdict of guilty is returned, and the Jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence.

See comments under section 478, at p. 536, *ante*, as to second offences, in general. See section 628, p. 760, *ante*, as to matters to be alleged in an indictment charging a previous conviction; and, see, also, p. 629, *ante*, for forms of indictment charging a previous conviction. See section 694, *post*, as to proof of a previous conviction.

**677. Attendance of witness.** — Every witness duly subpœnaed to attend and give evidence at any criminal trial before any court of criminal jurisdiction shall be bound to attend and remain in attendance throughout the trial. R.S.C., c. 174, s. 210.

**678. Compelling attendance of witness.** — Upon proof to the satisfaction of the judge of the service of the subpœna upon any witness who fails to attend or remain in attendance, or upon its appearing that any witness at the preliminary examination has entered into a recognizance to appear at the trial, and has failed so to appear, and that the presence of such witness is material to the ends of justice, the judge may, by his warrant, cause such witness to be apprehended and forthwith brought before him to give evidence and to answer for his disregard of the subpœna; and such witness may be detained on such warrant before the judge or in the common gaol with a view to secure his presence as a witness, or, in the discretion of the judge, he may be released on a recongnizance, with or without sureties, conditioned for his appearance to give evidence and to answer for his default in not attending or not remaining in attendance; and the judge may, in a summary manner, examine into and dispose of the charge against such witness, who, if he is found guilty thereof, shall be liable to

a fine not exceeding one hundred dollars, or to imprisonment, with or without hard labour, for a term not exceeding ninety days, or to both. R.S.C., c. 174, s. 211.

**678a.** Either before or during the sittings of any court of criminal jurisdiction, the court, or any judge thereof, or any judge of any superior or county court, if satisfied by evidence upon oath that any person within the province likely to give material evidence, either for the prosecution or for the accused, will not attend to give evidence at such sittings without being compelled so to do, may by his warrant cause such witness to be apprehended and forthwith brought before such court or judge, and such witness may be detained on such warrant before such court or judge or in the common jail with a view to secure his presence as a witness, or, in the discretion of the court or judge, may be released on a recognizance, with or without sureties, conditioned for his appearance to give evidence. (Added by the *Criminal Code Amendment Act 1900*).

In the province of Quebec, under Article 2614 of the Revised Statutes of that province, an accused can obtain an order for the gratuitous issue of subpœnas to his witnesses, at the expense of the Crown, in such cases only as were felonies before the present Code; and a motion for such an order should state two facts only, namely, that the witnesses named are necessary for the defence, and that the accused is poor and needy. (89)

**679. Witness in Canada but beyond Jurisdiction of Court.** — If any witness in any criminal case, cognizable by indictment in any court of criminal jurisdiction at any term, sessions or sittings of any court in any part of Canada, resides in any part thereof, not within the ordinary jurisdiction of the Court before which such criminal case is cognizable, such court may issue a writ of subpœna, directed to such witness, in like manner as if such witness was resident within the jurisdiction of the court; and if such witness does not obey such writ of subpœna the court issuing the same may proceed against such witness for contempt or otherwise, or bind over such witness to appear at such days and times as are necessary, and upon default being made in such appearance may cause the recognizances of such witness to be estreated, and the amount thereof to be sued for and recovered by process of law, in like manner as if such witness was resident within the jurisdiction of the court. R.S.C., c. 174, s. 212.

2. The courts of the various provinces and the judges of the said courts respectively shall be auxiliary to one another for the purposes of this Act; and any judgment, decree or order made by the court issuing such writ of subpœna upon any proceeding against any witness for contempt or otherwise may be enforced

(89) R. v. Grenier, (No. 2), 2 Can. Cr. Cas., 204; Que. Jud. Rep., 6 Q. B., 322.

or acted upon by any court in the province in which such witness resides in the same manner and as validly and effectually as if such judgment, order or decree had been made by such last mentioned court. (Added by the *Criminal Code Amendment Act 1900*).

**680. Procuring attendance of a prisoner as a witness.** — When the attendance of any person confined in any prison in Canada, or upon the limits of any gaol, is required in any court of criminal jurisdiction in any case cognizable therein by indictment, the court before whom such prisoner is required to attend may, or any judge of such court or of any superior court or county court, or any chairman of General Sessions, may before or during any such term or sittings at which the attendance of such person is required, make an order upon the warden or jailer of the prison, or upon the sheriff or other person having the custody of such prisoner, —

(*a*) to deliver such prisoner to the person named in such order to receive him; and such person named shall, at the time prescribed in such order, convey such prisoner to the place at which such person is required to attend, there to receive and obey such further order as to the said court seems meet; or

(*b*) to himself convey such prisoner to such place, there to receive and obey such further order as to the said court seems meet; and in such latter case, on being served with the order and being paid or tendered his reasonable charges, such warden, jailer, sheriff or other person shall convey the prisoner to such place and produce him there according to the exigency of the order. (As Amended by the *Criminal Code Amendment Act 1900*).

**681. Evidence, under commission, of person dangerously ill.** — Whenever it is made to appear at the instance of the Crown, or of the prisoner or defendant, to the satisfaction of a Judge of a superior court, or a judge of a county court having criminal jurisdiction, that any person who is dangerously ill, and who, in the opinion of some licensed medical practitioner, is not likely to recover from such illness, is able and willing to give material information relating to any indictable offence, or relating to any person accused of any such offence, such judge may, by order under his hand appoint a commissioner to take in writing the statement on oath or affirmation of such person.

2. Such commissioner shall take such statement and shall subscribe the same and add thereto the names of the persons, if any, present at the taking thereof, and if the deposition relates to any indictable offence for which any accused person is already committed or bailed to appear for trial shall transmit the same, with the said addition, to the proper officer of the court at which such accused person is to be tried; and in every other case he shall transmit the same to the clerk of the peace of the county, division

or city in which he has taken the same, or to such other officer as has charge of the records and proceedings of a superior court of criminal jurisdiction in such county, division or city, and such clerk of the peace or other officer shall preserve the same and file it of record, and upon order of the court or of a judge transmit the same to the proper officer of the court where the same shall be required to be used as evidence. R.S.C., c. 174, s. 220.

**682. Presence of prisoner at examination under commission.** — Whenever a prisoner in actual custody is served with, or receives, notice of an intention to take the statement mentioned in the last preceding section the judge who has appointed the commissioner may, by an order in writing, direct the officer or other person having the custody of the prisoner to convey him to the place mentioned in the said notice for the purpose of being present at the taking of the statement; and such officer or other person shall convey the prisoner accordingly, and the expenses of such conveyance shall be paid out of the funds applicable to the other expenses of the prison from which the prisoner has been conveyed. R.S.C., c. 174, s. 221.

**683. Evidence out of Canada may be taken by commission.** — Whenever it is made to appear, at the instance of the Crown, or of the prisoner or defendant, to the satisfaction of the judge of any superior court, or the judge of a county court having criminal jurisdiction, that any person who resides out of Canada is able to give material information relating to any indictable offence, for which a prosecution is pending, or relating to any person accused of such offence, such judge may, by order under his hand, appoint a commissioner or commissioners to take the evidence, upon oath, of such person.

2. Until otherwise provided by rules of court, the practice and procedure in connection with the appointment of commissioners under this section, the taking of depositions by such commisioners, and the certifying and return thereof, and the use of such depositions as evidence, shall be as nearly as practicable the same as those which prevail in the respective courts in connection with like matters in civil causes. (As amended by the 58-59 V., c. 40).

3. The depositions taken by such commissioners may be used as evidence as well before the grand jury as at the trial. (Added by the 58-59 V., c. 40).

3. Subject to such rules of court or to such practice or procedure as aforesaid, such depositions by the direction of the presiding judge may be read in evidence before the grand jury. (Added by the *Criminal Code Amendment Act 1900*).

A prosecution for an indictable offence is pending within the meaning of this section when an information has been laid charging such an offence; and a commission to take evidence abroad for use before a mag-

istrate at a preliminary examination may then be ordered. But the discretion of the judge, in ordering the issue of a commission, is to be exercised upon a sworn statement of what it is expected the witnesses can prove, and he must be satisfied as to the materiality of the evidence. (90)

Where, at the trial, a motion was made on behalf of the defendant in a libel case, for a commission to examine witnesses in England in support of a plea of justification, and it was objected on behalf of the Crown that the application was too late, it was held that the defendant was entitled to take every moment to consider whether he would put in a plea of justification, and that, as the evidence proposed to be taken under the commission asked for, was only as to that plea, — which had just been entered, — the application could not be made before. (91)

**Taking evidence in Canada for use in Courts out of Canada.** — Under chapter 140 of the R. S. C., an order may be made by a Court or Judge in Canada for the examination, in Canada, of a witness or witnesses in relation to any civil, commercial or criminal matter pending before any Court in any other part of the British Dominions or in any foreign country; and such order may be enforced in like manner as an order made by such Court or Judge in a cause depending in such Court or before such Judge.

**684. Cases in which evidence of one witness must be corroborated.**—No person accused of an offence under any of the hereunder mentioned sections shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused:

(*a*) Treason, Part IV., section sixty-five;

(*b*) Perjury, Part X., section one hundred and forty-six;

(*c*) Offences under Part XIII., sections one hundred and eighty-one to one hundred and ninety inclusive;

(*d*) Procuring feigned marriage, Part XXII., section two hundred and seventy-seven;

(*e*) Forgery, Part XXXI., section four hundred and twenty-three.

The material particular in which corroboration is required in a case of perjury is the falsity of the statement alleged as the perjury. The other facts, such as the judicial proceeding in which the statement in question was sworn to, the administering and taking of the oath, and the making of the statement under oath may be proved in the same manner and by the same evidence as in any ordinary case.

The corroborative evidence implicating the accused, — (made necessary by this section), — may consist of the prisoner's admission made after the girl, — whom he is accused of having seduced when she was under sixteen, — has attained that age, such admission being that he had had connection with her; and a statement made by the accused, before he was charged with the offence, that he had been advised that, if he could get the girl to marry him, he would escape punishment, is corroborative evidence implicating the accused and proper to be considered by the jury. (92)

(90) R. v. Verrall, 15 C. L. T., 138, 393.
(91) R. v. Nicol, 34 C. L. J., 475.
(92) R. v. Wyse, 1 Can. Cr. Cas., 6.

In a case of seduction, mere proof of the accused having had opportunities of having sexual intercourse with the prosecutrix is not sufficient corroboration of the latter's evidence. (93)

Evidence of the prosecutrix's pregnancy and of her having been employed in domestic service at the accused's residence and of facts shewing merely a strong probability of there having been no opportunity at which any other man could have been responsible for her condition does not constitute, in a case of seduction, corroborative evidence implicating the accused. (94)

See pp. 165-167, *ante*, for further comments on the subject of corroboration in cases of seduction.

In a case of forgery, the writings alleged to have been forged were a certificate of death for the purpose of supporting an insurance claim and an endorsement on a cheque of the Insurance Company for the amount of the claim. It was proved, at the trial, that the writings were forgeries, and it was sought to connect the prisoner with the forgeries by the evidence of a single witness who testified that they had been written by the accused, and who also swore that certain names in a book, written in the same hand as the alleged forged documents, were in the handwriting of the accused. *Held*, that this was not sufficient corroboration under the above section, 684. (95)

It has been held that the provisions of the above section, 684, refer to the trial, and not to a preliminary enquiry before a magistrate, and that what the section forbids is an accused's *conviction* upon the uncorroborated evidence of one witness, — and not his *committal* for trial thereon. (96)

**685. Evidence of child not under oath.** — Where, upon the hearing or trial of any charge for carnally knowing or attempting to carnally know a girl under fourteen or of any charge under section two hundred and fifty-nine for indecent assault, the girl in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not, in the opinion of the court or justices, understand the nature of an oath, the evidence of such girl or other child of tender years may be received though not given upon oath if, in the opinion of the court or justices, as the case may be, such girl or other child of tender years is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

2. But no person shall be liable to be convicted of the offence, unless the testimony admitted by virtue of this section, and given on behalf of the prosecution, is corroborated by some other material evidence in support thereof, implicating the accused.

3. Any witness whose evidence is admitted under this section, is liable to indictment and punishment for perjury in all respects as if he or she had been sworn. 53 V., c. 37, s. 13.

(93) *S. v. Gnagy*, 14 Cr. L. Mag., 522.
(94) *R. v. Vahey*, 2 Can. Cr. Cas., 258.
(95) *R. v. McBride*, 15 C. L. T., 274; 26 O. R., 639; 2 Can. Cr. Cas., 544.
(96) *In re* Lazier, 30 O. R., 419.

Section 4 of the Imperial Act, 48 and 49 Vic., c. 69, makes it a felony to carnally know a girl under thirteen years of age; and it contains a clause similar to the above section, 685, allowing a child against whom an offence under section 4 of the Imperial Act has been committed, to be examined and give evidence without being sworn, but it contains no provision for examining the child when the charge is only one of indecent assault. Still, in a case where the prisoner was indicted for carnally knowing a girl of six years of age, and the child gave her evidence without being sworn, and the Jury acquitted the prisoner of the charge of *carnally knowing*, but, found him guilty of an indecent assault, the Court, on an appeal, overru'ed the defendant's objection, — to the effect that the conviction for indecent assault could not be supported, because there being nothing in the statute to make the child's evidence, without oath, on a charge of indecent assault, admissible, that evidence should be rejected, — and affirmed the conviction. (97)

See section 25 of the *Canada Evidence Act*, *post*, which extends the power of receiving the evidence of a young child, without oath, to all other proceedings.

## EVIDENCE.

**General Rules.** — In general, there is no difference in the rules of evidence applicable to civil and criminal cases. (98) But the amount of degree of the proof to be exacted will vary with the nature of the proceedings. For, while, in matters of civil jurisdiction, a mere preponderance of proof will suffice to establish a case, the proof of the defendant's guilt must, in criminal proceedings, be full and convincing; and the defendant is entitled to the benefit of any doubt that may exist in the minds of the jury or in the minds of justices occupying the position and exercising the functions of a jury. (99)

The law presumes innocence until the contrary is proved.

Hearsay evidence is inadmissible.

The declarations of a person robbed, ravished or murdered are good evidence, as forming parts of the *res gestae*, — if made substantially contemporaneous with the fact, *i. e.*, made either during or immediately before or after its occurrence, but not when made at such an interval from the fact as to reduce them to a mere narration of a past event. Thus, in a case of murder, when it appeared that the deceased, with her throat cut, came suddenly out of a room in which she had left the prisoner, who also had his throat cut and was speechless, and that she has said something immediately after coming out of the room and a few minutes before she died, — the question being one of murder or suicide, — it was held that her statement was not admissible as a dying declaration or as part of the *res gestae*, the presiding judge, Cockburn, C. J., remarking, — "It was not as if, while being in the room, and while the act was being done, she had said something which was heard * * * Anything uttered by the deceased at the time the act was being done would be admissible, as, for instance, if she had been heard to say something, as, 'Don't Harry!' But, here, it was something stated by her after it was all over, whatever it was, and after the act was completed. The statement is not admissible as a dying declaration, because it does not appear that the woman was aware that she was dying, although she might have known it, if she had had time for reflection. Here, that

(97) R. v. Wealand, 11 L.N., 147; 16 Cox C.C., 402. See R. v. Grantyers, Que. Jud. Rep., 2 Q. B., 376.
(98) R. v. Atkinson, 17 U. C., C. P., 304.
(99) Kerr's Mag. Acts, 15.

was not so; for at the time she made the statement she had no time to consider and reflect that she was dying; there is no evidence to shew that she knew it, and I cannot presume it. There is nothing to shew that she was under the sense of impending death, so the statement is not admissible as a dying declaration." (99*a*)

As to Dying Declarations, see pp. 714-716, *ante*.

Conversations which have taken place out of the hearing of the party to be affected cannot, as a rule, be admitted in evidence.

The evidence of an accomplice is admissible, but ought not to be fully relied on, unless corroborated by some collateral proof. (See pp. 713. 714, for comments and authorities on this subject.)

The evidence offered should be only such as is relevant to the issue; and witnesses should be asked only questions of fact.

As a general rule, the opinions of a witness are not admissible as evidence. But there is an exception in the case of a skilled or scientific witness, whose opinions are admissible to elucidate matters of a strictly professional or scientific character.

**Confidential Communications.** — Counsel, solicitors, and attorneys cannot be compelled to disclose communications made to them in professional confidence by their clients. Nor can priests and ministers of religion be compelled to disclose secrets confided or confessed to them under the regulations of their respective churches or religious persuasions. A witness cannot be compelled and will not be allowed to state facts, the disclosure of which may be prejudicial to any public interest.

The advice which a solicitor gives to a client in connection with the latter's defence on a criminal charge is privileged; but the communications made to a solicitor and the advice given by him are not privileged, when the communications are made and the advice is obtained by the client, previous to and with the view of committing the offence. (100)

**Extent of Right to cross-examine.** — If a witness is called to produce a document, which either requires no proof, or can be identified by some other person, — he need not be sworn, and, if not sworn, he is not subject to cross-examination. (101) But, where a person is intentionally called and sworn, and is moreover a competent witness, the opposite party has a right to cross-examine him although the party calling him has declined to ask a single question. (102) This is the rule in England. But see comments on the subject, as regards Canada, under section 21 of the *Canada Evidence Act*, *post*.

It is usual for the prosecution to call every witness whose name is endorsed on the indictment, and even if he declines to call any such witness he should have him in Court so that he may be called for the defence, if required. (103) And the Judge will sometimes call any witness omitted, so as to give the prisoner's counsel an opportunity to cross-examine him. (104)

The cross-examination is not limited to the matters upon which the witness has been examined in chief, but extends to the whole case. (105)

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(99*a*) R. v. Bedingfield, 14 Cox C. C., 341.
(100) R. v. Cox, 15 Cox C. C., 611.
(101) R. v. Murlis, M. & M., 515.
(102) R. v. Brooks, 2 Stark. R., 472.
(103) R. v. Woodhead, 2 C. & K., 520; R. v. Cassidy, 1 F. & F., 79.
(104) R. v. Bull, 9 C. & P., 22; R. v. Vincent, 9 C. & P., 91.
(105) Berwick on Tweed v. Murray, L. J., Ch., 281, 286.

And, therefore, if the plaintiff calls a witness to prove the simplest fact connected with the case, the defendant is at liberty to cross-examine him on every issue, and, by putting leading questions, to establish, if he can, his entire defence. (106) This is the English rule. But see, as to Canada, the comments under section 21 of the *Canada Evidence Act, post.*

**Evidence of other Criminal Acts Committed by the Accused.** — It is not competent for the prosecution to prove other criminal acts of the accused outside of those forming the subject matter of the charge in hand for the purpose of showing that the defendant is a person likely from his criminal conduct or character, to have committed the offence for which he is being tried. Still, the mere fact that the evidence adduced may TEND to show the commission of other crimes does not render it inadmissible, if it be relevant to an issue, and it may be relevant, if it bears upon the question of whether the acts alleged to constitute the crime charged were DESIGNED or ACCIDENTAL. Thus, where, in a case of arson, the question was whether the burning was ACCIDENTAL or WILFUL, evidence was allowed to show that on another occasion the defendant was in such a situation as to render it probable that he was then engaged in the like offence against the same property. (107)

And where a woman was on trial for having murdered her husband by administering arsenic, evidence was admitted to show that two of her sons who had formed part of the same family and for whom, as well as for her husband, the prisoner had cooked their food, had died of poison, the symptoms in all these cases being the same. (108)

On another trial of a woman for the murder of her husband who, at the time of his death, was living with and attended by her in his illness, it was proved that his death was due to arsenical poisoning; and it was held that, — in order to shew that the poisoning was *designed* and *not accidental*, — evidence was admissable to prove that a former husband of the prisoner had been taken ill after eating food prepared by her, and that the circumstances and symptoms of his illness and death were similar to those attending the illness and death of the second husband and that the symptoms were those of arsenical poisoning. (108*a*)

On the trial of an indictment for obtaining money by false pretences, it was held that where there is evidence that, at dates *subsequent* to the offence charged, the prisoner obtained goods from other persons by false pretences similar to those used on the occasion charged in the indictment on trial, such evidence is admissible, when it points to one and the same system of fraud and a connected scheme of dishonesty. (109)

A prisoner was indicted for obtaining money under false pretences by means of worthless cheques. He had been previously indicted for a similar offence and acquitted. — *Held*, that, notwithstanding such acquittal, evidence of the facts in that case was admissible on the subsequent indictment as tending to shew that the prisoner's conduct was not inadvertent or accidental, but was part of a systematic fraud. (109*a*)

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(106) Morgan v. Brydges, 2 Stark, R., 314; R. v. Murphy, 1 A. M. & O., 206.

(107) R. v. Dossett, 2 C. & K., 306.

(108) R. v. Geering, 18 L. J. M. C., 215. See, also, Makin and wife, v. Attorney-General, N. S. Wales, 17 Cox C. C., 704; [1894] A. C., 57; 63 L. J., P. C., 41; R. v. Garner, 3 F. & F., 681, 4 F. & F., 346; R. v. Heeson, 14 Cox C. C., 40.

(108*a*) R. v. Sternaman, 18 C. L. T., 56; 29 O. R., 33; 1 Can. Cr. Cas., 1.

(109) R. v. Rhodes, 68 L. J., Q. B., 83; [1899] 1 Q. B., 77.

(109*a*) R. v. Ollis, 64 J. P., 518.

On the trial of a conspiracy to defraud, it has been held that, proof may be made of attempts by the defendant to defraud other persons than those mentioned in the indictment. (109*b*)

Upon an indictment for uttering a forged bank-note knowing it to be forged, proof that the defendant had passed other forged notes, was held to raise a probable presumption that he knew the note in question to be forged. (109*c*)

To prove the guilty knowledge of the defendant upon the trial of an indictment for being in possession of coining instruments, evidence may be given of his having previously uttered counterfeit money. (109*d*)

On an indictment for attempting to obtain money by falsely pretending that a ring was composed of diamonds, when in fact it was composed of crystals, it was held that, to show the defendant's guilty knowledge and his intent to defraud, evidence was admissible of a false pretence by him, on a prior occasion, to another person, that a chain was gold, whereas it was plated, and, on another distinct occasion, that a ring was of diamonds, which it was not. (110)

**Evidence in Rebuttal.** — Evidence in rebuttal must, as a general rule, be strictly confined to rebutting or cutting down the defendant's case, and must not be evidence to confirm the case for the prosecution. Thus in a case of robbery, where the defence was an *alibi*, it was held that, witnesses for the prosecution, though entitled, in rebuttal, to disprove the alleged whereabouts of the prisoner cannot, in doing so, go further and state that they saw the prisoner in or near the vicinity of the crime, since this is confirmatory of the case for the prosecution and should be produced in the first instance. (110*a*)

**686. Depositions of a sick witness may be read in evidence.** — If the evidence of a sick person has been taken under commission as provided in section six hundred and eighty-one, and upon the trial of any offender for any offence to which the same relates, the person who made the statement is proved to be dead, or if it is proved that there is no reasonable probability that such person will ever be able to attend at the trial to give evidence, such statement, may, upon the production of the judge's order appointing such commissioner, be read in evidence, either for or against the accused, without further proof thereof,— if the same purports to be signed by the commissioner by or before whom it purports to have been taken, and if is proved to the satisfaction of the Court that reasonable notice of the intention to take such statement was served upon the person (whether prosecutor or accused) against whom it is proposed to be read in evidence, and that such person or his counsel or solicitor had, or might have had, if he had chosen to be present, full opportunity of cross-examining the person who made the same. R.S.C., c. 174, s. 220.

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(109*b*) R. v. Shepherd, Que. Jud. Rep., 4 Q. B., 470.

(109*c*) See R. v. Millard, R. & R., 245, and other cases cited at p. 497, *ante*.

(109*d*) R. v. Weeks, 30 L. J., M. C., 141.

(110) R. v. Francis, 43 L. J., M. C., 97.

(110*a*) R. v. Hilditch, 5 C. & P., 299. And see R. v. Simpson, 2 C. & P. 415.

It seems that, in view of the proviso at the end of this section, no statement, professedly taken under the provisions of section 681, can be available as such at the trial, unless, before taking it, notice has been given of the intention to take it; (111) and such notice must be in writing; otherwise the statement cannot, at the trial, be read against the prisoner, although he may have been present when it was taken and had a full opportunity of cross-examination. (112)

See sec 690

**687. Depositions taken at preliminary enquiry may be read in evidence.** — (As amended by the *Criminal Code Amendment Act 1900*). If upon the trial of an accused person, such facts are proved upon the oath or affirmation of any credible witness that it can be reasonably inferred therefrom that any person whose deposition has been theretofore taken in the investigation of the charge against such person is dead, or so ill as not to be able to travel, or is absent from Canada, and if it is proved that such deposition was taken in the presence of the person accused, and that his counsel or solicitor had a full opportunity of cross-examining the witness, then if the deposition purports to be signed by the judge or justice before whom the same purports to have been taken, it shall be read as evidence in the prosecution without further proof thereof, unless it is proved that such deposition was not in fact signed by the judge or justice purporting to have signed the same.

2. In this section the word 'deposition' includes the evidence of a witness given at any former trial upon the same charge.

This section, as it stood before its amendment, provided that the deposition of an absent or a dead or sick witness might be read if it were proved that *he* or his counsel or solicitor had had a full opportunity of cross-examining the witness. The section, as amended, leaves out the word "*he*"; so, that, if the accused, at the time of the deposition being taken, has not been represented by a lawyer and there has thus been no cross-examination, the deposition will not be admissible at the trial.

The evidence of a constable, searching for a witness to serve him with a subpœna for the trial, to the effect that he had been informed by a person named (but who was not produced), that the witness was absent from Canada, is not sufficient evidence of such absence to render the witness' deposition at the preliminary enquiry admissible as evidence at the trial. (113)

On a trial for uttering forged notes it was proved that a witness, — who had lived at one time with the prisoner as his wife, — had left her lodgings and had since been heard from (several months ago), in the United States. Upon this proof, the witness's deposition, taken at the preliminary examination before the magistrate, was read at the trial, and, upon a case reserved, it was held that the admission of the deposition being in the discretion of the presiding Judge, it was not improperly received. (114)

When the ground of the application to read the witness' deposition is such illness as renders him or her unable to travel, there must be proof of

(111) R. v. Quigley, 18 L. T., N. S., 211.
(112) R. v. Shurman, 17 Q. B. D., 323; 55 L. J., M. C., 153.
(113) R. v. Graham, Que. Jud. Rep., 8 Q. B., 167; 2 Can. Cr. Cas., 388.
(114) R. v. Nelson, 1 O. R., 500.

*facts* to shew and satisfy the judge that the witness is in such a state of illness at the time of or so recently before the trial that it would not be possible for the witness to travel and be able to attend the trial. It would not be sufficient for a witness deposing to the illness of an absentee to simply *say so*, unless he were to state facts to shew that *it is so*.

It has been held, in England, that the words, "so ill as not to be able to travel," do not mean that the witness's coming to give evidence on the trial shall actually endanger his life, but that he is not reasonably fit, from illness, to attend. (115)

A witness came to the Assize town, and into Court, but, a short time before the trial commenced, he left the Court to return to his home, by the advice of a medical man, who deposed that in his judgment, it would have been highly dangerous for the witness to remain. Held, that the witness was "so ill as not to be able to travel," and that his deposition before the committing magistrate might be read in evidence. (116)

It is for the presiding judge at the trial to decide, in his descretion, whether the evidence that the witness is too ill to travel is sufficient; and such evidence need not *necessarily* come from a medical man. (117)

Where it was proposed to put in the deposition of an absent witness on the ground that he was "so ill as not to be able to travel," and the evidence of such inability was that of a medical man, who said that he had last seen the witness on the Monday (the trial being on the Wednesday next following), and that he was then recovering from a severe attack of pain in the bowels and was too feverish then to travel, but, that it was possible for him to have sufficiently recovered by the Wednesday to have travelled, although he (the medical man) would not have advised it, Blackburn, J., refused to admit the deposition, on the ground that no one had seen the witness for 48 hours, and that he might have become sufficiently recovered in that period. (118)

A superintendent of police having seen a policeman, — a material witness, — in bed, two days before the trial, stated that he appeared ill and so weak that he could not get out of bed. *Held*, that this, without medical evidence or any evidence as to the nature of the illness, was not sufficient to admit the policeman's deposition in evidence. (119)

It is almost always necessary to shew and satisfy the judge of two things, first, of the existence of an illness which renders the witness unable to travel, and, next, of an illness of such a nature that it would continue to such a time as to prevent the witness from attending the trial. It is not enough that there is an illness, unless it is such an illness as will render the witness unable to travel. (120)

Unless there is actual illness, old age, nervousness and inability to stand a cross-examination are not enough foundation for the reading of the deposition of an absent witness, (121) even although the bringing such witness, into court would be dangerous to his life. (122)

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(115) R. v. Riley, 3 C. & K., 116; R. v. Cockburn, Dears. & B., 203; 26 L. J. (M. C.), 136.
(116) R. v. Wicker, 18 Jur., 252.
(117) R. v. Stephenson, L. & C., 165; 31 L. J. (M. C.), 147.
(118) R. v. Bull, 12 Cox C. C., 31.
(119) R. v. Williams, 4 F. & F., 515.
(120) R. v. Riley, 3 C. & K., 316 R. v. Philips, 1 F. & F., 105; R. v. Walker, 1 F. & F., 534.
(121) R. v. Farrell, L. R., 2 C. C. R., 116; 43 L. J. (M. C.), 94.
(122) R. v. Thompson, 13 Cox C. C., 181, Lush, J.

It seems to have been considered doubtful, in England, how far indisposition from recent childbirth is an illness within the meaning of the Statute. In one case, Willes, J., said, "It must not be supposed that the fact of a woman having been delivered nine days ago, constitutes an illness within the meaning of the Statute; but, we have it in evidence that she was delivered of a dead child, which would tend to produce a morbid state of the body, and, therefore, her deposition may be read." (123) In another case, the same learned Judge rejected the deposition of a woman recently confined. His Lordship said, in that case, that, "illness from confinement was an ordinary state, and not such an illness as is contemplated by the Statute." (124)

It has been held that, there may be incidents in regard to the state of pregnancy which might bring the case within the Statute. For instance, Bramwell, B., allowed the deposition of a married woman to be read on the evidence of her husband that she was unable to attend and that, a fortnight before, she had suffered in consequence of having been driven to the Assize town. (125)

Where, however, it was proposed to put in the deposition of a married woman on the ground of pregnancy, there being no other illness, Mellor, J., said the matter had been much considered by the judges, and the general opinion of the Bench was that inability to travel arising from pregnancy *alone* was not such an illness as was contemplated by the Statute. (126)

It has, however, been since decided that pregnancy may be a source of such illness as to render the witness unable to travel. No medical evidence was tendered as to the condition of the witness; but, her deposition was held by the Court of Criminal Appeal to have been rightly admitted. The only evidence as to her condition was given by her husband who proved that he resided with his wife at a place 15 miles distant from the place of trial, and that when he left her on that morning, she was unable to move about without considerable difficulty, that she was then lying down and had been so during the greater part of the past week, though able to get up for a few minutes at intervals. (127)

Where a medical man deposed that he had examined the witness that morning, that she was very near her confinement, and that it would have been dangerous to expose her to the excitement of attending a criminal trial.—Bowen, J., after consulting with Lush, J., admitted her deposition. (128)

Where a witness is so ill as not to be able to travel, the judge may, if he thinks fit, postpone the trial, instead of allowing the absent witness' deposition to be read. (129)

In order that the above section, 687, should apply to make admissable, as evidence at the trial, the deposition taken at a prelimianry enquiry of a witness since dead, the document containing the deposition is alone to be looked at to ascertain if it "purports to be signed by the justice." Where a deposition, sought to be used, had been signed by the witness and the magistrate, and was attached at the end of depositions taken by the

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(123) R. v. Wilton, 1 F. & F., 309.
(124) R. v. Walker, 1 F. & F., 534.
(125) R. v. Croucher, 3 F. & F., 285.
(126) R. v. Parker & Ashworth, York Summer Assizes, 1862, M.S.; and see R. v. Omant, 6 Cox C. C., 496.
(127) R. v. Wellings, 3 Q. B. D., 426; 47 L. J. (M. C.), 100.
(128) R. v. Goodfellow, 44 Cox C. C., 326.
(129) R. v. Tait, 2 F. & F., 353.

magistrate on a previous date named, but did not itself contain a new "caption," nor the date when taken, nor any record by the magistrate certifying that such added deposition had been taken by him, and where the first depositions formed, in themselves, a complete document concluding with a note by the magistrate of the remand of the case, it was held that, it was not to be presumed that the informal deposition, following the formal document, was a continuation of the first depositions, (in which there was no reference to the added deposition), and that it was not to be presumed that the informal deposition related to the same charge; and it was further held that such added deposition did not "purport to be signed by the justice by or before whom the same purported to have been taken." (130)

Where a deposition of a deceased witness taken at a preliminary enquiry has been improperly admitted in evidence at the trial and is of such a nature that it must have influenced the jury in their verdict, its improper admission is a "substantial wrong" entitling the accused to a new trial. (131)

An abstract made by a Coroner of the evidence given by a witness at an inquest, — the abstract being in a language not spoken by the witness, — is not a deposition under the above section, 687, such abstract not being a *verbatim* record of the witness' evidence, and, moreover, not having been read over to nor signed by him. (132)

A deposition read over to and signed by the deponent may be admissible in evidence as a dying declaration, although irregular as a deposition, under the above section, 687, because taken in the absence of the accused. (133)

See pp. 714-716, *ante*, as to dying declarations.

**688. Depositions may be used on trial for other offences.** — Depositions taken in the preliminary or other investigation of any charge against any person may be read as evidence in the prosecution of such person for any other offence, upon the like proof and in the same manner, in all respects, as they may, according to law, be read in the prosecution of the offence with which such person was charged when such depositions were taken. R.S.C., c. 174, s. 224.

**689. Evidence of accused's statement before the justice.** — The statement made by the accused person before the justice may, if necessary, upon the trial of such person, be given in evidence against him without further proof thereof, unless it is proved that the justice purporting to have signed the same did not in fact sign the same. R.S.C., c. 174, s. 223.

As to the necessity of confessions made by an accused being free and voluntary, see comments and authorities under section 592 at pp. 706-713, *ante*.

See also comments and authorities under section 5 of the *Canada Evidence Act*, *post*, with regard to the admissibility of a witness' statements under oath in a subsequent prosecution against himself.

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(130) R. v. Hamilton, 2 Can. Cr. Cas., 390.
(131) *Ib.*
(132) R. v. Graham, 2 Can. Cr. Cas., 388.
(133) R. v. Woods, 2 Can. Cr. Cas., 159.

**690. Admission may be taken on trial.** — Any accused person on his trial for any indictable offence, or his counsel or solicitor, may admit any fact alleged against the accused so as to dispense with proof thereof.

**691. Certificate of trial at which perjury was committed.** — A certificate containing the substance and effect only omitting the formal part, of the indictment and trial for any offence, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court whereat the indictment was tried, or among which such indictment has been filed, or by the deputy of such clerk or other officer, shall, upon the trial of an indictment for perjury or subornation of perjury, be sufficient evidence of the trial of such indictment without proof of the signature or official character of the person appearing to have signed the same. R.S.C., c. 174, s. 225.

**692. Evidence of coin being false or counterfeit.** — When upon the trial of any person, it becomes necessary to prove that any coin produced in evidence against such person is false or counterfeit, it shall not be necessary to prove the same to be false and counterfeit by the evidence of any moneyer or other officer of Her Majesty's Mint, or other person employed in producing the lawful coin in Her Majesty's dominions or elsewhere, whether the coin counterfeited is current coin, or the coin of any foreign prince, state or country, not current in Canada, but it shall be sufficient to prove the same to be false or counterfeit by the evidence of any other credible witness. R.S.C., c. 174, s. 229.

**693. Evidence on proceedings for advertising counterfeit money.** — On the trial of any person charged with the offences mentioned in section four hundred and eighty, any letter, circular, writing or paper offering or purporting to offer for sale, loan, gift or distribution, or giving or purporting to give information, directly or indirectly, where, how, of whom or by what means any counterfeit token of value may be obtained or had, or concerning any similar scheme or device to defraud the public, shall be *primâ facie* evidence of the fraudulent character of such scheme or device.

**694. Proof of previous conviction.** — A certificate containing the substance and effect only, omitting the formal part, of any previous indictment and conviction for any indictable offence, or a copy of any summary conviction, purporting to be signed by the clerk of the Court or other officer having the custody of the records of the Court before which the offender was first convicted, or to which such summary conviction was returned, or by the deputy of such clerk or officer, shall, upon proof of the identity of

the person of the offender, be sufficient evidence of such conviction without proof of the signature or official character of the person appearing to have signed the same. R.S.C., c. 174, s. 230.

**695. Proof of conviction of a witness.** — A witness may be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction; and a certificate, as provided in the next preceding section, shall, upon proof of the identity of the witness as such convict, be sufficient evidence of his conviction, without proof of the signature or the official character of the person appearing to have signed the certificate. R.S.C., c. 174, s. 231.

Facts shewing that the witness is biassed or partial in relation to the parties or the case may be elicited on cross-examination: or, if such facts are, on cross-examination, denied, they may be proved, independently: (133*a*) *e.g.* that the witness has had quarrels with or expressed hostility to the opposite party. (133*b*) And independent evidence, may be given that an adversary's (but not a party's own) witness bears such a general reputation for untruthfulness that he is unworthy of credit upon oath. In theory, such evidence should relate to general reputation only, and not express the mere opinion of the impeaching witness; but, in practice, the question may be shortened thus: — "From your knowledge of the witness' reputation, would you believe him on his oath?" (133*c*)

A witness may, upon cross-examination, be asked any question concerning his antecedents, associations or mode of life, which, although irrelevant to the issue, would be likely to discredit his testimony or degrade his character. (133*d*) Thus, on a charge of rape, the prosecution may be cross-examined as to her connection with men other than the accused; but her answer to such a question will be conclusive; (133*e*) although, if, on cross-examination, she denies having had previous intercourse with the accused, evidence may, then, be given to contradict her. (133*f*)

Section 5 of the *Canada Evidence Act, 1893*, (as amended by the 61 Vic., c. 53), provides that no person shall be excused from answering any question on the ground that his answer may tend to criminate him; but, it also provides that (if he objects to answer on the ground that his answer may tend to criminate him), then, although he shall be compelled to answer, no evidence so given shall be used against such person in any criminal prosecution thereafter instituted against him other than a prosecution for perjury in giving such evidence.

**696. Proof of attested instrument.** — It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite; and such instrument may be proved by admission or otherwise as if there had been no attesting witness thereto. R.S.C., c. 174, s. 232.

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(133*a*) Ros. Cr. Ev., 12th Ed. 90.
(133*b*) R. v. Shaw, 16 Cox C. C., 503.
(133*c*) Phipson Ev., 2nd Ed., 164.
(133*d*) *Ib.*, 165.
(133*e*) R. v. Cockcroft, 11 Cox C. C., 410; R. v. Holmes, 12 Cox C. C., 137; L. R., 1 C. C. R., 334.
(133*f*) R. v. Riley, 18 Q. B. D., 481.

**697. Evidence at trial for child murder.** — The trial of any woman charged with the murder of any issue of her body, male or female, which being born alive would, by law, be bastard, shall proceed and be governed by such and the like rules of evidence and presumption as are by law used and allowed to take place in respect to other trials for murder. R.S.C., c. 174, s. 227.

**698. Comparison of disputed writing with genuine.** — Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same may be submitted to the Court and Jury as evidence of the genuineness or otherwise of the writing in dispute. R.S.C., c. 174, s. 233.

Evidence as to comparison of handwriting is admissible if it is given by a witness who from past experience is skilled in comparison of handwriting, and it is not necessary that he should have gained that skill in the way of his business or profession. (134)

**699. Discrediting a party's own witness.**—A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, such party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make such statement. R.S.C., c. 174, s. 234.

The word "adverse" in this section means "hostile," and not merely "unfavorable." (135)

A witness is not "adverse" merely because his testimony is unfavorable to the party calling him. (135*a*)

Where, on a trial for rape, a witness for the prosecution, — to whom the prosecutrix had, shortly after the commission of the alleged offence, made a communication, — being asked on cross-examination as to the particulars of such communication, gave an answer different from that which the prosecutrix's counsel was instructed was the truth, it was held that, the prosecuting counsel had the right, on re-examination to ask the witness, under 28 and 29 Vic., c. 18, section 3 (which is to the same effect as the above section 699), whether she had not at another time made a statement inconsistent with her present testimony to a person named, and also to call such person to give evidence of the statement so made to him. (136)

(134) R. v. Silverlock, 63 L. J., M. C., 233.
(135) Greenough v. Eccles., 28 L. J., (C. P.), 160.
(135*a*) 3 Russ. Cr., 6 Ed., 635 Note (*y*).
(136) R. v. Little, 15 Cox C. C., 319.

**700. Evidence of former written statements by witness.** — Upon any trial a witness may be cross-examined as to previous statements made by him in writing, or reduced to writing, relative to the subject-matter of the case, *without such writing being shown to him;* but if it is intended to contradict the witness by the writing his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; and the judge, at any time during the trial, may require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he thinks fit: Provided that a deposition of the witness, purporting to have been taken before a justice on the investigation of the charge and to be signed by the witness and the justice, returned to and produced from the custody of the proper officer, shall be presumed *primâ facie* to have been signed by the witness. R.S.C., c. 174, s. 235.

This section is a re-enactment of section 235, R. S. C., c. 174, and was originally taken from section 5 of the Imperial Statute 28 and 29 Vict., c. 18. Before the passing of that Act the rule was that if a previous statement of a witness were in writing, it was irregular to question him as to the contents of it, without first producing it, and, after asking him if it were his handwriting, putting it in evidence; so that a witness could not be asked whether he did or did not state a particular fact before the Magistrate, without first allowing him to read or have read to him his deposition; (137) and in the Queen's case it was held that, in cross-examination, a witness could not be asked if he had ever written a letter or other writing to the effect of so and so, but that he must, first, have been shewn the letter or writing, and then if he admitted it to be his, it must have been put in evidence; or that a portion of the letter or writing could have been shewn to him and he could then have been asked if he wrote it, but if he did not admit it he could not be cross-examined upon its contents; and, even if he admitted it to be his letter or writing he could not have been questioned as to whether such and such statements were contained in it, but the entire letter must first have been put in evidence. (138)

The above rule, while it was in force, excluded one of the best tests by which the memory and integrity of a witness can be tried. (139) It was abrogated by section 5 of 28 and 29 Vic., c. 18; so that, now, a witness may be cross-examined either as to his statements before the Magistrate or as to any other previous statement made by him in writing, without his deposition or the writing being shewn to him; or the cross-examining counsel may, if he thinks fit, put the witness's deposition in his hand for the purpose of cross-examining him upon it, without reading it as part of the evidence of the cross-examining party, but the latter will be bound by the answer of the witness, unless the deposition is put in to contradict him; and it is not admissible to state that the deposition does contradict him unless it is so put in. (140)

If the former declaration of the witness were not in writing but merely by parol, you might, even before the 28 and 29 Vict., c. 18, s. 5, and still may cross-examine him on the subject of it; and if he deny it you may

(137) R. v. Taylor, 8 C. & P. 726.
(138) The *Queen's Case*, 2 Brod. & B. 286, 288.
(139) Tayl. Ev. s. 1301.
(140) R. v. Riley, 4 F. & F., 964; R. v. Wright, 4 F. & F. 967.

call another witness to prove it. (See section 701 *post.*) So, if a witness admit that, when before the magistrates, he was cross-examined for the prisoner, and it appears that such cross-examination is not returned with the depositions, he may and he might, even before the enactment above mentioned, be questioned by the prisoner's counsel as to the answers he gave. (141)

If it appear that a statement of the witness before the magistrate, although written down by him, was not read over to the witness, nor signed by him or by the Magistrate, the witness may and he might even before the 28 and 29 Vic., c. 18 s. 5, be cross-examined as to such statement, without producing the writing. (142)

Witnesses for the prosecution were duly sworn and examined before the Magistrate and cross-examined by the prisoner; minutes thereof were duly made by the Magistrate's clerk, and then sent to his office to be copied as draft depositions. The witnesses attended there, also. T., the copying clerk, while copying the minutes, asked the witnesses some questions for the purpose of making the depositions more correct, clear and complete, and inserted their answers to such questions in the depositions. The prisoner was not then present. The depositions thus written were sent back to the Magistrate; and the witnesses in the presence of the prisoner, after being resworn, and after hearing the depositions read over to them and full opportunity for cross-examination being given to the prisoner, signed them. At the trial, a material question was put to one of the witnesses as to something which he had said to T., in answer to one of the questions so put to him by T. It was held that such answer formed no part of the depositions but was wholly independent of them, and therefore that the question might be asked without putting in the depositions. (143)

So, also, a witness may be cross-examined as to his statement before the Grand Jury in the same case. (144)

If a witness, when examined in chief as to the occurrence of a fact, answer that he does not remember it, the counsel on the opposite side cannot give evidence of a former declaration by the witness of the fact having occurred unless he have in cross-examination questioned the witness as to such a declaration; for the fact may have occurred and the witness have formerly declared his knowledge of it, and yet he may not recollect it at the time of his examination. (145)

As a general rule, a witness cannot be cross-examined as to any distinct collateral fact not relevant to the matter in issue, for the purpose of disproving the truth of the expected answer by other witnesses, in order to discredit the whole of his testimony. (146)

As to variations between a witness' deposition and his evidence at the trial, Cockburn, C. J., in a case tried before him, said that he did not attach much importance to the accordance between what a witness said at the trial and what he was reported in his deposition to have said before the Magistrate. He knew from his own experience, how difficult it was to take down a witnesss, exact words. A witness expressed himself in a long sentence, the magistrate's clerk struck out a particular word, and with that omission it went down on the notes and was not the whole sentence. The whole meaning of the sentence which the witness had uttered might there-

(141) R. v. Edwards, 8 C. & P. 26; R. v. Curtis, 2 C. & K. 763
(142) R. v. Griffiths, 9 C. & P. 746; See Jeans v. Wheeldon, 2 M. & Rob. 486.
(143) R. v. Christopher, 1 Den 536; 2 C. & K. 995; 19 L. J. (M. C.) 101.
(144) R. v. Gibson, C. & Mar. 672.
(145) *The Queen's Case*, 2 Brod. & B. 292.
(146) Spencely v. De Willott, 7 East, 108.

by be entirely altered. Too much importance ought not, therefore, to be attached to such variations, and if there was a substantial agreement between the evidence at the preliminary enquiry and that adduced at the trial that was sufficient. (147)

A defendant was indicted, tried and convicted on a charge of assault occasioning actual bodily harm. At the trial, it was admitted that the depositions taken before the magistrate had been lost; and the defendant's counsel proposed to ask the defendant, who was examined on his own behalf, certain questions with the view of shewing that one of the principal witnesses for the prosecution had, when examined before the magistrate, made statements at variance with her testimony at the trial. The trial judge rejected the proposed evidence. Held that, in doing so, he erred: and a new trial was ordered. (148)

The clause of the above section, 700, — which empowers the judge to require the production of the writing for his inspection and for such use in the trial as he thinks fit, — applies equally before and after the question is put to the witness; and the judge may, if he thinks fit, have the writing read before the witness answers. (148*a*)

**701. Proof of contradictory statements by witness.** — If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the case and inconsistent with his present testimony, does not distinctly admit that he did make such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness and he shall be asked whether or not he did make such statement. R.S.C., c. 174, s. 236.

Under this section, the credit of a witness may be impeached by giving evidence of his having said or written, relative to the subject matter of the case, something which is at variance and inconsistent with his testimony on the trial. But, in order to lay a foundation for such discrediting evidence, the witness must be asked upon cross-examination whether he has made the statement or held the conversation intended to be proved, and his attention must be called to the particular circumstances. Thus, if a witness, on being examined as to some supposed transaction or occurrence, should answer that no such transaction or occurrence took place or that he did not remember it, it would be irregular to prove his previous statements or declarations shewing that the transaction or occurrence did take place to his knowledge, — without first asking him, in cross-examination, whether he had made such statements or declarations. And it is not enough to ask the general question whether the witness had ever said so and so; because, upon the general question, he may not remember having said so; but he must be asked as to the time, place and person involved in the supposed contradiction; because, when his attention is challenged to particular circumstances, he may recollect and explain what he has formerly said. (148*b*) So, that, where a witness had denied that he had ever said that he was in partnership with the defendant, but had not been questioned as to the particular person or to whom or the place or time when he said it, Tindal, C. J., refused to allow a witness, afterwards

(147) R. v. Wainwright, 13 Cox, 171, 173.
(148) R. v. Troop, 30 N. S. R., 339; 34 C. L. J., 93; 2 Can. Cr. Cas., 22.
(148*a*) R. v. Hughes, Ros. Cr. Ev. 12 Ed., 123.
(148*b*) The Queen's Case, 2 B. & B. 299.

called, to be asked whether, on a particular occasion, the first mentioned witness had told him that he was in partnership with the defendant. But the first mentioned witness was allowed by the Court to be recalled and asked the particular question. (148c)

The same rule of allowing a witness to be recalled in order to lay a foundation for the admission of contradictory evidence has been followed in other instances. (148d); it being said by Abbott, C. J., in delivering the judgment of the Judges in the *Queen's Case*, that in any grave or serious case, if Counsel had, in his cross-examination, omitted to lay the necessary foundation, the Court would, of its own authority, call back the witness in order to give him an opportunity of doing so. (148e)

Where the evidence of a witness at a preliminary enquiry was given in French, but was translated and taken down in English, the deposition so taken, without having been read over and explained to and signed by the witness, cannot be read at a trial to establish a contradiction between the witness' former and present evidence; but the witness may be cross-examined as to any material statements made by him at the preliminary enquiyr, and the defence may be allowed to examine witnesses with the object of shewing a contradiction between his evidence at the trial and his former testimony. (149)

**701a. Proof of young person's age.** — In order to prove the age of a boy, girl, child or young person for the purposes of sections 181, 186, 210, 211, 216, 261, 269, 270, 283, 284 and 934A, the following shall be sufficient prima facie evidence: —

(*a*) Any entry or record by an incorporated society or its officers having had the control or care of the boy, girl, child or young person at or about the time of the boy, girl, child or young person being brought to Canada, if such entry or record has been made before the alleged offence was committed.

(*b*) In the absence of other evidence, or by way of corroboration of other evidence, the judge or, in cases where an offender is tried with a jury, the jury before whom an indictment for the offence is tried, or the justice before whom a preliminary inquiry thereinto is held, may infer the age from the appearance of the boy, girl, child or young person. (Added by the *Criminal Code Amendment Act 1900*).

**702. Evidence of a place being a common gaming house.** — When any cards, dice, balls, counters, tables or other instruments of gaming used in playing any unlawful game are found in any house, room or place suspected to be used as a common gaming-house, and entered under a warrant or order issued under this Act, or about the person of any of those who are found therein, it shall be prima facie evidence, on the trial of a prosecution under section 198 or section 199, that such house, room or place is used

(148c) Angus v. Smith, M. & M. 473.
(148d) See Crowley v. Page, 7 C. & P. 789.
(148e) 2 B. & B., 314.
(149) R. v. Ciarlo, Que. Jud. Rep., 6 Q. B., 144.

as a common gaming house, and that the persons found in the room or place where such tables or instruments of gaming are found were playing therein although no play was actually going on in the presence of the officer entering the same under such warrant or order, or in the presence of those persons by whom he is accompanied as aforesaid. (As amended by the *Criminal Code Amendment Act 1900*).

For provisions as to warrants to search gaming houses, etc., see section 575, pp. 682, 683, *ante*.

**703. Other evidence of unlawful gaming.** — In any prosecution under section 198 for keeping a common gaming house, or under section 199 for playing or looking on while any other person is playing in a common gaming house, it shall be *prima facie* evidence that a house, room or place is used as a common gaming house, and that the persons found therein were unlawfully playing therein —

(*a*) If any constable or officer authorized to enter any house, room or place, is wilfully prevented from or obstructed or delayed in entering the same or any part thereof; or

(*b*) if any such house, room or place is found fitted or provided with any means or contrivance for unlawful gaming, or with any means or contrivance for concealing, removing or destroying any instruments of gaming. (As amended by the *Criminal Code Amendment Act 1900*).

By the wording of these two sections, as amended, the provisions thereof are *expressly* made applicable to prosecutions, under section 198, *ante*, for the *indictable* offence of *keeping* a common gaming house, etc., and, under section 199, *ante*, for the *non-indictable* offence of *playing or looking on at play* in a gambling house.

Before they were amended, it was doubtful whether these two sections 702 and 703 applied to a prosecution under section 199, *ante*. (150)

Sections 9 and 10 of the R. S. C., c. 158, (which are unrepealed), empower a police magistrate to swear and examine, when brought before him, any persons found in any gaming house entered and searched under the provisions of section 575, *ante*. These sections 9 and 10 of the R. S. C., c. 158, are set out at pp. 683, 684, *ante*.

**704. Evidence in cases of Gaming in stocks, etc.** — Whenever, on the trial of a person charged with making an agreement for the sale or purchase of shares, goods, wares or merchandise in the manner set forth in section two hundred and one, it is established that the person so charged has made or signed any such contract or agreement of sale or purchase, or has acted, aided or abetted in the making or signing thereof, the burden of proof of the *bonâ fide* intention to acquire or to sell such goods, wares or merchan-

(150) R. v. Ah Dock, 19 C. L. T., 369.

dise, or to deliver or receive delivery thereof, as the case may be, shall rest upon the person so charged.

**705. Evidence in certain cases of libel.** — (*As amended by 56 Vic., c. 32*). In any criminal proceeding commenced or prosecuted for publishing any extract from, or abstract of, any paper containing defamatory matter and which has been published by, or under the authority of, the Senate, House of Commons, or any Legislative Council, Legislative Assembly or House of Assembly, such paper may be given in evidence, and it may be shown that such extract or abstract was published in good faith and without ill-will to the person defamed, and if such is the opinion of the jury, a verdict of not guilty shall be entered for the defendant. R.S.C., c. 163, s. 8.

In connection with this subject, sections 6 & 7 of the R. S. C., c. 163, remain unrepealed. (See Schedule Two, *post.*)

**706. Evidence in cases of polygamy, etc.** — In the case of any indictment under section two hundred and seventy-eight (*b*), (*c*) and (*d*), no averment or proof of the method in which the sexual relationship charged was entered into, agreed to, or consented to, shall be necessary in any such indictment, or upon the trial of the person thereby charged; nor shall it be necessary upon such trial to prove carnal connection had or intended to be had between the persons implicated. 53 V., c. 37, s. 11.

**707. Evidence of stealing ores or minerals.** — In any prosecution, proceeding or trial for stealing ores or minerals the possession, contrary to the provisions of any law in that behalf, or any smelted gold or silver, or any gold-bearing quartz, or any unsmelted or otherwise unmanufactured gold or silver by any operative, workman or labourer actively engaged in or on any mine, shall be *primâ facie* evidence that the same has been stolen by him. R.S. C., c. 164, s. 30.

**707a. Cattle brands as evidence.**—In any criminal prosecution, proceeding or trial, the presence upon any cattle of a brand or mark, which is duly recorded or registered under the provisions of any Act, ordinance or law, shall be *primâ facie* evidence that such cattle are the property of the registered owner of such brand or mark; and where a person is charged with theft of cattle or with an offence under paragraph (*a*) or paragraph (*b*) of section 331A respecting cattle, possession by such person or by others in his employ or on his behalf, of such cattle, bearing such a brand or mark of which the person charged is not the registered owner, shall throw upon the accused the burden of proving that such cattle came lawfully into his possession or into the possession of such others in his employ or on his behalf, unless it appears that such possession by others in his employ or on his behalf was without his knowledge and without his authority, sanction or appro-

val. (Added by the *Criminal Code Amendment Act 1900*, and since amended by the *1 Edward VII, c. 42*).

**708. Evidence of stealing timber.** — In any prosecution, proceeding or trial for any offence under section three hundred and thirty-eight a timber mark, duly registered under the provisions of the *Act respecting the Marking of Timber*, on any timber, mast, spar, saw-log or other description of lumber, shall be *primâ facie* evidence that the same is the property of the registered owner of such timber mark; and possession by the offender, or by others in his employ or on his behalf, of any such timber, mast, spar, saw-log or other description of lumber so marked, shall, in all cases, throw upon the offender the burden of proving that such timber, mast, spar, saw-log or other description of lumber came lawfully into his possession, or into the possession of such others in his employ or on his behalf. R.S.C., c. 174, s. 228.

**709. Evidence in cases relating to public stores.** — In any prosecution, proceeding or trial under sections three hundred and eighty-five to three hundred and eighty-nine inclusive for offences relating to public stores proof that any soldier, seaman or marine was actually doing duty in Her Majesty's service shall be *primâ facie* evidence that his enlistment, entry or enrolment has been regular.

2. If the person charged with the offence relating to public stores mentioned in article three hundred and eighty-seven was, at the time at which the offence is charged to have been committed, in Her Majesty's service or employment, or a dealer in marine stores, or a dealer in old metals, knowledge on his part that the stores to which the charge relates bore the marks described in section three hundred and eighty-four shall be presumed until the contrary is shown. 50-51 V., c. 45, s. 13.

**710. Evidence in cases of fraudulent marks on merchandise.** — In any prosecution, proceeding or trial for any offence under Part XXIII, relating to fraudulent marks on merchandise, if the offence relates to imported goods evidence of the port of shipment shall be *primâ fâcie* evidence of the place or country in which the goods were made or produced. 51 V., c. 41, s. 13.

2. Provided that in any prosecution for forging a trade mark the burden of proof of the assent of the proprietor shall lie on the defendant.

This section applies only to cases of *forgery* of and not to cases of *falsely applying* a trade mark. (151)

**711. Full offence charged. — Attempt proved.** — When the complete commission of the offence charged is not proved but the evidence establishes an attempt to commit the offence, the accused

(151) R. v. Howarth, 1 Can. Cr. Cas., 243.

may be convicted of such attempt and punished accordingly. R. S. C., c. 174, s. 183.

It will be seen by section 713 *post*, that the above section, 711, does not apply to murder.

See section 64 and comments and authorities, at pp. 70-73, *ante*, as to what constitutes an attempt to commit a crime.

Upon this section, 711, the defendant can only be convicted of an attempt to commit the very offence with which he is charged. (152)

If A be indicted for stealing B's watch, he cannot be convicted of attempting to steal B's umbrella.

The provision contained in the above section, 711, was derived from sec. 9 of the Imperial statute 14 and 15 Vict., c. 100, by which, after reciting that offenders often escaped conviction by reason that such persons ought to have been charged with attempting to commit offences, and not with the actual commission thereof, it was 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 only of an attempt 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 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 so tried." Where an indictment charged A. with rape and B. with aiding him, and the Jury found A guilty of attempt to commit rape and B. of aiding in the attempt, it was contended that this finding amounted to an acquittal of B., as the case was not within sec. 9 of 14 and 15 Vict., c. 100; but the objection was overruled, and the conviction of B., for misdemeanor was affirmed. (153)

It was held by the Court of Queen's Bench (Appeal Side) at Montreal, before the coming into force of the Code, that a verdict of attempt to commit an assault was not irregular. (154)

**712. Attempt charged. — Full offence proved.** — When an attempt to commit an offence is charged but the evidence establishes the commission of the full offence, the accused shall not be entitled to be acquitted, but the Jury may convict him of the attempt, unless the court before which such trial is had thinks fit, in its discretion, to discharge the Jury from giving any verdict upon such trial, and to direct such person to be indicted for the complete offence.

2. Provided that after a conviction for such attempt the accused shall not be liable to be tried again for the offence which he was charged with attempting to commit. R.S.C., c. 174, s. 184.

Where a prisoner is indicted for attempting to steal and the proof establishes that the offence of stealing was actually committed, the jury may convict of the attempt, unless the Court discharges them and directs the prisoner to be indicted for the stealing (155)

(152) R. v. McPherson, Dears. & B., 197.
(153) R. v. Hapgood, L. R., 1 C. C. R., 221; R. v. Wyatt, 39 L. J. (M. C.) 83, S. C.
(154) Leblanc v. R. 16 L. N. 187.
(155) R. v. Taylor, Que. Jud. Rep., 4 Q. B., 226.

**713. Offence charged.—Part only proved.** — Every count shall be deemed divisible; and if the commission of the offence charged, as described in the enactment creating the offence or as charged in the count, includes the commission of any other offence the person accused may be convicted of any offence so included which is proved, although the whole offence charged is not proved; or he may be convicted of an attempt to commit any offence so included:

2. Provided, that on a count charging murder, if the evidence proves manslaughter but does not prove murder, the Jury may find the accused not guilty of murder but guilty of manslaughter, but shall not on that count find the accused guilty of any other offence.

This section follows the general rule of the common law, (now considerably extended by the abolition of the distinction between felonies and misdemeanors), under which upon a charge of an offence composed of several ingredients the accused may be convicted of any offence included in the one charged against him, — a rule which does not require proof, to the full extend laid, of the offence charged in the indictment, provided the facts actually proved constitute an offence punishable by law, and for which the defendant may by law be convicted on that indictment. (156)

Under this rule, if, upon an indictment for burglary and stealing goods, there be no burglary but only stealing proved, or if, upon an indictment for robbery, there be proof of the stealing of the property but not that it was taken from the person by violence or putting in fear, the prisoner may be convicted of the simple theft. (157) Indeed, upon an indictment for burglary and stealing, the prisoner may be convicted either of burglary, of entering a dwelling-house in the night with intent to commit an indictable offence therein, of housebreaking, of stealing in a dwelling-house to the amount of $25, (if the property stolen be laid in the indictment to be of that value) or simply of theft, according to the facts proved. (158)

Upon an indictment for assaulting and unlawfully wounding and ill-treating the prosecutor and thereby occasioning him actual bodily harm, the defendant may be convicted of a common assault. (159)

Upon an indictment charging that the defendant did unlawfully make an assault in and upon a girl between the ages of ten and twelve and did then unlawfully and carnally know and abuse her, etc., being the ordinary form of an indictment for an offence against sec. 51 (now repealed) of 24 and 25 Vict., c. 100, the defendant might have been convicted of a common assault. (160)

The defendant may also be convicted of a common assault upon an indictment charging him with unlawfully wounding and with unlawfully inflicting grievous bodily harm, although the word "*assault*" is not used in the indictment. (161)

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(156) R. v. Hollingberry, 4 B. & C. 330; R. v. Hunt., 2 Camp. 583; R. v. Williams, 2 Camp. 246.

(157) 2 Hale, 203.

(158) R. v. Compton, 3 C. & P. 418; R. v. Bullock, 1 Moo. C. C. 423; R. v. Brookes, C. & Mar. 543.

(159) R. v. Oliver, Bell, 287; 30 L. J. (M. C. ) 12; R. v. Yeadon, L. & c. 81; 31 L. J. (M. C.) 70.

(160) R. v. Guthrie, L. R., 1 C. C. R., 241; 39 L. J. (M. C.) 95.

(161) R. v. Taylor, L. R., 1 C. C. R., 194; 38 L. J. (M. C.) 106.

It was held on on indictment for publishing a defamatory libel "*knowing the same to be false*," (a misdemeanor punishable under sec. 4, of 6 and 7 Vict., c. 96) that the defendant might be convicted of merely *publishing* a defamatory libel, a misdemeanor punishable under sec. 5 of 6 and 7 Vic., c. 96. (162)

It has been held that, upon an indictment for perjury, it is sufficient if any one of the assignments of perjury be proved. (163) And where, upon the trial of an indictment for perjury, it appeared that the false oath, although taken before a competent authority, was not taken in a judicial proceeding, it was held that the defendant might be convicted of the common law misdemeanor of taking a false oath. (164)

Upon an indictment for conspiring to prevent *workmen* from continuing to work, it is sufficient to prove a conspiracy to prevent *one workman* from working. (165)

Where an indictment contains divisible averments, as, that the defendant "forged and caused to be forged," proof of either averment will be sufficient. (166)

Where two intentions are ascribed to one act, — as that a libel was published with intent to defame A. B., and also to bring the administration of justice into contempt, or, that an assault was committed on a female with intent *to abuse* and *to carnally know* her, — proof of either of the intentions ascribed will be sufficient. (167)

Where an information for libel charged that outrages had been committed *in* and *near* the neighborhood of Nottingham, it was held that the averment was divisible and that it was sufficient to prove that outrages had been committed in either place. (168)

Upon a charge of stealing, if any one of the articles enumerated in the indictment be proved to have been stolen by the defendant, it will be sufficient. (169)

Upon an indictment for extortion alleging that the defendant extorted twenty shillings, it was held sufficient to prove that he extorted one shilling. (170)

On a charge of obtaining money by false pretences, proof of part of the pretence alleged was held sufficient, where the money was obtained upon that part of the pretence which was proved. (171)

Where several are indicted for burglary and theft, one may be found guilty of the burglary and stealing, and the others of the stealing only. (172)

**714. On charge of murder, conviction may be of concealment of birth.** — If any person tried for the murder of any child is acquitted thereof the Jury by whose verdict such person is acquitted

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(162) Boaler v. R., 21 Q. B. D., 284; 57 L. J. (M. C.) 85.
(163) R. v. Rhodes, 2 Ld. Raym. 886.
(164) R. v. Hodgkiss, L. R., 1 C. C. R., 212; 39 L. J. (M. C.) 14.
(165) R. v. Bykerdike, 1 M. & R. 179.
(166) R. v. Middlehurst, 1 Burr. 400.
(167) R. v. Evans, 3 Stark, 35; R. v. Dawson, 3 Stark, 62.
(168) R. v. Sutton, 4 M. & Sel, 532.
(169) 2 Hale, 302. See R. v. Ellins, R. & R. 188.
(170) R. v. Burdett, 1 Ld. Raym. 149. See R. v. Carson, R. & R. 303.
(171) R. v. Hill, R. & R. 190.
(172) R. v. Butterworth, R. & R. 520.

may find, in case it so appears in evidence, that the child had recently been born, and that such person did, by some secret disposition of such child or of the dead body of such child, endeavour to conceal the birth thereof, and thereupon the court may pass such sentence as if such person had been convicted upon an indictment for the concealment of birth. R.S.C., c. 174, s. 188.

See sections 239 and 240 and comments and authorities at pp. 255, 256, *ante*.

**714a. Proof in cattle cases.** — When an offence under section 331 is charged and not proved, but the evidence establishes an offence under section 331A the accused may be convicted of such latter offence and punished accordingly. (Added by *1 Edward VII, c. 42*).

**715. Trial of joint receivers.** — If, upon the trial of two or more persons indicted for jointly receiving any property, it is proved that one or more of such persons separately received any part or parts of such property, the Jury may convict, upon such indictment, such of the said persons as are proved to have received any part or parts of such property. R.S.C., c. 174, s. 200.

**716. Proceedings against receivers.** — When proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given, at any stage of the proceedings, that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property which forms the subject of the proceedings taken against him to be stolen: Provided, that not less than three days' notice in writing has been given to the person accused that proof is intended to be given of such other property, stolen within the preceding period of twelve months, having been found in his possession; and such notice shall specify the nature or description of such other property, and the person from whom the same was stolen. R.S.C., c. 174, s. 203.

It has been held that it is not sufficient merely to prove that "other property stolen within the preceding twelve months "had at *some time* during the twelve months been dealt with by the prisoner, but that it must be proved that such other property was found in the prisoner's possession when he was found in possession of the property forming the subject matter of the indictment. (173) So, that, where a prisoner was indicted for receiving stolen goods, and, to shew guilty knowledge, evidence was tendered to prove that, a short time previously, the prisoner had sold

(173) R. v. Carter, 12 Q. B. D., 522.

for half its value and had otherwise disposed of other property stolen within the twelve months, it was held that such evidence was not admissible. (174)

See section 314 and comments and authorities at pp. 370-374, *ante*.

**717. Proceedings against receivers after previous conviction.**— When proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession, then if such person has, within five years immediately preceding, been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings, and may be taken into consideration for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen: Provided, that not less than three days' notice in writing has been given to the person accused that proof is intended to be given of such previous conviction; and it shall not be necessary, for the purposes of this section, to charge in the indictment the previous conviction of the person so accused. R.S.C., c. 174, s. 204.

**718. Trial for coinage offences.** — Upon the trial of any person accused of any offence respecting the currency or coin, or against the provisions of Part XXXV., no difference in the date or year, or in any legend marked upon the lawful coin described in the indictment, and the date or year or legend marked upon the false coin counterfeited to resemble or pass for such lawful coin, or upon any die, plate, press, tool or instrument used, constructed, devised, adapted or designed for the purpose of counterfeiting, or imitating any such lawful coin, shall be considered a just or lawful cause or reason for acquitting any such person of such offence; and it shall in any case, be sufficient to prove such general resemblance to the lawful coin as will show an intention that the counterfeit should pass for it. R.S.C., c. 174, s. 205.

**719. Verdict in Case of libel.** — On the trial of any indictment or information for the making or publishing of any defamatory libel, on the plea of not guilty pleaded, the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information, and shall not be required or directed, by the court or judge before whom such indictment or information is tried, to find the defendant guilty merely on the proof of publication by such defendant of the paper charged to be a defamatory libel, and of the sense ascribed to the same in such indictment or information; but the

(174) R. v. Drage, 14 Cox C. C., 85.

court or judge before whom such trial is had shall, according to the discretion of such court or judge, give the opinion and direction of such court or judge to the jury on the matter in issue as in other criminal cases; and the jury may, on such issue, find a special verdict if they think fit so to do; and the defendant, if found guilty, may move in arrest of judgment on such ground and in such manner as he might have done before the passing of this Act. R.S.C., c. 174, s. 152.

**720. Impounding documents.** — Whenever any instrument which has been forged or fraudulently altered is admitted in evidence the Court or the judge or person who admits the same may, at the request of any person against whom the same is admitted in evidence, direct that the same shall be impounded and be kept in the custody of some officer of the Court or other proper person for such period and subject to such conditions, as to the Court judge or person admitting the same seems meet. R.S.C., c. 174, s. 208.

When documents, filed as exhibits in a civil suit, form the subject matter of indictment for forgery and uttering, they may be impounded, on the application of the Attorney General acting for the Crown. (174*a*)

**721. Destroying counterfeit coin.** — If any false or counterfeit coin is produced on any trial for an offence against Part XXXV., the Court shall order the same to be cut in pieces in open Court, or in the presence of a justice of the peace, and then delivered to or for the lawful owner thereof, if such owner claims the same. R.S.C., c. 174, s. 209.

**722. View.** — On the trial of any person for an offence against this Act, the court may, if it appears expedient for the ends of justice, at any time after the Jurors have been sworn to try the case and before they give their verdict, direct that the Jury shall have a view of any place, thing or person, and shall give directions as to the manner in which, and the persons by whom, the place, thing or person shall be shown to such Jurors, and may for that purpose adjourn the trial and the costs occasioned thereby shall be in the discretion of the court. R.S.C., c. 174, s. 171.

2. When such view is ordered, the court shall give such directions as seem requisite for the purpose of preventing undue communication with such Jurors: Provided that no breach of any such directions shall affect the validity of the proceedings. R.S.C., c. 174, s. 171.

As clause 2 of this section provides that no breach of any directions given by the Court to prevent undue communication with the Jurors shall affect the validity of the proceedings, it is difficult to say what would be the consequence of any communication being irregularly made with the Jurors in

(174*a*) Couture v. Fortier, Que. Jud. Rep., 7 S. C., 197.

the course of taking a view. In England, it is competent for the judge to permit the Jury to view the *locus in quo* at any time during the trial; but it is said to be questionable there whether if any evidence be given irregularly to the Jury at such view that fact is ground for a case for the consideration of the Court for Crown Cases Reserved, or is matter to be placed upon the record and the subject of a writ of error, or merely furnishes ground for an application to the Home Secretary for remission of the sentence. (175)

Where upon an indictment for unlawfully displacing a railway switch, a prisoner was tried without a Jury by a County Court Judge, exercising jurisdiction under the "Speedy Trials Act," and after hearing the evidence and the addresses of counsel, the judge reserved his decision, and, then, before giving it, having occasion to pass the place, he examined the switch in question, neither the prisoner nor any one on his behalf being present, and the prisoner was found guilty; — it was held that there was no authority for the judge taking a "*view*" of the place and that even if he had the right to take the view, the manner of his taking it, without the presence of the prisoner or of any one on his behalf, was unwarranted; and, further, that the question whether the judge had the right to take a view was a question of law arising on the trial and was a proper question to reserve under R. S. C., c. 174, sec. 259. (176)

**723. Variance and amendment.** — If on the trial of any indictment there appears to be a variance between the evidence given and the charge in any count in the indictment, either as found or as amended, or as it would have been if amended in conformity with any particular supplied as provided in sections six hundred and fifteen and six hundred and seventeen, the Court before which the case is tried may, *if of opinion that the accused has not been misled or prejudiced in his defence by such variance*, amend the indictment or any count in it or any such particular so as to make it conformable with the proof.

2. If it appears that the indictment has been preferred under some other Act of Parliament instead of under this Act, or under this instead of under some other Act, or that there is in the indictment, or in any count in it, an omission to state or a defective statement of anything requisite to constitute the offence, or an omission to negative any exception which ought to have been negatived, but that the matter omitted is proved by the evidence, the Court before which the trial takes place, *if of opinion that the accused has not been misled or prejudiced in his defence by such error or omission*, shall amend the indictment or count as may be necessary.

3. The trial in either of these cases may then proceed in all respects as if the indictment or count had been originally framed as amended: Provided that *if the Court is of opinion that the accused has been misled or prejudiced* in his defence by any such variance, error, omission or defective statement, but that the effect of such

(175) R. v. Martin, L. R., 1 C. C. R., 378; 41 L. J. (M. C. ) 113.
(176) R. v. Petrie, 20 Ont. Rep. 317.

misleading or prejudice might be removed by adjourning or postponing the trial, the Court, may, in its discretion make the amendment and adjourn the trial to a future day in the same sittings, or discharge the Jury and postpone the trial to the next sittings of the Court, on such terms as it thinks just.

4. In determining whether the accused has been misled or prejudiced in his defence, the Court which has to determine the question shall consider the contents of the depositions, as well as the other circumstances of the case.

5. Provided that the propriety of making or refusing to make any such amendment shall be deemed a question for the Court, and that the decision of the Court upon it may be reserved for the Court of Appeal, or may be brought before the Court of Appeal like any other decision on a point of law. R.S.C., c. 174, ss. 237, 238, 239.

The first paragraph of this section is based upon sec. 1 of the Imperial statute 14 and 15 Vict., c. 100, giving power to amend variances between the statement as contained in the indictment, of matters of description, etc., and the evidence offered in proof of such matters; but the Imperial statute not only makes the right to amend dependent upon the variance being such as cannot in the opinion of the Court, prejudice the defendant in his defence, but also dependent upon its being such as the Court considers is *not material to the merits of the case*. The power of amendment given by the first paragraph of the above section seems, therefore, to be broader than that given by the English statute; and clause 2 of the above section goes still further by enacting that the Court may amend omissions or defective statements of anything requisite to constitute the offence, etc., provided the matter omitted be proved by the evidence; and clause 3 provides that, even, if the defendant has in the opinion of the Court, been misled or prejudiced in his defence, by any such variance, error, omission, or defective statement, the Court may make the amendment, and adjourn or postpone the trial.

It seems that the amendment may be made after the prisoner's counsel has addressed the jury; (177) but that it must be made before the verdict is rendered. (178)

It was held, under the English statute, that where an amendment had once been made there was no power of amending the amendment or of reverting to the indictment as it originally stood, and that the case must have been decided upon the indictment in its amended form. (179) But it will be seen that, under the first paragraph of the above section 723, either the indictment as found or as amended, or any particular supplied under sections 615 and 617, may now be amended so as to make a variance conformable with the proof.

It has been held, under the Imperial statute, that an indictment might be amended by striking out an erroneous and unnecessary statement of the time of the passing of an Act of parliament referred to in it; (180) that

(177) R. v. Fullarton, 6 Cox C. C., 194.
(178) R. v. Frost, Dears. 474; 24 L. J. (M. C.) 116; R. v. Larkin, Dears. 365; 23 L. J. (M. C.) 125.
(179) R. v. Barnes, L. R., 1 C. C. R., 45; 35 L. J. (M. C.) 204; R. v. Pritchard, L. & C. 34; 30 L. J. (M. C.) 169; R. v. Webster, L. & C., 77.
(180) R. v. Westley, Bell, 193; 29 L. J. (M. C.), 35.

an indictment for the obstruction of a footway might be amended so as to correct a misdescription of one of the termini of the footway; (181) that in an indictment for night poaching an amendment might be made so as to correct a misdescription of the occupation of the field; (182) that an amendment might also be made where the ownership of stolen property was wrongly described; (183) or in order to correct a wrong description of the stolen property itself, as where the statement in the indictment was that the prisoner stole nineteen shillings and six pence, whereas the proof shewed that she stole a sovereign. (184) And where an indictment for perjury alleged that the perjury was committed on a trial for burning a *barn*, whereas the proof was that the trial was for firing a *stack*, the indictment was allowed to be amended. (185) So, also, where an indictment charged the prisoner with intent to kill and murder A. W., an infant, and the prosecution failed to prove that the child had ever borne such a name, the indictment was allowed to be amended by striking out the name, and describing the child as "a certain female child whose name is to the Jurors unknown." (186)

Where in an indictment for perjury before justices, the justices were described as being justices for the country and the evidence shewed that they were borough justices only, this was held a proper subject for amendment. (187)

See comments under section 629 at pp. 760-762, *ante*.

See sections 733 and 734 *post*, as to motions in arrest of judgment.

As to reserving questions of law, see section 743, *post*.

**724. Amendment to be endorsed on record.** — In case an order for amendment as provided for in the next preceding section is made it shall be endorsed on the record; and all other rolls and proceedings connected therewith shall be amended accordingly by the proper officer and filed with the indictment, among the proper records of the court. R.S.C., c. 174, s. 240.

**725. Form of formal record in case of an amendment.** — If it becomes necessary to draw up a formal record in any case in which an amendment has been made as aforesaid, such record shall be drawn up in the form in which the indictment remained after the amendment was made, without taking any notice of the fact of such amendment having been made. R.S.C., c. 174, s. 243.

**726. Form of record of conviction or acquittal.** — In making up the record of any conviction or acquittal of any indictment, it shall be sufficient to copy the indictment with the plea pleaded thereto, without any formal caption or heading; and the statement of the arraignment and the proceedings subsequent thereto

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(181) R. v. Sturge, 3 E. & B. 374; 23 L. J. (M. C.) 172.
(182) R. v. Sutton, 13 Cox, 648.
(183) R. v. Vincent, 2 Den. 464; 21 L. J. (M. C.) 109; R. v. Marks, 10 Cox, 367.
(184) R. v. Gumble, L. R., 2 C. C. R., 1; 42 L. J. (M. C.) 68.
(185) R. v. Neville, 6 Cox, 69.
(186) R. v. Welton, 9 Cox, 297.
(187) R. v. Western, L. R., 1 C. C. R., 122; 37 L. J. (M. C.) 81.

shall be entered of record in the same manner as before the passing of this Act subject to any such alterations in the forms of such entry as are, from time to time, prescribed by any rule or rules of the superior courts of criminal jurisdiction respectively, — which rules shall also apply to such inferior courts of criminal jurisdiction as are therein designated. R.S.C., c. 174, s. 244.

See comments at pp. 857-859, *post*, as to form of Crown Book suggested by the Royal Commissioners.

**727. Jury retiring to consider verdict.** — If the Jury retire to consider their verdict they shall be kept under the charge of an officer of the court in some private place, and no person other than the officer of the court who has charge of them shall be permitted to speak or to communicate in any way with any of the Jury without the leave of the court.

2. Disobedience to the directions of this section shall not affect the validity of the proceedings: Provided that if such disobedience is discovered before the verdict of the Jury is returned, the Court, it is of opinion that such disobedience has produced substantial mischief, may discharge the Jury and direct a new Jury to be sworn or empanelled during the sitting of the court, or postpone the trial on such terms as justice may require.

**728. Jury unable to agree may be discharged.** — If the Court is satisfied that the Jury are unable to agree upon their verdict, and that further detention would be useless, it may in its discretion discharge them and direct a new Jury to be empanelled during the sittings of the Court, or may postpone the trial on such terms as justice may require.

2. It shall not be lawful for any court to review the exercise of this discretion.

The Judge alone is to decide upon the existence of the necessity of discharging the Jury without agreeing upon their verdict. Thus where the Jury, on a trial at the Assizes, for murder, were locked up from the middle of the day until the following morning, and then, on their being sent for into court, stated that it was impossible for them to agree, whereupon the judge discharged them, it was held that he was warranted by law in doing so. (188)

Where a material and necessary witness for the prosecution refused to answer a question put to him, and although informed by the Judge that he was bound to do so, persisted in such refusal, and was thereupon adjudged guilty of contempt of court and fined and imprisoned, the Judge, on the application of the Counsel for the prosecution, and against the will of the defendant, discharged the Jury. The course pursued in this case was afterwards questioned in the Court of Queen's Bench, and although it did not become necessary to give judgment upon its propriety, Blackburn, J.,

(188) R. v. Newton, 13 Q. B., 716; 18 L. J., (M. C.) 201; 13 Jur., 606.

expressed an opinion that it was right, which opinion seems to have been shared by Cockburn, C. J. (189)

The exercise of the Judge's discretion in discharging a Jury unable to agree upon their verdict is now expressly declared by clause 2 of section 728, to be not subject to review by any Court.

After verdict, the jury may, if the trial judge in his discretion thinks proper to allow it, be polled. The prisoner is not entitled to demand it as a right. (189*a*)

**729. Proceedings on Sunday.** — The taking of the verdict of the Jury or other proceeding of the court shall not be invalid by reason of its happening on Sunday or on any other holiday. (As amended by the *Criminal Code Amendment Act 1900*).

See Remarks of the English Commissioners, upon this provision, at p. 794 *ante*, and the case of Windsor v. R., there cited.

It has been held that, this section, 729, deals only with matters before a jury, and does not authorize such judicial acts as the holding of a preliminary enquiry and a committal for trial on a Sunday or other holiday. So, that, where a preliminary enquiry was held on a Sunday and the prisoner was on that day committed for trial, it was held that the proceedings were illegal and that the prisoner was entitled, upon *habeas corpus*, to be discharged. (190)

At common law, Sunday being a *dies non juridicus*, all judicial proceedings on that day are void. (191)

Only ministerial acts done on a Sunday or other non-juridical day were valid at common law.

**730. Suspension of sentence of death on pregnant woman.** — If sentence of death is passed upon any woman she may move in arrest of execution on the ground that she is pregnant. If such a motion is made the Court shall direct one or more registered medical practitioners to be sworn to examine the woman in some private place either together or successively, and to inquire whether she is with child of a quick child or not. If upon the report of any of them it appears to the Court that she is so with child execution shall be arrested till she is delivered of a child, or until it is no longer possible in the course of nature that she would be so delivered.

**731. Jury de ventre inspiciendo abolished.** — After the commencement of this Act, no Jury *de ventre inspiciendo* shall be empanelled or sworn.

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(189) R. v. Charlesworth, 2 F. & F., 326; 31 L. J., (M. C.) 25.
(189*a*) R. v. McClung, 1 N. W. T. Rep. Part. 4, p. 1.
(190) R. v. Cavalier, 16 C. L. T., 359; 1 Can. Cr. Cas., 134.
(191) 2 Co. Inst., 264-5; 1 Bish. Cr. Proc., section 207; 1 Can. Cr. Cas., 140.

The oaths heretofore in use and taken by the fore matron and matrons of a Jury of matrons may be altered and administered to medical practitioners appointed under section 730, in the following form: —

"You and each of you swear that you will examine and search the prisoner at the bar and enquire and ascertain whether she be with child of a quick child and a true report thereof make according to your skill and understanding. — So help you God."

See comments at pp. 283, 284, *ante*, as to the different stages of pregnancy.

**732. Stay of proceedings.** — The Attorney-General may, at any time after an indictment has been found against any person for any offence, and before judgment is given thereon, direct the officer of the court to make on the record an entry that the proceedings are stayed by his direction, and on such entry being made all such proceedings shall be stayed accordingly.

2. The Attorney-General may delegate such power in any particular court to any counsel nominated by him.

This power of the Attorney-General to stay proceedings was formerly exercised by entering a *nolle prosequi*. As to the occasions on which it has been usual to enter a *nolle prosequi*, see Archbold's Cr. Pl. and Ev., 21st Ed., pp. 119-121.

**733. Motion in arrest of judgment.** — If the jury find the accused guilty, or if the accused pleads guilty, the judge presiding at the trial shall ask him whether he has anything to say why sentence should not be passed upon him according to law: but the omission so to ask shall have no effect on the validity of the proceedings.

2. The accused may at any time before sentence move in arrest of judgment on the ground that the indictment does not (after any amendment which the Court is willing to and has power to make) state any indictable offence.

3. The Court may in its discretion either hear and determine the matter during the same sittings or reserve the matter for the Court of Appeal as herein provided. If the Court decides in favour of the accused, he shall be discharged from that indictment. If no such motion is made, or if the court decides against the accused upon such motion, the Court may sentence the accused during the sittings of the Court, or the Court may in its discretion discharge him on his own recognizance, or on that of such sureties as the Court thinks fit, or both, to appear and receive judgment at some future Court or when called upon. If sentence is not passed during the sitting, the judge of any superior court before which the person so convicted afterwards appears or is brought, or if he was convicted before a court of general or quarter sessions, the court of general or quarter sessions at a subsequent

sitting may pass sentence upon him or direct him to be discharged.

4. When any sentence is passed upon any person after a trial had under an order for changing the place of trial, the Court may in its discretion, either direct the sentence to be carried out at the place where the trial was had or order the person sentenced to be removed to the place where his trial would have been had but for such order, so that the sentence may be there carried out.

See comments under section 629, at pp, 760-762, *ante*; and see section 723 and comments at pp. 842-844, *ante*.

See, also, section 745, *post*, as to reserving questions of law.

Section 733 gives an accused, who has been found guilty or who pleads guilty, the right at any time before sentence to move in arrest of judgment on the ground that the indictment does not, (after any amendment which the Court can and will make), state any indictable offence.

**734. Judgment not to be arrested for formal defects.** — Judgment, after verdict upon an indictment for any offence against this Act, shall not be stayed or reversed for want of a *similiter*, — nor by reason that the jury process has been awarded to a wrong officer, upon an insufficient suggestion, — nor for any misnomer or misdescription of the officer returning such process, or of any of the jurors, — nor because any person has served upon the jury who was not returned as a juror by the sheriff or other officer; and where the offence charged is an offence created by any statute, or subjected to a greater degree of punishment by any statute, the indictment shall, after verdict, be held sufficient, if it describes the offence in the words of the statute creating the offence, or prescribing the punishment, although they are disjunctively stated or appear to include more than one offence, or otherwise. R.S.C., c. 174, s. 246.

The most important part of this section is that which declares that, "where the offence charged is an *offence created by any statute*," etc., "the indictment shall, after verdict, be held sufficient, if it describes the offence in the words of the statute creating the offence," etc.

See section 629 and comments at pp. 760-762, *ante*; and see, also, section 723, *ante*.

Where an indictment is quashed or judgment upon it arrested for the insufficiency or illegality thereof, the Court will order that a new indictment be preferred against the prisoner and may detain the prisoner in custody therefor. (192)

**735. Verdict not to be impeached for certain Omissions as to Jurors.** — (*As Amended by 56 Vic., c. 32*). — No omission to observe the directions contained in any Act as respects the qualification, selection, balloting or distribution of Jurors, the prepa-

(192) 1 Bish. Cr. Proc., 730; Tasch. Cr. Code, 858.

ration of the jurors' book, the selecting of jury lists, the drafting panels from the jury lists or the striking of special juries, shall be a ground for impeaching any verdict, or shall be allowed for error upon any appeal to be brought upon any judgment rendered in any criminal case. R.S.C., c. 174, s. 247.

**736. Insanity of accused at time of offence.** — Whenever it is given in evidence upon the trial of any person charged with any indictable offence, that such person was insane at the time of the commission of such offence, and such person is acquitted, the jury shall be required to find, specially whether such person was insane at the time of the commission of such offence, and to declare whether he is acquitted by it on account of such insanity; and if it finds that such person was insane at the time of committing such offence, the Court before which such trial is had, shall order such person to be kept in strict custody in such place and in such manner as to the Court seems fit, until the pleasure of the Lieutenant-Governor is known.

See section 11, and comments, at pp. 14-20, on Insanity. See, also, comments, under section 657, at p. 791, *ante*.

**737. Insanity of accused on arraignment or trial.** — If at any time after the indictment is found, and before the verdict is given, it appears to the Court that there is sufficient reason to doubt whether the accused is then, on account of insanity, capable of conducting his defence, the Court may direct that an issue shall be tried whether the accused is or is not then on account of insanity unfit to take his trial.

2. If such issue is directed before the accused is given in charge to a Jury for trial on the indictment, such issue shall be tried by any twelve Jurors. If such issue is directed after the accused has been given in charge to a Jury for trial on the indictment, such Jury shall be sworn to try this issue in addition to that on which they are already sworn.

3. If the verdict on this issue is that the accused is not then unfit to take his trial the arraignment or the trial shall proceed as if no such issue had been directed. If the verdict is that he is unfit on account of insanity the Court shall order the accused to be kept in custody till the pleasure of the Lieutenant-Governor of the province shall be known, and any plea pleaded shall be set aside and the Jury shall be discharged.

4. No such proceeding shall prevent the accused being afterwards tried on such indictment. R.S.C., c. 174, ss. 252 and 255.

As insanity is matter of defence, a Grand Jury have no authority by law to ignore a bill upon the ground that the prisoner is insane. It is their

duty to find the bill, and then the Court, either on arraignment or trial, may order the prisoner's detention during the King's pleasure. (193)

The form of oath to be administered to the Jury to try whether a prisoner refusing to plead be insane or not is as follows: —

"You shall diligently enquire and true presentment make for and on behalf of Our Sovereign Lord the King whether A B., the defendant who stands here indicted for an indictable offence be insane or not, and a true verdict give according to the best of your understanding. — So help you God."

Where a prisoner was tried for using seditious language against the Queen, in her presence, it was held that, the Jury might form their own opinion of the state of the prisoner's mind when arraigned, from his demeanor, without any evidence being given on the subject; but, under ordinary circumstances it is usual for the Judges to require some evidence as to the prisoner's then state of mind. (194)

Where, on a prisoner being brought up to plead, his counsel states that he is insane, and a jury is sworn to try whether he is so or not, the proper course is for the prisoner's counsel to begin the evidence on this issue and prove the insanity, as sanity is always presumed. (195)

Peremptory challenges are not allowed upon a collateral issue. (196)

With regard to the manner of proving a plea of insanity, it has been held that a medical man, who has been present in Court and heard the evidence, may be asked as a matter of science whether the facts stated by the witnesses, supposing such facts to be true, shew in the accused a state of mind incapable of distinguishing right from wrong. *Held*, further, that where the opinion sought is that of a medical expert who has had no previous acquaintance with the accused, and has merely read the depositions, without hearing the witnesses, the question must be put to him in the form of a suppositious case relating all the facts proved, and asking if, — assuming all such facts to be true, — they would indicate in the accused any and what form of insanity. (197)

**738. Custody of persons formerly acquitted for insanity.** — If any person before the passing of this Act, whether before or after the first day of July, one thousand eight hundred and sixty-seven, was acquitted of any such offence on the ground of insanity at the time of the commission thereof, and has been detained in custody as a dangerous person by order of the Court before which such person was tried, and still remains in custody, the Lieutenant-Governor may make a like order for the safe custody of such person during pleasure. R.S.C., c. 174, s. 254.

**739. Insanity of person to be discharged for want of prosecution.** — If any person charged with an offence is brought before any Court to be discharged for want of prosecution, and such person appears to be insane, the Court shall order a Jury to be empanelled to try the sanity of such person, and if the Jury so empa-

(193) R. v. Hodges, 8 C. & P., 195.
(194) R. v. Goode, 7 A. & E., 536.
(195) R. v. Turton, 6 Cox C. C., 385.
(196) R. v. Ratcliffe, Fost., 40; Tasch. Cr. Code, 780.
(197) R. v. Dubois, 17 Q. L. R., 203.

nelled finds him insane, the Court shall order such person to be kept in strict custody, in such place and in such manner as to the Court seems fit, until the pleasure of the Lieutenant-Governor is known. R.S.C., c. 174, s. 256.

**740. Custody of insane person.** — In all cases of insanity so found, the Lieutenant-Governor may make an order for the safe custody of the person so found to be insane, in such place and in such manner as to him seems fit. R.S.C., c. 174, ss. 253 and 257.

**741. Insanity of person imprisoned.** — The Lieutenant-Governor, upon such evidence of the insanity of any person imprisoned in any prison other than a penitentiary for an offence, or imprisoned for safe custody charged with an offence, or imprisoned for not finding bail for good behaviour or to keep the peace, as the Lieutenant-Governor considers sufficient, may order the removal of such insane person to a place of safe keeping; and such person shall remain there, or in such other place of safe keeping, as the Lieutenant-Governor from time to time orders, until his complete or partial recovery is certified to the satisfaction of the Lieutenant-Governor, who may then order such insane person back to imprisonment, if then liable thereto, or otherwise to be discharged. R.S.C., c. 174, s. 258.

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## FORMS UNDER PART LI.

FROM SCHEDULE ONE.

KK. — (*Section* 666).

CHALLENGE TO ARRAY.

Canada,
Province of ,
County of .

The Queen
*v.*
C. D.

The said A. B., who prosecutes for our Lady the Queen (*or* the said C. D., *as the case may be*) challenges the array of the panel on the ground that it was returned by X. Y., sheriff of the county of (*or* E. F, deputy of X. Y., sheriff of the county of , *as the case may be*), and that the said X. Y. (*or* E. F., *as the case may be*) was guilty of partiality (*or* fraud, *or* wilful misconduct) (198) on returning said panel.

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(198) Particulars should be given shewing in what respect the Sheriff or Deputy Sheriff was partial or in what his alleged fraud or wilful misconduct consists.

LL. — (*Section* 668).

CHALLENGE TO POLL.

Canada,
Province of ,
County of .

The Queen
*v.*
C. D.

The said A. B., who prosecutes, etc., (*or* the said C. D., *as the case may be*) challenges G. H., on the ground that his name does not appear in the panel, (*or* "that he is not indifferent between the Queen and the said C. D.," (199) *or* "that he was convicted and sentenced to 'death' *or* 'penal servitude,' *or* 'imprisonment with hard labour,' *or* 'exceeding twelve months,'" *or* "that he is disqualified as an alien.")

The word "King" should be substituted for the word "Queen," in the above forms.

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## PART LII.

## APPEAL.

On this subject the English Commissioners made the following report:—

"The procedure, under the existing law, subsequent to a trial, and in the nature of an appeal, may be arranged under three separate heads. These are, *first*, proceedings in error; *secondly*, cases for the Court of Crown Cases reserved; *thirdly*, motions for a new trial.

**Error.**—"PROCEEDINGS IN ERROR are proceedings by which the Queen's Bench Division of the High Court is called upon to reverse a judgment on the ground that error appears on the record, — a writ of error being granted only on the Attorney General's fiat. An appeal lies ultimotely to the House of Lords. The record, however, is so drown up that many matters by which a prisoner might be prejudiced, — indeed, the matters by which he is most likely to be prejudiced, would not appear upon it; for instance, the improper reception or rejection of evidence, or a misdirection by the judge would not appear upon the record. This remedy, therefore, applies only to questions of law, and only to that very small number of legal questions which concern the regularity of the proceedings themselves, *e. g.*, an alleged irregula-

(199) Particulars should be given shewing in what respect the Juror is un-indifferent.

rity in empanelling the Jury, (Mansel v. R.), (1) or in discharging a Jury (Winsor v. R.), (2) or a defect appearing upon the face of the indictment (Bradlaugh v. R.) (3). The result is that the remedy by writ of error is confined to a very small number of cases of rare occurrence. It must be added that the procedure in writs of error is extremely technical. It is necessary in such cases to draw up the record, and this is an extremely formal and prolix document, though the materials from which it is compiled are simply short notes in a rough minute book kept by the officer of the Court. When the record is drawn up the Court of Appeal cannot look beyond it, but is tied down to the matters expressly entered in it. The proceedings on special verdicts and demurrers to evidence have practically fallen into disuse.

**Reserved Case.** — "The second mode in which proceedings in the nature of an appeal may be taken, is upon a CASE STATED by the judge for the Court for CROWN CASES RESERVED. Up to the year 1848 it was the practice if any question of law which would not appear on the record arose at a criminal trial at the Assizes, for the judge who tried the case to state the point for the opinion of all the judges, by whom it was afterwards considered and determined, no reasons for the determination being given. If the judges thought that the conviction was wrong, the person convicted was pardoned. There was no mode of reserving cases which arose at the Quarter Sessions. By 11 and 12 Vict., c. 78, a Court for Crown Cases Reserved was instituted, composed of the judges of the three common law Courts or any five of them, a Chief Justice or the Lord Chief Baron being one. Upon the construction of the Act it has been considered that if a differance of opinion occurs between the five judges, the minority are not bound by the majority, but the matter must be referred to the whole body, — a course which is on many obvious grounds inconvenient. The existing power of appeal on a point reserved, is only on behalf of the accused. The consequence is that the judge cannot reserve a question unless he rules it against the accused, notwithstanding his own opinion may be that though the point is doubtful it should be decided in favour of the accused; and if ultimately it is determined that there has been an improper ruling against the accused, on some point of perhaps very little importance, or that some evidence, perhaps of little weight, has been improperly received or rejected, the Court of Appeal must avoid the conviction and has no power to grant a new trial. The procedure is, however, extremely simple and free from technicality. No record is drawn up, and the Judge who reserves the point states a case in simple language.

(1) Mansell v. R., 8 E. & B., 54; Dears. & B., 375; 27 L. J. (M. C.), 4.
(2) Winsor v. R., L. R., 1 Q. B., 377; 35 L. J. (M. C.), 121.
(3) Bradlaugh v. R., 3 Q. B. D., 607.

**New Trial.** — "The third proceeding in the nature of an appeal is a Motion for a NEW TRIAL. This is confined to cases which have either originated in or have been removed into the Queen's Bench Division, and as it seems (R. v. Bertrand, (4), disapproving of R. v. Scaiffe), (5), to cases of misdemeanour. A defendant who has been convicted may move for a new trial in these cases as in a civil case, but the decision of the Queen's Bench Division is final.

"It seems to us that in order to form a complete system these various forms of proceedings ought to be combined. For this purpose we propose in the first place to constitute a single Court of Criminal Appeal closely resembling the Court for Crown Cases Reserved, but with two important differences. We propose that, as in other courts, the minority should be bound by the majority. A Court composed of fifteen judges is inconveniently large. If on a point of importance a Court of five should be divided it might be desirable that a further appeal should be possible. We accordingly propose that the Court should have power to permit an appeal to the House of Lords.

"We do not interfere with the present practice as to trials in the Queen's Bench Division, and we propose that in the case of such trials, the Queen's Bench Division should be the Court of Appeal, and that it should have power to give leave to appeal to the House of Lords. (6)

"As to the power to appeal and the cases in which an appeal should lie the draft code proposes to make considerable changes in the existing law as regards both matter of law and matter of fact. With regard to matter of law, the Judge has at present absolute discretion as to reserving or not reserving questions which arise at the trial and do not appear on the record. This we think ought to be modified. We propose accordingly that the Judge shall be bound to take a note of such questions as he may be asked to reserve, unless he considers the application frivolous. If he refuses to grant a case for the Court of Appeal the Attorney General may in his discretion grant leave to the person making the application to move the Court of Appeal for leave to appeal, and the Court may direct a case to be stated. The Court on hearing the case argued may either confirm the ruling appealed from, or grant a new trial, or direct the accused to be discharged; in a word, it may act in all respects as in a civil action when the question is one of law, and that *on the application of either side*. This in some ways is favorable and in others unfavorable to accused persons. By the ex-

(4) R. v. Bertrand, L. R., 1 Priv. Coun., 520.
(5) R. v. Scaiffe, 2 Den., 281, 20 L. J. (M. C.), 229, 17 Q. B., 238.
(6) In Canada, the further appeal from the Provincial Appeal Court is to the Supreme Court of Canada, but it is only allowed in case of any Judge of the Provincial Court of Appeal dissenting from the opinion of the majority. (See sections 742 and 750, *post*.)

isting law the prisoner's right to appeal on a point of law is, generally speaking, subject to the absolute discretion of the Judge; but if he is permitted to appeal and if the Court above decides in his favor, the conviction is quashed, although in a civil case he would gain nothing but a right to a new trial. Under section 542, (7) the prisoner would be able to appeal with the leave of the Attorney General, against the will of the Judge, but if he succeeded he would in many cases only obtain a new trial. If the matter appealed upon was a mere irregularity, immaterial to the merits of the case, the Court of Appeal would have power to set it right. All this would diminish the value of the right of appeal to prisoners, though it would increase its extent. It must be observed too that the right of appeal on questions of law is given, equally to both sides. The Commissioners as a body express no opinion on the expediency of this. If it is thought proper to confine the right to the accused, the alteration of a few words in the section would effect that object.

"In dealing with appeals upon matter of law little is wanted beyond an adaptation of the existing law.

"It is more difficult to provide in a satisfactory way for an appeal upon matters of fact. It is obvious that the only practicable means of giving such an appeal is by permitting convicted persons to move, under certain circumstances, for a new trial, either on the ground that the verdict was against the evidence, or on the ground that the verdict has been shown to be wrong by facts discovered subsequently to the trial. If the ground on which a new trial is sought for is that the verdict was against the evidence, the case is comparatively simple. In such cases the judge before whom the case was tried ought to have power to give leave to the convicted person to apply to the Court of Appeal for a new trial. If the convict had an absolute right to make such an application, it would be made whenever the convict could afford it. By making the leave of the judge who tried the case a condition for such an application, such motions would be practically confined to cases in which the Judge thought the Jury had been harsh towards the prisoner. However, when the application was made, the Court of Appeal could deal with it as in civil cases.

"A much more difficult question arises in relation to cases which occur from time to time, where circumstances throwing doubt on the propriety of a conviction are discovered after the conviction has taken place. In these cases it was provided by the Bill that the Secretary of State should have power to give leave to the person convicted to apply to the Court of Appeal for a new trial. Upon the fullest consideration of the subject we do not

(7) Section 744, *post*, is to the same effect as section 542 of the English Draft Code.

think that such an enactment would be satisfactory. In such a case, the Court of Appeal must either hear the new evidence itself, or have it brought before it upon affidavit. In the former case the Court would substantially try the case upon a motion for a new trial, and this is opposed to the principle of trial by Jury. In the latter case, they would have no materials for a satisfactory decision.

"It is impossible to form an opinion on the value of evidence given on affidavit and *ex parte* until it has been checked and sifted by independant inquiry. Such duties could not be undertaken by a Court of Appeal. If the Secretary of State gave leave to a convict to move the Court of Appeal for a new trial on evidence brought before the court by affidavit, the only well-ascertained fact before the court would be that the Secretary of State considered that there were grounds for such an application. This would make it difficult to refuse the application. The Secretary of State would be responsible only for granting leave to move the the court for a new trial. The court in granting a new trial would always in fact take into account the opinion indicated by the Secretary of State's conduct. It must also be remembered that a court of justice in deciding upon such applications would, in order to avoid great abuses, be obliged to bind itself by strict rules, similar to those which are enforced in applications for new trials in civil cases on the ground of newly discovered evidence. Such applications cannot be made at all after the lapse of a very short interval of time and are not granted if the applicant has been guilty of any negligence; and this stringency is essential to the due administration of justice and to the termination of controversies. It would be unsatisfactory to apply such rules to applications for new trials in criminal cases. No matter at what distance of time the innocence of a convicted person appeared probable, — no matter how grossly a man (suppose under sentence of death) had mismanaged his case, it would be impossible to refuse him a fresh investigation on the ground of such lapse of time or mismanagement. Cases in which, under some peculiar state of facts, a miscarriage of justice takes place, may sometimes though rarely occur; but when they occur it is under circumstances for which fixed rules of procedure cannot provide.

"Experience has shown that the Secretary of State is a better judge of the existence of such circumstances than a Court of Justice can be. He has every facility for enquiring into the special circumstances; he can and does if necessary avail himself of the assistance of the judge who tried the case and of the law officers. The position which he occupies is a guarantee of his own fitness to form an opinion. He is fettered by no rule, and his decision does not form a precedent for subsequent cases. We do not see how a better means could be provided for enquiry into the circumstances of the exceptional cases in question. The powers of

the Secretary of State, however, as to disposing of the cases which come before him are not as satisfactory as his power of enquiring into their circumstances. He can advise Her Majesty to remit or commute a sentence: but, to say nothing of the inconsistency of pardoning a man for an offence on the ground that he did not commit it, such a course may be unsatisfactory.

"The result of the enquiries of the Secretary of State may be to show not that the convict is clearly innocent, but that the propriety of the conviction is doubtful; that matters were left out of account which ought to have been considered, or that too little importance was attached to a view of the case, the bearing of which was not sufficiently apprehended at the trial; in short, the enquiry may show that the case is one on which the opinion of a second Jury ought to be taken. If this is the view of the Secretary of State, he ought, we think to have the right of directing a new trial on his own undivided responsibility. Such a power we accordingly propose to give him by section 545. (8)

"With respect to the materials to be laid before the Court of Appeal, we propose to abolish the present record. It is extremely technical and gives little real information. Instead of it we propose that a book to be called the Crown Book should be kept by the officer, which should record in common language the proceedings of the Court. In practice the record is hardly ever made up, and if it is necessary to make it up, the officer's minute book affords the only materials for doing so. Our proposal is practically to substitute the original book for the record which is made up from it, and is merely a technical expansion of the original.

"We also propose that the Court of Appeal should have power to call for the judge's notes, and to supply them if they are considered defective by any other evidence which may be available,—a shorthand writer's notes for instance. (9)

"We consider the statutory recognition of the duty of the Judge to take notes as a matter of some importance." (*Eng. Commrs'. Rep., pp. 37-40*).

**Crown Book.** — The provision by which the Royal Commissioners proposed to substitute the Crown Book for the present formal record is contained in section 511 of the English Draft Code, and is as follows: —

"It shall not in any case be necessary to draw up any formal record of the proceedings on a trial for a criminal offence, but the proper officer of the Court before which the trial takes place shall

(8) A similar provision to section 545 of the English Draft Code is contained in section 748, *post*, with this difference that our section contains the words "Minister of Justice" instead of the words "Secretary of State," contained in the English section.

(9) For a provision to this effect, see section 745, *post*.

cause to be preserved all indictments and all depositions transmitted to him, and he shall keep a book to be called the Crown Book, which book shall be the property of the Court, and shall be deemed a record thereof, and the contents thereof proveable by a certified copy or extract without production of the original.

"In the Crown Book shall be entered the names of the Judge, Recorder, Justices or other members of the Court, and of the Grand Jurors, and a memorandum of the substance of all proceedings at every trial, and of the result of every trial; and such entries, or a certified copy thereof, or of so much thereof as may be material, may be referred to on any proceeding by way of appeal as herein provided; and any certificate of any indictment, trial, conviction, or acquittal, or of the substance thereof, shall be made up from the memorandum in such book, and shall be receivable in evidence for the same purpose and to the same extent as certificates of records or the substantial parts thereof are now receivable.

"Any erroneous or defective entry in the Crown Book may at any time be amended, in accordance with the fact, by the Judge or Justice who presided at the trial.

"Provided always that nothing herein contained shall dispense with the taking of notes by the Judge or Justice presiding at the trial.

"If the trial takes place before a different Court from that to which the Accused was committed for trial or at a different Court from that before which the indictment was found, a statement shall be made in the Crown Book of the order under which the trial is so held, and by whom and where it was made.

"The officer of the Court shall cause to be entered in the Crown Book a statement of the following particulars:

(*a*) The name of the committing Justice and the charge on which the Accused was committed; or

(*b*) If the accused was not committed and the prosecutor was bound over to prosecute under the provisions of section 458 of this Act, (10) the name of such prosecutor, and by whom he was bound over; or

(*c*) If the indictment is preferred by consent, then the name of the Court or person giving such consent;

(*d*) The names of all the witnesses whose depositions have been transmitted to the officer of the Court, and of the Justices before whom and of the places where their depositions were taken;

"Provided that the absence of such a statement or any mistake

(10) See section 595, *ante*.

in it shall not be an objection to the proceedings; but the Court to which the Crown Book belongs may and shall on the application of either the prosecutor or accused at any time, order a statement of these particulars to be entered, or amend the statement where erroneous or defective."

The provisions of the above quoted section, 511, of the English Draft Code have not been incorporated in our Code; but, it is provided by section 726, *ante*, that the manner of making up the record shall be subject to any such alterations in the present mode as may, from time to time, be prescribed by any rules of the Superior Courts of Criminal Jurisdiction; and it may, by some of the Courts, be found advisable to adopt the Crown Book above suggested by the Royal Commissioners.

**742. Appeal in criminal cases.** — An appeal from the verdict or judgment of any court or judge having jurisdiction in criminal cases or of a Magistrate proceeding under section seven hundred and eighty-five, (11) on the trial of any person for an indictable offence, shall lie upon the application of such person *if convicted*, to the Court of Appeal in the cases hereinafter provided for, and in no others.

2. Whenever the Judges of the Court of Appeal are unanimous in deciding an appeal brought before the said court their decision shall be final. If any of the judges dissent from the opinion of the majority, an appeal shall lie from such decision to the Supreme Court of Canada as hereinafter provided.

The right of appeal, under this section and under section 750, *post*, to the Supreme Court of Canada is restricted to cases where there has been an *affirmance* by the Court of Criminal Appeal, and where such affirmance is not unanimous but dissented from by one or more of the judges of the latter Court. (12)

An order made by the presiding judge of a court of criminal jurisdiction awarding costs against a private prosecutor in respect of an indictment for assault on which indictment the Grand Jury found no bill is not subject to review by or appeal to the Court *en banc*. (13)

**743. Writs of error abolished. — Reserving questions of law.**— No proceeding in error shall be taken in any criminal case BEGUN AFTER THE COMMENCEMENT OF THIS ACT:

2. The Court before which any accused person is tried may, either during or after the trial, reserve *any question of law* arising either *on* the trial or on any of the proceedings *preliminary, subsequent*, or *incidental* thereto, or arising out of the direction of the judge, for the opinion of the Court of Appeal in manner hereinafter provided.

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(11) Section 785, *post* relates to summary trials of indictable offences, by police magistrates, in Ontario, and in cities and incorporated towns in other parts of Canada.
(12) R. v. Viau, 2 Can. Cr. Cas., 540.
(13) R. v. Mosher, 3 Can. Cr. Cas., 312.

3. EITHER THE PROSECUTOR OR THE ACCUSED may, during the trial, either orally or in writing, apply to the Court to reserve any such question as aforesaid, and the Court, if it refuses so to reserve it, shall nevertheless take a note of such objection.

4. After a question is reserved the trial shall proceed as in other cases.

5. If the result is a conviction, the Court may in its discretion respite the execution of the sentence or postpone sentence till the question reserved has been decided, and shall in its discretion commit the person convicted to prison or admit him to bail, with one or two sufficient sureties, in such sums as the Court thinks fit, to surrender at such time as the Court directs.

6. If the question is reserved, a case shall be stated for the opinion of the Court of Appeal.

This section gives the Court power to reserve for the opinion of the Court of Appeal questions of law arising either *on the trial* or on any of the proceedings *preliminary, subsequent* or *incidental* thereto, or arising out of the direction of the judge.

In an English case, where a prisoner had pleaded guilty, the Judge, — having, after leaving the Assize town, had his attention called to an unreported case which, if it was law, showed that the indictment to which the plea of guilty had been so pleaded was bad, — thereupon stated a case for the opinion of the Court for Crown Cases Reserved; and it was held, that, although the prisoner had pleaded guilty, the question of whether the indictment was bad was a question arising on the trial, so as to give the Court of Crown Cases Reserved jurisdiction to decide it. (14)

A reserved case may be granted at any time, however remote from the date of trial or judgment, if it is still possible that some beneficial result may accrue to the prisoner by a decision in his favor. (15)

Whether the udge presiding at the trial had jurisdiction to summarily convict a defendant is a "question of law," under the above section, 743, and may be the subject of a reserved case. (16)

Notice of an application by the Crown for a new trial and of the hearing of a case reserved on the Crown's application, where the accused has been acquitted, should be served upon the accused personally. The authority of the solicitor acting for the accused in the trial proceedings is *prima facie* presumed to have terminated upon the accused's acquittal; and proof of service upon the accused's solicitor is insufficient in the absence of evidence rebutting such presumption. (17)

Where several persons are tried together and convicted of an offence, and, at the trial, evidence which equally affects each prisoner is wrongly admitted, it has been held that, the Court of Crown Cases Reserved has jurisdiction, — upon a case reserved, — to quash the conviction against each of the prisoners, although, by the case stated, the opinion of the Court, — as to the admissibility of the evidence and the legality of the conviction, — is asked with reference to one only of the prisoners. (18)

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(14) R. v. Brown, 24 Q. B. D., 357; 59 L. J., M. C., 47.
(15) R. v. Paquin, 2 Can. Cr. Cas., 134.
(16) *Ib.*
(17) R. v. Williams, 3 Can. Cr. Cas., 9.
(18) R. v. Saunders, (No. 2), 68 L. J., Q. B., 296; [1899] 1 Q. B., 490.

**744. Appeal when no question is reserved.** — (As amended by the *Criminal Code Amendment Act 1900*). If the Court refuses to reserve the question, the PARTY APPLYING may move the Court of Appeal as hereinafter provided.

2. The Attorney General or party so applying may on notice of motion to be given to the accused or prosecutor, as the case may be, move the Court of Appeal for leave to appeal. The Court of Appeal may, upon the motion and upon considering such evidence (if any) as they think fit to receive, grant or refuse such leave.

3. If leave to appeal is granted, a case shall be stated for the opinion of the Court of Appeal as if the question had been reserved.

4. If the sentence is alleged to be one which could not by law be passed, either party may without leave, upon giving notice of motion to the other side, move the Court of Appeal to pass a proper sentence.

5. If the Court has arrested judgment, and refused to pass any sentence, the prosecutor may, *without leave*, make such a motion.

It will be seen from the wording of these two sections 743 and 744, and of section 746, *post*, that on points of law, an equal appeal is given to the Crown and to the accused. But, in regard to questions of fact it will be seen, by section 747, as well as by clauses (*d*) and (*e*) of section 746, *post*, that the right to move for a new trial is not given to the Crown, but only to a convicted defendant.

**745. Evidence for Court of Appeal.** — On any appeal or application for a new trial, the court before which the trial was had shall, if it thinks necessary, or if the Court of Appeal so desires, send to the Court of Appeal a copy of the whole or of such part as may be material of the evidence or the notes taken by the judge or presiding justice at the trial. The Court of Appeal may, if only the judge's notes are sent and it considers such notes defective, refer to such other evidence of what took place at the trial as it may think fit. The Court of Appeal may in its discretion send back any case to the Court by which it was stated to be amended or re-stated. R.S.C., c. 174, s. 264.

**746. Powers of Court of Appeal.** — Upon the hearing of any appeal under the powers hereinbefore contained, the Court of Appeal may —

(*a*) confirm the ruling appealed from; or

(*b*) if of opinion that the ruling was erroneous, and that there has been a mis-trial in consequence, direct a new trial; or

(*c*) if it considers the sentence erroneous or the arrest of judgment erroneous, pass such a sentence as ought to have been passed or set aside any sentence passed by the court below, and remit the

case to the court below with a direction to pass the proper sentence; or

(*d*) if of opinion in a case in which the accused has been convicted that the ruling was erroneous, and that the accused ought to have been acquitted, direct that the accused shall be discharged, which order shall have all the effects of an acquittal; or

(*e*) direct a new trial; or

(*f*) make such other order as justice requires: Provided that no conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, *unless in the opinion of the Court of Appeal some substantial wrong or miscarriage was thereby occasioned* on the trial: Provided that if the Court of Appeal is of opinion that any challenge for the defence was improperly disallowed, a new trial shall be granted.

2. If it appears to the Court of Appeal that such wrong or miscarriage affected some count only of the indictment, the Court may give separate directions as to each count and may pass sentence on any count unaffected by such wrong or miscarriage which stands good, or may remit the case to the court below with directions to pass such sentence as justice may require.

3. The order or direction of the Court of Appeal shall be certified under the hand of the presiding Chief Justice or senior puisne judge to the proper officer of the court before which the case was tried, and such order or direction shall be carried into effect. R.S.C., c. 174, s. 263.

In England, it has been held that if some evidence has been improperly admitted, the conviction is bad, although there was sufficient other evidence upon which to base a conviction. (19)

In Canada, it has been held that the intention of the above section, 746, is that the improper admission of evidence in a criminal trial does not, *of itself*, constitute a reason for granting a new trial, and does not necessarily amount, of itself, to "substantial wrong or miscarriage," but that it is a question for the Court, upon the hearing of any appeal, whether, in the particular case, it does so or not. (20)

Where, on a charge of pocket picking, tried under the sections relating to *Speedy Trials*, the evidence in the opinion of the Court of Appeal, goes no further than to support a suspicion of guilt and lacks the material ingredients necessary to establish proof of guilt, the conviction will be quashed on an appeal under the above section, 746. (21)

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(19) R. v. Gibson, 18 Q. B. D., 537; Connor v. Kent, (1891) 2 Q. B., 547; Makin v. Atty.-Gen. of N. S. W., [1894] A. C., 57. And see, to the same effect, 29 N. S. R., 462.

(20) R. v. Woods, 5 B. C. R., 585; Can. Ann. D'g., (1898) 126; 2 Can. Cr. Cas., 159. *(Makin v. Atty.-Gen. of N. S. W., distinguished.)*

(21) R. v. Winslow, 3 Can. Cr. Cas., 215.

If a defendant omit to challenge a juror for cause of hostile feeling against him, he cannot, after a verdict of guilty, ask on that ground for the quashing of the verdict and to have a new trial; and when the private prosecutor and one of the jurors have, during an adjournment in the course of the trial, had an unpremeditated and innocent conversation which could not bias the juror's mind, although such conversation is improper, it cannot have the effect of avoiding the verdict and of constituting a good ground for allowing a new trial. (22)

**747. Application for a New Trial.** — After the *conviction* of any person for any indictable offence, the Court before which the trial takes place may, either during the sitting or afterwards, give leave to the person convicted to apply to the Court of Appeal for a new trial on the ground that the verdict was against the weight of evidence. The Court of Appeal may, upon hearing such motion, direct a new trial if it thinks fit.

2. In the case of a trial before a Court of General or Quarter Sessions such leave may be given, during or at the end of the session, by the judge or other person who presided at the trial.

It is the province of the jury, after taking into consideration the circumstances of a case and the character and demeanor of the witnesses, to discredit some of the witnesses and reject their evidence and to believe others and accept their evidence; and when there is a conflict in the evidence, but, there is some evidence to support the verdict it cannot be judicially maintained that the verdict is against the weight of evidence; and it is only an absolute failure of evidence to sustain the verdict that can be a ground for a new trial. (23)

When, however, there is no conflict of evidence and it tends indubitably in a direction favorable to the defendant, or does not establish his guilt, a verdict convicting him would not be supported by nor be based upon proper evidence, and would manifestly be against the weight of evidence. (24)

**748. New Trial by order of the Minister of Justice.** — If upon any application for the mercy of the Crown, on behalf of any person *convicted* of an indictable offence, the Minister of Justice entertains a doubt whether such person ought to have been convicted, he may, instead of advising Her Majesty to remit or commute the sentence, after such inquiry as he thinks proper, by an order in writing direct a new trial at such time and before such Court as he may think proper.

See Remarks of Royal Commissioners on this subject set out at pp. 666, and 667, *ante*.

It will be seen, by the terms of sections 747 and 748, that no new trial can be granted in favor of the Crown, but only in favor of a convicted defendant on the grounds in these sections mentioned.

**749. Intermediate effects of appeal.** — The sentence of a Court shall not be suspended by reason of any appeal, unless the Court

(22) R. v. Harris, 2 Can. Cr., 75.
(23) R. v. Harris, 2 Can. Cr. Cas., 75; Que. Jud. Rep., 7 Q. B, 569.
(24) *Ib.*

expressly so directs, except where the sentence is that the accused suffer death, or whipping. The production of a certificate from the officer of the Court that a question has been reserved, or that leave has been given to apply for a new trial, or of a certificate from the Attorney-General that he has given leave to move the Court of Appeal, or of a certificate from the Minister of Justice that he has directed a new trial, shall be a sufficient warrant to suspend the execution of any sentence of death or whipping.

2. In all cases it shall be in the discretion of the Court of Appeal in directing a new trial to order the accused to be admitted to bail.

**750. Appeal to Supreme Court of Canada.** — Any person convicted of any indictable offence, *whose conviction has been affirmed* on an appeal taken under section seven hundred and forty-two may appeal to the Supreme Court of Canada against the affirmance of such conviction; and the Supreme Court of Canada shall make such rule or order thereon, either, in affirmance of the conviction or for granting a new trial, or otherwise, or for granting or refusing such application, as the justice of the case requires, and shall make all other necessary rules and orders for carrying such rule or order into effect: Provided that no such appeal can be taken if the Court of Appeal is unanimous in affirming the conviction, nor unless notice of appeal in writing has been served on the Attorney-General within fifteen days after such affirmance or such further time as may be allowed by the Supreme Court of Canada or a judge thereof.

2. Unless such appeal is brought on for hearing by the appellant at the session of the Supreme Court during which such affirmance takes place, or the session next thereafter if the said court is not then in session, the appeal shall be held to have been abandoned, unless otherwise ordered by the Supreme Court or a Judge thereof.

3. The judgment of the Supreme Court shall, in all cases, be final and conclusive. 50-51 V., c. 50, s. 1.

We have already seen that the right of appeal to the Supreme Court of Canada is restricted to cases where there has been an *affirmance* by the provincial Court of Appeal and where such affirmance has not been unanimous, but, has been dissented from by one or more of the judges of the latter Court. (25)

Where a motion for a reserved case, made on two grounds, was refused by the trial judge, and, on appeal to the Court of Queen's Bench of the province of Quebec, Appeal Side, the latter Court was unanimous in affirming the decision of the trial judge as to one of the two grounds, but, were not unanimous as to the other, it was held that, an appeal to the Supreme Court of Canada could only be based on the ground as to which there was a dissent. (26)

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(25) See R. v. Viau, *cit.* at p. 859, *ante*.
(26) R. v. McIntosh, 14 C. L. T., 329; 23 S. C. R., 180.

**751. Appeals to Privy Council Abolished.** — Notwithstanding any royal prerogative, or anything contained in *The Interpretation Act* or in *The Supreme and Exchequer Courts Act*, no appeal shall be brought in any criminal case from any judgment or order of any court in Canada to any court of appeal or authority, by which in the United Kingdom appeals or petitions to Her Majesty in Council may be heard. 51 V., c. 43, s. 1.

This is a re-enactment, *verbatim*, of 51 Vict., c. 43, sec. 1.

## PART LIII.

## SPECIAL PROVISIONS.

**752. Further detention of person accused.**—Whenever any person in custody charged with an indictable offence has taken proceedings before a judge or criminal Court having jurisdiction in the premises by way of *certiorari*, *habeas corpus* or otherwise, to have the legality of his imprisonment inquired into, such judge or Court may, with or without determining the question, make an order for the further detention of the person accused, and direct the judge or justice under whose warrant he is in custody, or any other judge or justice to take any proceedings, hear such evidence, or do such further act as in the opinion of the Court or judge may best further the ends of justice.

This section is to be applied only to cases where the *habeas corpus* issues in the same province in which the magistrates' warrant of arrest or commitment has issued; so that a Court or a Judge in Ontario would have no jurisdiction over a justice or a judge in the province of Quebec, whereby the latter could or would be required or compelled "to take any proceedings, hear such evidence," etc. (1)

**753. Reserve of final decision on questions raised at Trial.** — Any judge or other person presiding at the sittings of a Court at which any person is tried for an indictable offence under this Act, whether he is the judge of such Court or is appointed by commission or otherwise to hold such sittings, may reserve the giving of his final decision on questions raised at the trial; and his decision, whenever given, shall be considered as if given at the time of the trial. R.S.C., c. 174, s. 269.

PROVISIONS AS TO ONTARIO.

**754. Practice in High Court of Justice in Ontario.** — The practice and procedure in all criminal cases and matters in the High Court of Justice of Ontario which are not provided for in this Act,

(1) R. v. Defries & R. v. Tamblyn, 1 Can. Cr. Cas., 207; 14 C. L. T., 513; 25 O. R., 645.

shall be the same as the practice and procedure in similar cases and matters heretofore. R.S.C., c. 174, s. 270.

**755. Commission of Court of Assize, etc., in Ontario.** — If any general commission for the holding of a Court of Assize and *nisi prius*, Oyer and Terminer or general gaol delivery is issued by the Governor-General for any county or district in the province of Ontario, such commission shall contain the names of the Justices of the Supreme Court of Judicature for Ontario, and may also contain the names of the Judges of any of the County Courts in Ontario, and of any of Her Majesty's counsel learned in the law duly appointed for the province of Upper Canada, or for the province of Ontario, and if any such commission is for a provisional judicial district, such commission may contain the name of the judge of the district court of the said district.

2. The said courts shall be presided over by one of the justices of the said Supreme Court, or in their absence by one of such county court judges or by one of such counsel, or in the case of any such district by the judge of such district court. R.S.C., c. 174, s. 271.

**756. Court of General Sessions, in Ontario.**—It shall not be necessary for any Court of General Sessions in the province of Ontario to deliver the gaol of all prisoners who are confined upon charges of theft, but the Court may leave any such cases to be tried at the next Court of Oyer and Terminer and general gaol delivery, if, by reason of the difficulty or importance of the case, or for any other cause, it appears to it proper so to do. R.S.C., c. 174, s. 272.

**757. Time for pleading to indictment in Ontario.** — If any person is prosecuted in any division of the High Court of Justice for Ontario for any indictable offence by information there filed, or by indictment there found or removed into such Court, and appears therein in term time in person, or, in case of a corporation, by attorney, to answer to such information or indictment, such defendant, upon being charged therewith, shall not imparl to a following term, but shall plead or demur thereto within four days from the time of his appearance; and in default of his pleading or demurring within four days as aforesaid judgment may be entered against such defendant for want of a plea. R.S.C., c. 174, s. 273.

**758. Rule to Plead.** — If such defendant appears to such information or indictment by attorney, he shall not imparl to a following term, but a rule, requiring him to plead, may forthwith be given and served, and a plea to such information or indictment may be enforced, or judgment in default may be entered in the same manner as might have been done formerly in cases in which

the defendant had appeared to such information or indictment by attorney in a previous term; but the Court, or any Judge thereof, upon sufficient cause shown for that purpose, may allow further time for such defendant to plead or demur to such information or indictment. R.S.C., c. 174, s. 274.

**759. Delay in prosecution, in Ontario.** — If any prosecution for an indictable offence, instituted by the Attorney-General for Ontario in the said court, is not brought to trial within twelve months next after the plea of not guilty has been pleaded thereto, the Court in which such prosecution is depending, upon application made on behalf of any defendant in such prosecution of which application twenty days' previous notice shall be given to such Attorney-General, may make an order authorizing such defendant to bring on the trial of such prosecution; and thereupon such defendant may bring on such trial accordingly unless a *nolle prosequi* is entered to such prosecution. R.S.C., c. 174, s. 275.

PROVISIONS AS TO NOVA SCOTIA.

**760. Calendar of criminal cases in Nova Scotia.** — In the province of Nova Scotia a calendar of the criminal cases shall be sent by the clerk of the Crown to the Grand Jury in each term, together with the depositions taken in each case and the names of the different witnesses. (As amended by the *Criminal Code Amendment Act 1900*).

The amendment made, in this section, by the *Criminal Code Amendment Act, 1900*, consisted in striking out, at the end thereof, the words, "and the indictments shall not be made out, except in Halifax, until the Grand Jury so directs."

Before this amendment was made, it was held, in Nova Scotia, that the provisions of this section, as it then stood, made it unnecessary in that province (Halifax excepted) that the words "true bill" as well as the signature of the foreman of the Grand Jury should be endorsed on a bill of indictment. So, that, where an indictment was endorsed with the name of the cause, and, over the signature of the foreman of the Grand Jury were the words, "indictment for an assault on a peace officer and for resisting and preventing apprehension and detainer," — the words "a true bill" not appearing, — it was held sufficient, and that the signature of the foreman on the back of the indictment could only signify a true bill. (2)

**761. Criminal sentence in Nova Scotia.** — A judge of the Supreme Court of Nova Scotia may sentence convicted criminals on any day of the sittings at Halifax, as well as in term time. R.S.C., c. 174, s. 277.

(2) R. v. Townsend, 28 N. S. R., 468; 3 Can. Cr. Cas., 29.

## PART LIV.

## SPEEDY TRIALS OF INDICTABLE OFFENCES.

**762. Application.** — The provisions of this part do not apply to the North-West Territories or the District of Keewatin. 52 V., c. 47, s. 3.

**763. Meanings of expressions.** — In this part, unless the context otherwise requires, —

(*a*) the expression "Judge" means and includes, —

(i) In the province of Ontario any judge of a county or district court, junior judge or deputy judge authorized to act as chairman of the general sessions of the peace. (As amended by 58-59 Vic., c. 40).

(ii) in the province of QUEBEC, in any district wherein there is a judge of the sessions, such judge of sessions, and in any district wherein there is no judge of sessions but wherein there is a district magistrate, such district magistrate, and in any district wherein there is neither a judge of sessions nor a district magistrate, the sheriff of such district;

(iii) in each of the provinces of NOVA SCOTIA, NEW BRUNSWICK and PRINCE EDWARD ISLAND, any judge of a county court;

(iv) in the province of MANITOBA the Chief Justice or a puisne judge of the Court of Queen's Bench, or any judge of a county court;

(v) in the province of BRITISH COLUMBIA the Chief justice or a puisne judge of the Supreme Court, or any judge of a county court;

(*b*) the expression "County Attorney" or "Clerk of the Peace" includes in the province of Ontario the County Crown Attorney, in the Provinces of Nova Scotia, New Brunswick and Prince Edward Island, any clerk of a county court, and in the Province of Manitoba, any Crown Attorney, the Prothonotary of the Court of Queen's Bench, and any Deputy Prothonotary thereof, any deputy Clerk of the Peace, and the deputy Clerk of the Crown and Pleas for any district in the said province. 52 V., c. 47, s. 2. (As amended by the *Criminal Code Amendment Act 1900*).

In the province of Quebec, the sheriff of a district, for which there is a district magistrate, has no jurisdiction to try a prisoner under this Part. (1)

(1) R. v. Paquin, Que. Jud. Rep., 7 Q. B., 319; 2 Can. Cr. Cas., 134.

**764. Judge to be a Court of Record.** — The judge sitting on any trial under this part for all the purposes thereof and proceedings connected therewith or relating thereto, shall be a Court of Record, and in every province of Canada, except the province of Quebec, such Court shall be called. "The County Court Judge's Criminal Court" of the county or union of counties or judicial district in which the same is held.

2. The record in any such case shall be filed among the records of the Court over which the judge presides, and as part of such records. 52 V., c. 47, s. 4.

**765. Offences triable under this part.** — Every person committed to gaol for trial on a charge of being guilty of any of the offences which are mentioned in section 539 as being within the jurisdiction of the General or Quarter Sessions of the Peace, may, with his own consent (of which consent an entry shall then be made of record), and subject to the provisions herein, be tried in any province under the following provisions out of sessions and out of the regular term or sittings of the Court, whether the Court before which, but for such consent, the said person would be triable for the offence charged, or the Grand Jury thereof, is or is not then in session, and if such person is convicted, he may be sentenced by the judge.

2. A person who has been bound over by a justice under the provisions of section 601 and has either been unable to find bail or been surrended by his sureties, and is in custody on such a charge, or who is otherwise in custody awaiting trial on such a charge, shall be deemed to be committed for trial within the meaning of this section. (Added by the *Criminal Code Amendment Act 1900*).

See section 785, *post*, for special provisions as to the summary trial before a police magistrate, etc., of persons *charged* with offences triable in a Court of General or Quarter Sessions of the Peace.

Before the amendment made, to the above section, 765, by the addition of sub-section 2, it had been held, by the Supreme Court of Nova Scotia, that the section only applied to cases where the accused was committed for trial under section 596, *ante*, and not to the other cases to which it is now extended by the added sub-section. (2)

It was however held, in British Columbia, before the above amendment, that a person who is accused of an indictable offence, and who has been admitted to bail under section 601, and is, afterwards, surrendered by his sureties, has a right to a speedy trial to the same extent as if the magistrate had committed him for trial under section 590. (3)

Before the coming into force of the Code it was held that where there had been a committal for trial and the defendants were under bail their sur-

(2) R. v. Gibson, 29 N. S. R., 4; 3 Can. Cr. Cas., 451; R. v. Smith, 31 N. S. R., 411; 3 Can. Cr. Cas., 467.

(3) R. v. Lawrence, 5 B. C. R., 160; 1 Can. Cr. Cas., 295.

render, including the surrender of himself by one of the defendants, who was out on his personal bail, had the effect of remitting them to custody and enabled them to elect summary trial under the *Speedy Trials Act*; and it was held that, where the defendants had so elected, indictments subsequently laid against them at the *Assizes* instead of their being tried under the *Speedy Trials Act*, were bad, and were quashed, even after plea pleaded, it being shewn that the defendants had pleaded through inadvertence. (4)

**766. Duty of Sheriff after committal of accused.** — Every sheriff shall, within twenty-four hours after any prisoner charged as aforesaid is committed to gaol for trial, notify the judge in writing that such prisoner is so confined, stating his name and the nature of the charge preferred against him, whereupon, with as little delay as possible, such judge shall cause the prisoner to be brought before him. 52 V., c. 47, s. 6.

2. Where the judge does not reside in the county in which the prisoner is committed, the notification required by this section may be given to the prosecuting officer, instead of to the judge, and the prosecuting officer shall in such case, with as little delay as possible, cause the prisoner to be brought before him. (Added by the *Criminal Code Amendment Act 1900*).

**767. Arraignment of accused before Judge.** — The judge, or prosecuting officer upon having obtained the depositions on which the prisoner was so committed, shall state to him, —

(*a*) that he is charged with the offence, describing it;

(*b*) that he has the option to be forthwith tried before a judge without the intervention of a Jury, or to remain in custody or under bail, as the Court decides, to be tried in the ordinary way by the Court having criminal jurisdiction.

2. If the prisoner has been brought before the prosecuting officer, and consents to be tried by the judge, without a jury, such prosecuting officer shall forthwith inform the judge, and the judge shall thereupon fix an early day for the trial and communicate the same to the prosecuting officer; and in such case the trial shall proceed in the manner provided by sub-section 3.

3. If the prisoner has been brought before the judge and consents to be tried by him without a jury, the prosecuting officer shall prefer the charge against him for which he has been committed for trial, and if, upon being arraigned upon the charge, the prisoner pleads guilty, the prosecuting officer shall draw up a record as nearly as may be in one of the forms MM or NN in schedule one, (5) such plea shall be entered on the record, and the judge shall pass the sentence of the law on such prisoner, which shall have the same force and effect as if passed by any court having jurisdiction to try the offence in the ordinary way.

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(4) R. v. Burke et al, 13 C. L. T., 365; 24 O. R., 64.
(5) For Forms MM and NN, see pp. 875 and 876, *post*.

4. If the prisoner demands a trial by jury, he shall be remanded to jail.

5. Any prisoner who has elected to be tried by jury, may notwithstanding such election, at any time before such trial has commenced, and whether an indictment has been preferred against him or not, notify the sheriff that he desires to re-elect, and it shall thereupon be the duty of the sheriff and judge or prosecuting officer to proceed as directed by section 766, and thereafter unless the judge, or the prosecuting officer acting under subsection 2 of that section, is of opinion that it would not be in the interests of justice that the prisoner should be allowed to make a second election, the prisoner shall be proceed against as if his first election had not been made. (As amended by the *Criminal Code Amendment Act 190*).

Before the amendment of this section by the addition of subsection 5, it had been held in Ontario that where an accused, on being arraigned before a County Court judge elected trial by jury, he had no absolute right, after being remanded to gaol, to change his election so made; (6) although a different decision was rendered in British Columbia. (7)

**768. Persons jointly accused.** — If one of two or more prisoners charged with the same offence demands a trial by Jury, and the other or others consent to be tried by the judge without a Jury, the judge, in his discretion, may remand all the said prisoners to gaol to await trial by a Jury. 52 V., c. 47, s. 8.

**769. Election after refusal to be tried by Judge.** — If under Part LV. (8) or Part LVI., (9) any person has been asked to elect whether he would be tried by the magistrate or justices of the peace, as the case may be, or before a Jury, and he has elected to tried before a Jury, and if such election is stated in the warrant of committal for trial, the sheriff and judge shall not be required to take the proceedings directed by this part. 52 V., c. 47, s. 9.

2. But if such person, after his said election to be tried by a Jury, has been committed for trial he may, at any time before the regular term or sittings of the Court at which such trial by Jury would take place, notify the sheriff that he desires to re-elect; whereupon it shall be the duty of the sheriff to proceed as directed by section seven hundred and sixty-six, and thereafter the person so committed shall be proceeded against as if his said election in the first instance had not been made. 53 V., c. 37, s. 30.

(6) R. v. Ballard, 17 C. L. T., 257; 28 O. R., 489; 1 Can. Cr. Cas., 96.
(7) R. v. Prevost, 4 B. C. R., 326.
(8) Part LV. (comprising sections 782-808, relates to Summary Trials of Indictable offences.
(9) Part LVI (comprising sections 809-831), relates to Trial of Juvenile Offenders for Indictable offences.

**770. Continuance of proceedings before another judge.** — Proceedings under this part commenced before any judge may, where such judge is for any reason unable to act, be continued before any other judge competent to try prisoners under this part in the same judicial district, and such last mentioned judge shall have the same powers with respect to such proceedings as if such proceedings had been commenced before him, and may cause such portion of the proceedings to be repeated before him as he shall deem necessary. 53 V., c. 37, s. 30.

**771. Election after committal under part LV or LVI.** — If, on the trial under Part LV. or Part LVI. of this Act of any person charged with any offence triable under the provisions of this part, the magistrate or justices of the peace decide not to try the same summarily, but commit such person for trial, such person may afterwards, with his own consent, be tried under the provisions of this part. 52 V., c. 47, s. 10.

**772. Trial of accused.**—If the prisoner upon being so arraigned and consenting as aforesaid pleads not guilty the judge shall appoint an early day, or the same day, for his trial, and the county attorney or clerk of the peace shall subpœna the witnesses named in the depositions, or such of them and such other witnesses as he thinks requisite to prove the charge, to attend at the time appointed for such trial, and the judge may proceed to try such prisoner, and if he be found guilty sentence shall be passed as hereinbefore mentioned; but if he be found not guilty the judge shall immediately discharge him from custody, so far as respects the charge in question. 52 V., c. 47, s. 11.

Although a preliminary enquiry held by a magistrate on a statutory holiday and a commitment for trial on such a day are bad in law, (10) it has been held that if the accused after such commitment elects trial at the County judges Criminal Court and pleads there to the charge and is convicted, the conviction is not invalidated because of the invalidity of the commitment for trial. (11)

**773. Trial of offences other than those for which accused is committed.** — The county attorney or clerk of the peace or other prosecuting officer may, with the consent of the judge, prefer against the prisoner a charge or charges for any offence or offences for which he may be tried under the provisions of this part other than the charge or charges for which he has been committed to gaol for trial, although such charge or charges do not appear or are not mentioned, in the depositions upon which the prisoner was so committed. 52 V., c. 47, s. 12.

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(10) See R. v. Cavalier, 1 Can. Cr. Cas., 134, cit. p. 721, *ante*.
(11) R. v. Murray, 17 C. L. T., 381; 28 O. R., 549; 1 Can. Cr. Cas., 452.

**774. Powers of Judge.** — The judge shall, in any case tried before him, have the same power as to acquitting or convicting, or convicting of any other offence than that charged, as a Jury would have in case the prisoner were tried at a sitting of any Court mentioned in this part, and may render any verdict which may be rendered by a Jury upon a trial at a sitting of any such Court. 52 V., c. 47, s. 13.

A defendant, having been committed for trial on a charge of larceny, elected a speedy trial, and was tried accordingly, and acquitted. After his acquittal, and, while the defendant was still in custody, the prosecuting attorney applied for and obtained leave to prefer and thereupon preferred another charge, upon which the defendant had not been committed for trial. The defendant elected a speedy trial on the second charge, and was tried and convicted. *Held*, on a case reserved, that inasmuch as the defendant was tried and acquitted on the only charge on which he was committed, and inasmuch as the matter was thus completely disposed of, the judge had no further jurisdiction, and that the defendant was entitled to his discharge. (12)

**775. Admission to Bail.** — If a prisoner elects to be tried by the judge without the intervention of a Jury the judge may, in his discretion, admit him to bail to appear for his trial, and extend the bail, from time to time, in case the Court be adjourned or there is any other reason therefor; and such bail may be entered into and perfected before the clerk. 52 V., c. 47, s. 14.

**776. Bail in case of election of trial by Jury.** — If a prisoner elects to be tried by a Jury the judge may, instead of remanding him to gaol, admit him to bail, to appear for trial at such time and place and before such Court as is determined upon, and such bail may be entered into and perfected before the clerk. 52 V., c. 47, s. 15.

**777. Adjournment.** — The judge may adjourn any trial from time to time until finally terminated. 52 V., c. 47, s. 16.

Notwithstanding the power of adjournment given by this section, it has been held that it is not competent for a judge, who tries a case under this Part, to postpone his decision thereon until he has heard the evidence on several other charges against the same accused and to then decide the question of guilt in all. To interject one trial into another trial of the same accused person for another offence is a proceeding which prejudices his defence and entitles him to a new trial upon both charges. (13)

**778. Powers of amendment.** — The judge shall have all powers of amendment which any Court mentioned in this part would have if the trial was before such Court. 52 V., c. 47, s. 17.

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(12) R. v. Lonar, 14 C. L. T., 174; 25 N. S. R., 124. And see R. v. Smith, 14 C. L. T., 175; 25 N. S. R., 138; and R. v. Morgan, 2 B. C. R., 329.

(13) R. v. McBerny, 3 Can. Cr. Cas., 339.

**779. Recognizance to prosecute or give evidence.** — Any recognizance taken under section five hundred and ninety-eight of this Act, for the purpose of binding a prosecutor or a witness, shall, if the person committed for trial elects to be tried under the provisions of this part, be obligatory on each of the persons bound thereby, as to all things therein mentioned with reference to the trial by the Judge under this part, as if such recognizance had been originally entered into for the doing of such things with reference to such trial: Provided, that at least forty-eight hours' notice in writing shall be given, either personally or by leaving the same at the place of residence of the persons bound by such recognizance as therein described, to appear before the Judge at the place where such trial is to be had. 53 V., c. 37, s. 29.

**780. Witnesses to attend throughout trial.** — Every witness whether on behalf of the prisoner or against him, duly summoned or subpœnaed to attend and give evidence before such judge, sitting on any such trial, on the day appointed for the same, shall be bound to attend and remain in attendance throughout the trial; and if he fails so to attend he shall be held guilty of contempt of court, and may be proceeded against therefor accordingly. 52 V., c. 47, s. 18.

**781. Compelling attendance of Witnesses.** — Upon proof to the satisfaction of the judge of the service of subpœna upon any witness who fails to attend before him, as required by such subpœna, and upon such Judge being satisfied that the presence of such witness before him is indispensable to the ends of justice, he may, by his warrant, cause the said witness to be apprehended and forthwith brought before him to give evidence as required by such subpœna, and to answer for his disregard of the same; and such witness may be detained on such warrant before the said Judge, or in the common gaol, with a view to secure his presence as a witness; or, in the discretion of the Judge, such witness may be released on recognizance with or without sureties, conditioned for his appearance to give evidence as therein mentioned, and to answer for his default in not attending upon the said subpœna, as for a contempt; and the Judge may, in a summary manner, examine into and dispose of the charge of contempt against the said witness who, if found guilty thereof, may be fined or imprisoned, or both, such fine not to exceed one hundred dollars, and such imprisonment to be in the common gaol, with or without hard labour, and not to exceed the term of ninety days, and he may also be ordered to pay the costs incident to the execution of such warrant and of his detention in custody.

2. Such warrant may be in the form OO (14) and the conviction

(14) For Form OO, see p. 876, *post*.

for contempt in the form PP in schedule one to this Act, (15) and the same shall be authority to the persons and officers therein required to act to do as therein they are respectively directed. 52 V., c. 47, s. 19.

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## FORMS UNDER PART LIV.

FROM SCHEDULE ONE.

MM. — (*Section 767*).

FORM OF RECORD WHEN THE PRISONER PLEADS NOT GUILTY.

Canada, }
Province of , }
County of }

Be it remembered that A. B. being a prisoner in the gaol of the said county, committed for trial on a charge of having on day of , in the year , stolen, &c. (*one cow, the property of* C. D., *or as the case may be, stating briefly the offence*) and having been brought before *me* (*describe the Judge*) on the day of , in the year , and asked by me if he consented to be tried before me without the intervention of a jury, consented to be so tried; and that upon the day of , in the year , the said A. B., being again brought before me for trial, and declaring himself ready, was arraigned upon the said charge and pleaded not guilty; and after hearing the evidence adduced, as well in support of the said charge as for the prisoner's defence (*or as the case may be*), I find him to be guilty of the offence with which he is charged as aforesaid, and I accordingly sentence him to (*here insert such sentence as the law allows and the Judge thinks right*), (*or* I find him not guilty of the offence with which he is charged, and discharge him accordingly).

Witness my hand at , in the county of this day of , in the year

O. K.,
*Judge.*

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(15) For Form PP, see p. 877, *post*.

NN. — (*Section 767*).

FORM OF RECORD WHEN THE PRISONER PLEADS GUILTY.

Canada,
Province of ,
County of .

Be it remembered that A. B. being a prisoner in the gaol of the said county, on a charge of having on the day of in the year , stolen, &c., (*one cow, the property of C. D., or, as the case may be, stating briefly the offence*), and being brought before me (*describe the Judge*) on the day of in the year , and asked by me if he consented to be tried before me without the intervention of a Jury, consented to be so tried; and that the said A. B. being then arraigned upon the said charge, he pleaded guilty thereof, whereupon I sentenced the said A. B. to (*here insert such sentence as the law allows and the Judge thinks right*).

Witness my hand this day of , in the year

O. K.,
*Judge.*

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OO. — (*Section 781*).

WARRANT TO APPREHEND WITNESS.

Canada,
Province of ,
County of

To all or any of the constables and other peace officers in the said county of

Whereas it having been made to appear before me, that E. F., of , in the said county of , was likely to give material evidence on behalf of the prosecution (*or* defence, *as the case may be*) on the trial of a certain charge of (*as theft, or as the case may be*), against A. B., and that the said E. F., was duly subpœnaed (*or* bound under recognizance) to appear on the day of , in the year , at , in the said county at o'clock (forenoon *or* afternoon, *as the case may be*). before me, to testify what he knows concerning the said charge against the said A. B.

And whereas proof has this day been made before me, upon oath of such subpœna having been duly served upon the said E.

F., (*or* of the said E. F. having been duly bound under recognizance to appear before me, *as the case may be*); and whereas the said E. F. has neglected to appear at the trial and place appointed, and no just excuse has been offered for such neglect: These are therefore to command you to take the said E. F. and to bring him and have him forthwith before me, to testify what he knows concerning the said charge against the said A. B., and also to answer his contempt for such neglect.

Given under my hand, this day of , in the year.

O. K.,
*Judge.*

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PP. — (*Section* 781).

CONVICTION FOR CONTEMPT.

Canada,
Province of
County of

Be it remembered that on the day of in the year , in the county of , E. F. is convicted before me, for that he the said E. F. did not attend before me to give evidence on the trial of a certain charge against one A. B. of (*theft or as the case may be*), although duly subpœnaed (*or* bound by recognizance to appear and give evidence in that behalf, *as the case may be*) but made default therein, and has not shown before me any sufficient excuse for such default, and I adjudge the said E. F., for his said offence, to be imprisoned in the common gaol of the county of , at , for the space of there to be kept at hard labour (*and in case a fine is also intended to be imposed, then proceed*), and I also adjudge that the said E. F. do forthwith pay to and for the use of Her Majesty a fine of dollars, and in default of payment, that the said fine, with the cost of collection, be levied by distress and sale of the goods and chattels of the said E. F., (*or in case a fine alone is imposed, then the clause of imprisonment is to be omitted*).

Given under my hand at , in the said county of , the day and year first above mentioned.

O. K.,
*Judge.*

**For the words "Her Majesty" in this form, substitute "His Majesty."**

## PART LV.

## SUMMARY TRIAL OF INDICTABLE OFFENCES.

**782. Definitions.** — In this part, unless the context otherwise requires,

(*a*) the expression "Magistrate" means and includes —

(i) in the provinces of ONTARIO, QUEBEC and MANITOBA, any Recorder, Judge of a County Court, being a Justice of the Peace, Commissioner of Police, Judge of the Sessions of the Peace, Police Magistrate, District Magistrate, or other functionary or tribunal, invested by the proper legislative authority, with power to do alone such acts as are usually required to be done by two or more Justices of the Peace, and acting within the local limits of his or of its jurisdiction;

(ii) in the provinces of NOVA SCOTIA and NEW BRUNSWICK, any Recorder, Judge of a county Court, Stipendiary Magistrate or Police Magistrate, acting within the local limits of his jurisdiction, and any Commissioner of Police and any functionary, tribunal or person invested by the proper legislative authority with power to do alone such acts as are usually required to be done by two or more Justices of the Peace;

(iii) in the provinces of PRINCE EDWARD ISLAND and BRITISH COLUMBIA and in the district of KEEWATIN, any two Justices of the Peace sitting together, and any functionary or tribunal having the powers of two Justices of the Peace;

(iv) in the NORTH-WEST TERRITORIES, any Judge of the Supreme Court of the said territories, any two Justices of the Peace sitting together, and any functionary or tribunal having the powers of two Justices of the Peace;

(v) In all the provinces, where the defendant is charged with any of the offences mentioned in paragraphs (*a*) and (*f*) of section 783, any TWO JUSTICES of the peace sitting together; provided that when any offence is tried by virtue of this sub-paragraph an appeal shall lie from a conviction in the same manner as from summary convictions under part LVIII., and that section 879 and the following sections relating to appeals from such summary convictions shall apply to such appeal. (Added by 58-59 Vic., c. 40).

(*b*) the expression "the common gaol or other place of confinement," in the case of any offender whose age at the time of his conviction does not, in the opinion of the Magistrate, exceed sixteen years, includes any reformatory prison provided for the reception of juvenile offenders in the province in which the conviction referred to takes place, and to which by the law of that province the offender may be sent; and

(*c*) the expression "property" includes everything included under the same expression or under the expression "valuable security," as defined by this Act, and in the case of any "valuable security" the value thereof shall be reckoned in the manner prescribed in this Act. R.S.C., c. 176, s. 2.

Before clause (v) of the above subsection (*a*) was added by the 58-59 Vic., c. 40, there was no appeal from a conviction by two justices of the peace in the case of any of the offences mentioned in subsections (*a*) and (*f*) of section 783. (1) And, since the amendment, it has been held that the right of appeal given by that clause is restricted to trials of such cases before two justices and does not extend to the summary trial of any indictable offence before a recorder, a judge of sessions a police magistrate or any of the other functionaries mentioned in clause (i) of the above subsection (*a*), but that in the case of a summary trial, — before any of these functionaries, — of a person charged with an indictable offence, there is still no right of appeal. (2)

**783. Offences to be dealt with under this Part.**—Whenever any person is charged before a Magistrate,

(*a*) with having committed theft, or obtained money or property by false pretences, or unlawfully received stolen property, and the value of the property alleged to have been stolen, obtained or received, does not, in the judgment of the Magistrate, exceed ten dollars; or

(*b*) with having attempted to commit theft; or

(*c*) with having committed an aggravated assault by unlawfully and maliciously inflicting upon any other person, either with or without a weapon or instrument, any grievous bodily harm, or by unlawfully and maliciously wounding any other person; or

(*d*) with having committed an assault upon any female whatsoever, or upon any male child whose age does not, in the opinion of the Magistrate, exceed fourteen years, such assault being of a nature which cannot, in the opinion of the Magistrate, be sufficiently punished by a summary conviction before him under any other part of this Act, and such assault, if upon a female, not amounting, in his opinion, to an assault with intent to commit a rape; or

(*e*) with having assaulted, obstructed, molested or hindered any peace officer or public officer in the lawful performance of his duty, or with intent to prevent the performance thereof; or

(*f*) with keeping or being an immate, or habitual frequenter of any disorderly house, house of ill-fame or bawdy-house; or

(*g*) with using or knowingly allowing any part of any premises under his control to be used —

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(1) R. v. Nixon, 19 C. L. T., 344. And see R. v. Egan, 11 Man. L. R 134; 16 C. L. T., 130; 1 Can. Cr. Cas., 112.

2 R. v. Racine, 3 Can. Cr. Cas., 446; Que. Jud. Rep., 9 Q. B., 134.

(i) for the purpose of recording or registering any bet or wager, or selling any pool; or

(ii) keeping, exhibiting, or employing, or knowingly allowing to be kept, exhibited or employed, any device or apparatus for the purpose of recording or registering any bet or wager, or selling any pool; or

(*h*) becoming the custodian or depositary of any money, property, or valuable thing staked, wagered or pledged; or

(*i*) recording or registering any bet or wager, or selling any pool, upon the result of any political or municipal election, or of any race, or of any contest or trial of skill or endurance of man or beast, —

the Magistrate may, subject to the provisions hereinafter made, hear and determine the charge in a summary way. R.S.C., c. 176, s. 3.

The offence of theft mentioned in clause (*a*) of this section does not include the indictable offence of stealing from the person punishable under section 344, *ante*; and where, in the case of such a charge, a prisoner consented to be tried by the police magistrate for the city of Hamilton and pleaded guilty and was sentenced to three years imprisonment, it was contended for the defendant on a writ of habeas corpus that there was no power to impose on the prisoner a sentence in excess of that provided by section 785, *post*, namely 6 months, but it was held that the police magistrate had jurisdiction by virtue of section 787, *post*, to inflict the same punishment as if the prisoner had been tried before the Court of General Sessions, namely the punishment provided by section 344, *ante*. (3)

If, upon the summary trial, under this Part, of a charge of theft effected by picking the lock of a locked box on a ship in port, it is shewn that the accused, one of the ship's seamen had access, in common with the other seamen to the place where the box was kept that shortly before the theft he borrowed a small amount of money on the plea of having none, that shortly after the money was missed he had considerably more money on him although in the meantime he had received nothing for wages, that, on the money being missed he had suggested that he should not be suspected, as he had borrowed money from another party named, which latter statement was shewn to be false, such facts constitute legal evidence to support a conviction. But if the trial judge, in making his finding, base such finding upon the theory that, as a matter of law, it would be presumed that it was possible for the accused to shew how he had come by the money in his possession and that the *onus* was upon him to do so, this is an error in law entitling the accused to a new trial. (3*a*)

It has been held, in the province of Quebec, that the above section, 783, does not apply to the offence (mentioned in sections 196 and 198, *ante*), of keeping a common gaming-house, — the meaning of the words "disorderly house" in clause (*f*) of the above section 783 and in section 784, *post*, being governed by the rule "*noscitur a sociis*," and being, therefore, restricted to houses of the nature and kind of a house of ill-fame or bawdy-house associated therewith and that therefore a magistrate has no jurisdiction, (either with or without the consent of the accused),to summarily

(3) R. v. Conlin, 18 C. L. T., 15; 29 O. R., 28; 1 Can. Cr. Cas., 111.
(3*a*) R. v. MacCaffery, 4 Can. Cr. Cas., 193.

try a charge of keeping a common gaming house under sections 196 and 198, but that such a charge may, after a preliminary enquiry, and a commital for trial thereon, be tried under Part 54, *ante*, if the accused elects a speedy trial instead of a trial by jury. (4)

This case is in conflict with a decision rendered in British Columbia, by a Judge of the Supreme Court of that province, to the effect that in the case of a charge of keeping a gaming-house, a police magistrate has, under sections 783 and 784, jurisdiction to hear and determine the charge summarily, without the consent of the accused, and that the exercise of the jurisdiction is, in the discretion of the magistrate, so that he may, if he thinks proper, take the other course, and hold a preliminary examination and commit the accused for trial. (5)

**784. When Magistrate shall have absolute Jurisdiction.** — The jurisdiction of such Magistrate is absolute in the case of any person charged with keeping or being an inmate or habitual frequenter of any disorderly house, house of illfame or bawdy-house, and does not depend on the consent of the person charged to be tried by such Magistrate, nor shall such person be asked whether he consents to be so tried; nor do the provisions of this part affect the absolute summary jurisdiction given to any Justice or Justices of the Peace, in any case by any other Part of this Act. R.S.C., c. 176, s. 4.

2. The jurisdiction of the Magistrate is absolute in the case of any person who, being a seafaring person and only transiently in Canada and having no permanent domicile therein, is charged, either within the city of Quebec as limited for the purpose of the police ordinance, or within the city of Montreal as so limited, or in any other seaport city or town in Canada where there is such Magistrate, with the commission therein of any of the offences hereinbefore mentioned, and also in the case of any other person charged with any such offence on the complaint of any such seafaring person whose testimony is essential to the proof of the offence; and such jurisdiction does not depend on the consent of any such person to be tried by the Magistrate, nor shall such person be asked whether he consents to be so tried. R.S.C., c. 176, s. 5.

3. The jurisdiction of the magistrate in the provinces of Prince Edward Island and British Columbia, and in the North-west Territories, and the district of Keewatin, under this part, is absolute without the consent of the party charged except in cases coming within the provisions of section 785, and except in cases under sections 789 and 790 where the person charged is not a person who under section 784, sub-section 2, can be tried summarily without his consent. (As amended by the *Criminal Code Amendment Act 1900*).

The right of appeal, given by clause (v) of section 782 (as amended by 58-59 Vic., c. 40), from a conviction by two justices under clauses (*a*) and

(4) R. v. France, Que. Jud. Rep., 7 Q. B., 83; 1 Can. Cr. Cas., 321.
(5) *Ex parte* John Cook, 3 Can. Cr. Cas., 72.

(*f*) of section 783, is not taken away in British Columbia, by the amendment, (made by the said 58-59 Vic., c. 40), to the third clause of the above section 784. (6)

**785. Summary trial in certain cases, in Ontario and cities, etc., elsewhere.** — If any person is *charged*, in the province of ONTARIO before a Police Magistrate or before a Stipendiary Magistrate in any county, district or provisional county in such province, with having committed any offence for which he may be tried at a Court of General Sessions of the Peace, or if any person is COMMITTED TO A GAOL in the county, district or provisional county, under the warrant of any Justice of the Peace, for trial on a charge of being guilty of any such offence, such person may, *with his own consent*, be tried before such Magistrate, and may, if found guilty, be sentenced by the Magistrate to the same punishment as he would have been liable to if he had been tried before the Court of General Sessions of the Peace. R.S.C., c. 176, s. 7.

2. This section shall apply also to police and stipendiary magistrates of cities and incorporated towns in every other part of Canada, and to recorders where they exercise judicial functions. (As amended by the *Criminal Code Amendment Act 1900*).

3. Sections 787 and 788 do not extend or apply to cases tried under this section; but where the magistrate has jurisdiction by virtue of this section only, no person shall be summarily tried thereunder without his own consent. (As amended by the *Criminal Code Amendment Act 1900*).

All persons appointed to judicial offices in Canada are required to take oaths of allegiance and of office before acting in their judicial capacity; and a person temporarily appointed to be deputy recorder of Montreal is under this obligation. And, if an accused takes objection at the trial to the want of qualification of the magistrate to act in the case, because of the latter's failure to take such oaths, public acquiescence in the exercise by him of his judicial functions will not avail to make his adjudication binding on the defendant, who has so taken objection at the trial; and the magistrate cannot, as to such defendant, claim to be in the position of a judge *de facto*. (6*a*)

But the failure of a judicial officer to take the oaths of allegiance and of office, — where he has acted as the holder of the office and has been acknowledged and accepted as the duly qualified incumbent thereof by the public, — does not invalidate his judgments in criminal cases in which his qualification has *not* been contested at the time of the trial, his judgments in such cases being valid and building as having been rendered by him as a judge *de facto*. (6*b*)

As to powers of police magistrates in the Yukon, see Extra Appendix E. *post*.

**786. Proceedings on arraignment of accused.** — Whenever the Magistrate, before whom any person is charged as aforesaid, pro-

(6) R. v. Wirth & Reed, 5 B. C. R., 114; 1 Can. Cr. Cas., 231.
(6*a*) *Ex parte* Mainville, 1 Can. Cr. Cas., 528.
(6*b*) *Ex parte* Curry, 1 Can. Cr. Cas., 532.

poses to dispose of the case summarily under the provisions of this part, such Magistrate, after ascertaining the nature and extent of the charge, but before the formal examination of the witnesses for the prosecution, and before calling on the person charged for any statement which he wishes to make, shall state to such person the substance of the charge against him, and (if the charge is not one that can be tried summarily without the consent of the accused) shall then say to him these words, or words to the like effect: "Do you consent that the charge against you shall be tried by me, or do you desire that it shall be sent for trial by a Jury at the (*naming the court at which it can probably soonest be tried*);" and if the person charged consents to the charge being summarily tried and determined as aforesaid, or if the power of the Magistrate to try it does not depend on the consent of the accused, the Magistrate shall reduce the charge to writing and read the same to such person, and shall then ask him whether he is guilty or not of such charge. If the person charged confesses the charge, the Magistrate shall then proceed to pass such sentence upon him as by law may be passed in respect to such offence, subject to the provisions of this Act; but if the person charged says that he is not guilty, the Magistrate shall then examine the witnesses for the prosecution, and when the examination has been completed, the Magistrate shall inquire of the person charged whether he has any defence to make to such charge, and if he states that he has a defence the Magistrate shall hear such defence, and shall then proceed to dispose of the case summarily. R.S.C., c. 176, ss. 8 and 9.

An accused is entitled to be informed of his right to be tried by a jury, when the magistrate's jurisdiction to summarily try him is not absolute; and neither the fact that the accused knows of his right to be so tried nor the fact that the magistrate is aware of the accused's intention to plead guilty can give jurisdiction to convict him, if he pleads guilty without having been informed of his right. (7)

The provisions of section 144, *ante*, fixing,—for the offence of obstructing a peace officer,—one punishment on conviction upon indictment and another punishment upon summary conviction are controlled, as to the latter, by sections 783 and 784, and the charge cannot be summarily tried by a magistrate except with the consent of the accused given in conformity with section 786; and where accused persons were tried by two justices on such a charge without being asked whether they would be tried by a jury, the conviction was quashed, on *certiorari*. (8)

A defendant was committed for trial on a charge of having *offered for sale* certain lottery tickets contrary to section 205 (*b*), *ante*. He was arraigned, and elected to be tried summarily. Afterwards on the day set for the trial the Crown prosecutor caused to be read to the accused an amended charge, charging him will *selling* lottery tickets and *causing them to be sold*. The defendant refused to plead to the amended charge and would consent to be tried summarily only upon the original charge. Objection upheld. (9)

(7) R. v. Cockshott, *Ex parte* Rickaby, 67 L. J., Q. B., 467.
(8) R. v. Crossen, 3 Can. Cr. Cas., 152.
(9) R. v. Woods, 19 C. L. T., 18.

A defendant was committed before a stipendiary magistrate on a charge of assaulting a police constable in contravention of section 263 (*b*), *ante*, and, having elected to be tried summarily, was tried accordingly and convicted and sentenced to six months imprisonment with hard labor. The warrant recited that the defendant was "duly convicted," etc., of the offence charged, but did not shew on its face that he had consented to a summary trial, which under the above section, 786, is a condition precedent to the magistrate's jurisdiction. Held, upon *habeas corpus*, that the warrant was bad for not shewing on its face the defendant's consent to be tried summarily; and the defendant was discharged. (10)

**787. Punishment for certain offences under this part.** — In the case of an offence charged under paragraph (*a*) or (*b*) of section seven hundred and eighty-three, the Magistrate, after hearing the whole case for the prosecution and for the defence, shall, if he finds the charge proved, convict the person charged and commit him to the common gaol or other place of confinement, there to be imprisoned, with or without hard labour, for any term not exceeding six months. R.S.C., c. 176, s. 10.

**788. Punishment for certain other offences.** — In any case summarily tried under paragraph (*c*), (*d*), (*e*), (*f*), (*g*), (*h*) or (*i*) of section seven hundred and eighty-three, if the Magistrate finds the charge proved, he may convict the person charged and commit him to the common gaol or other place of confinement, there to be imprisoned, with or without hard labour, for any term not exceeding six months, or may condemn him to pay a fine not exceeding, with the costs in the case, one hundred dollars, or to both fine and imprisonment not exceeding the said sum and term; and such fine may be levied by warrant of distress under the hand and seal of the Magistrate, or the person convicted may be condemned, in addition to any other imprisonment on the same conviction, to be committed to the common gaol or other place of confinement for a further term not exceeding six months, unless such fine is sooner paid. R.S.C., c. 176, s. 11.

This section does not apply so as to authorise a magistrate to direct imprisonment for 6 months as a means of enforcing payment of a fine, when a fine only has been imposed, in the case, for instance, of a conviction under section 208, *ante*, for keeping a bawdy house, the powers of a magistrate, for enforcing payment of the fine, being, in such a case, limited, by section 872 (*b*), *post*, to directing imprisonment for not more than 3 months, although in the first instance he might, under section 208, *ante*, have imposed 6 months' imprisonment, as the substantive punishment, instead of a fine. *Semble*, the above section, 788, only applies to authorize six months' imprisonment in default of payment of a fine when a fine and imprisonment are conjointly imposed in the first instance. (11)

Where, upon the face of a conviction for keeping a house of ill-fame, there was nothing to shew whether the police magistrate, who had tried

(10) R. v. Sears, 17 C. L. T., 124.
(11) R. v. Stafford 1, Can. Cr. Cas., 239. But see R. v. Bougie, 3 Can. Cr. Cas., 487.

the case, acted under the "*summary trials*" clauses of the present Part, LV, or simply as a justice of the peace under the "*summary convictions*" clauses of Part LVIII, *post*, and sections 207 and 208, *ante* and the conviction was defective in form but would be amendable if under the "*summary convictions*" clauses and not amendable if under the "*summary trials*" clauses, it was, — upon an application, by *habeas corpus*, to quash the conviction, — treated, by the Court, as a "summary conviction," and corrected, under section 889, *post*, by reducing the term of imprisonment, the sentence being one in excess of that authorised by law. (11*a*)

**789. Proceedings for offences in respect of property worth over ten dollars.** — When any person is charged before a Magistrate with theft or with having obtained property by false pretenses, or with having unlawfully received stolen property, and the value of the property stolen, obtained or received exceeds ten dollars, and the evidence in support of the prosecution is, in the opinion of the magistrate, sufficient to put the person on his trial for the offence charged, such magistrate, if the case appears to him to be one which may properly be disposed of in a summary way, shall reduce the charge to writing, and shall read it to the said person, and, unless such person is one who, under section 784, subsection 2, can be tried summarily without his consent, shall then put to him the question mentioned in section 786, and shall explain to him that he is not obliged to plead or answer before such magistrate, and that if he does not plead or answer before him, he will be committed for trial in the usual course. (As amended by the *Criminal Code Amendment Act 1900*).

**790. Punishment on plea of guilty in such case.**—If the person charged as mentioned in the next preceding section consents to be tried by the Magistrate, the Magistrate shall then ask him whether he is guilty or not guilty of the charge, and if such person says that he is guilty, the Magistrate shall then cause a plea of guilty to be entered upon the proceedings, and sentence him to the same punishment as he would have been liable to if he had been convicted upon indictment in the ordinary way; and if he says that he is not guilty, he shall be remanded to jail to await his trial in the usual course. (As amended by the *Criminal Code Amendment Act 1900*).

**791. Magistrate may decide not to proceed summarily.** — If, in any proceeding under this part, it appears to the Magistrate that the offence is one which, owing to a previous conviction of the person charged, or from any other circumstance, ought to be made the subject of prosecution by indictment rather than to be disposed of summarily, such Magistrate may, before the accused person has made his defence, decide not to adjudicate summarily upon the case; but a previous conviction shall not prevent the Ma-

(11*a*) R. v. Spooner, 4 Can. Cr. Cas., 209.

gistrate from trying the offender summarily, if he thinks fit so to do. R.S.C., c. 176, s. 14.

**792. Election of trial by Jury to be stated on warrant of committal.** — If, when his consent is necessary, the person charged elects to be tried before a Jury, the Magistrate shall proceed to hold a preliminary inquiry as provided in Parts XLIV., and XLV., and if the person charged is committed for trial, shall state in the warrant of committal the fact of such election having been made. R.S.C., c. 176, s. 15.

**793. Full defence allowed.** — In every case of summary proceedings under this part the person accused shall be allowed to make his full answer and defence and to have all witnesses examined and cross-examined by Counsel or Solicitor. R.S.C., c. 176, s. 16.

**794. Proceedings to be in open Court.** — Every Court held by a Magistrate for the purposes of this part shall be an open Public Court.

**795. Procuring attendance of witnesses.** — The Magistrate before whom any person is charged under the provisions of this part may, by summons, require the attendance of any person as a witness upon the hearing of the case, at a time and place to be named in such summons, and such Magistrate may bind, by recognizance, all persons whom he considers necessary to be examined, touching the matter of such charge to attend at the time and place appointed by him and then and there to give evidence upon the hearing of such charge; and if any person so summoned, or required or bound as aforesaid, neglects or refuses to attend in pursuance of such summons or recognizance, and if proof is made of such person having been duly summoned as hereinafter mentioned, or bound by recognizance as aforesaid, the Magistrate before whom such person should have attended may issue a warrant to compel his appearance as a witness. R.S.C., c. 176, s. 18.

**796. Service of summons.** — Every summons issued under the provisions of this part may be served by delivering a copy of the summons to the person summoned, or by delivering a copy of the summons to some inmate of such person's usual place of abode apparently over sixteen years of age; and every person so required by any writing under the hand of any Magistrate to attend and give evidence as aforesaid, shall be deemed to have been duly summoned. R.S.C., c. 176, s. 19.

**797. Dismissal of charge.** — Whenever the Magistrate finds the offence not proved, he shall dismiss the charge, and make out and deliver to the person charged a certificate under his hand stating the fact of such dismissal. R.S.C., c. 176, s. 20.

**798. Effect of conviction.** — Every conviction under this part shall have the same effect as a conviction upon indictment for the same offence. R.S.C., c. 176, s. 22.

**799. Certificate of dismissal a bar to further proceeding.** — Every person who obtains a certificate of dismissal or is convicted under the provisions of this part, shall be released from all further or other criminal proceedings for the same cause. R.S.C., c. 176, s. 23.

It has been held in England, under statutory provisions similar to the above, that, where a case summarily dealt with has been dismissed by the Magistrate or Justice on its merits, the defendant has the right *ex debito justitiæ* to receive the certificate of dismissal. (12)

The certificate of dismissal should only be granted when there has been a full hearing on the merits. If granted on a withdrawal of the charge before hearing, it will be no bar to subsequent proceedings for the same offence. (13)

See comments at pp. 271, and 272, *ante*.

See, also, comments and authorities at pp. 766, 767, *ante*; and see sections 821, 865 and 867, *post*.

For form of plea of summary conviction, see p. 771, *ante*.

**800. Proceeding not to be void for defect in form.**—No conviction, sentence or proceeding under the provisions of this part shall be quashed for want of form; and no warrant of commitment upon a conviction shall be held void by reason of any defect therein, if it is therein alleged that the offender has been convicted, and there is a good and valid conviction to sustain the same. R.S.C., c. 176, s. 24.

A commitment which recited a conviction for "unlawfully procuring *or* attempting to procure a girl of 17 years of age to become, without Canada, a common prostitute, *or* with intent that she might become an inmate elsewhere," was held void on its face as it recited a conviction which was invalid for duplicity and uncertainty. Held, also, that the commitment could not, under the above section, 800, be supported as *alleging* a conviction, because there was not a good and valid conviction to sustain it, — the conviction, returned under *habeas corpus* proceedings, being found not to disclose any offence within section 185, *ante*, upon which the prosecution was based. (14)

**801. Result of hearing to be filed in Court of Sessions.** — The Magistrate adjudicating under the provisions of this part shall transmit the conviction, or a duplicate of the certificate of dismissal, with the written charge, the depositions of witnesses for the prosecution and for the defence, and the statement of the

(12) Hancock v. Somes, 28 L. J., M. C., 196; Costar v. Hetherington, 29 L. J., M. C., 198.
(13) Reed v. Nutt, 24 Q. B. D., 669.
(14) R. v. Gibson, 2 Can. Cr. Cas., 302; 29 O. R., 660.

accused, to the clerk of the peace or other proper officer for the district, city, county or place wherein the offence was committed, there to be kept by the proper officer among the records of the general or quarter sessions of the peace or of any court discharging the functions of a court of general or quarter sessions of the peace. (As amended by the *Criminal Code Amendment Act 1900*).

2. This section shall not apply to police magistrates, stipendiary magistrates, or recorders of cities or incorporated towns. (Added by the *Criminal Code Amendment Act 1900*).

Subsection 2 of this section has, by the 1 Edw. VII, c. 42, been repealed as of the first of January 1901.

**802. Evidence of conviction or dismissal.** — A copy of such conviction, or of such certificate of dismissal, certified by the proper officer of the Court, or proved to be a true copy, shall be sufficient evidence to prove a conviction or dismissal for the offence mentioned therein, in any legal proceedings. R.S.C., c. 176, s. 26.

**803. Restitution of property.** — The Magistrate by whom any person has been convicted under the provisions of this part may order restitution of the property stolen or taken or obtained by false pretenses, in any case in which the Court, before whom the person convicted would have been tried, but for the provisions of this part, might by law order restitution. R.S.C., c. 176, s. 27.

**804. Remand for further investigation.**—Whenever any person is charged before any Justice or Justices of the Peace, with any offence mentioned in section seven hundred and eight-three, and in the opinion of such Justice or Justices the case is proper to be disposed of summarily by a Magistrate, as herein provided, the Justice or Justices before whom such person is so charged may, if he or they see fit, remand such person for further examination before the nearest Magistrate in like manner in all respects as a Justice or Justices are authorized to remand a person accused for trial at any Court, under Part XLV., section five hundred and eighty-six; but no Justice or Justices of the Peace, in any province shall so remand any person for further examination or trial before any such Magistrate in any other province. Any person so remanded for further examination before a Magistrate in any city, may be examined and dealt with by any other Magistrate in the same city. R.S.C., c. 176, ss. 28, 29 and 30.

**805. Non-appearance of accused under recognizance.** — If any person suffered to go at large upon entering into such recognizance as the justice or justices are authorized, under Part XLV., section five hundred and eighty-seven, to take on the remand of a person accused, conditioned for his appearance before a Magis-

trate, does not afterwards appear, pursuant to such recognizance, the Magistrate before whom he should have appeared shall certify, under his hand on the back of the recognizance, to the Clerk of the Peace of the district, county or place, or other proper officer, as the case may be, the fact of such non-appearance, and such recognizance shall be proceeded upon in like manner as other recognizances; and such certificate shall be *primâ facie* evidence of such non-appearance without proof of the signature of the magistrate thereto. R.S.C., c. 176, s. 31.

**806. Application of fines.**—[This section, including the amendment made to it by the 57-58 V., c. 57, has been repealed by the *Criminal Code Amendment Act 1900*, which has substituted, for the subject matter of it, the general provisions, (as amended), of section 927, *post*.]

**807. Forms to be used.** — Every conviction or certificate may be in the form QQ, RR, or SS, in Schedule One hereto, applicable to the case, or to the like effect, (15) and whenever the nature of the case requires it, such forms may be altered by omitting the words stating the consent of the person to be tried before the magistrate, and by adding the requisite words, stating the fine imposed, if any, and the imprisonment, if any, to which the person convicted is to be subjected if the fine is not sooner paid. R.S.C., c. 176, s. 33.

**808. Certain provisions not applicable to this Part.** — The provisions of this Act relating to preliminary inquires before justices, except as mentioned in sections eight hundred and four and eight hundred and five and of Part LVIII., shall not apply to any proceedings under this part. Nothing in this part shall affect the provisions of Part LVI., and this part shall not extend to persons punishable under that part so far as regards offences for which such persons may be punished thereunder. R.S.C., c. 176, ss. 34 and 35.

Where a prisoner had been convicted of theft under section 783 (*a*), *ante*, the Court refused, — in view of the provisions of this section, 808, — to grant an application for a mandamus to compel the magistrate to take a recognizance on appeal from such conviction under section 880, *post*. (16)

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(15) For Forms QQ, RR, and SS, see pp. 590, 591, *post*.
(16) R. v. Egan, 11 Man. L. R., 134.

## FORMS UNDER PART LV.

FROM SCHEDULE ONE.

QQ. — (*Section* 807).

CONVICTION.

Canada,
Province of
County of

Be it remembered that on the day of in the year , at , A. B., being charged before me, the undersigned, , of the said (*city*) (and consenting to my trying th charge summarily, is convicted before me, for that he, the said A. B., (*&c., stating the offence, and the time and place when and where committed*), and I adjudge the said A. B., for his said offence, to be imprisoned in the (and there kept to hard labour) for the term of

Given under my hand and seal, the day and year first above mentioned, at aforesaid.

J. S., [SEAL.]

*J. P.*, (*Name of county*).

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RR. — (*Section* 807).

CONVICTION UPON A PLEA OF GUILTY.

Canada,
Province of
County of

Be it remembered that on the day of in the year , at , A. B. being charged before me, the undersigned, , of the said (*city*) (and consenting to my trying the charge summarily), for that he, the said A. B., (*&c., stating the offence, and the time and place when and where committed*), and pleading guilty to such charge, he is thereupon convicted before me of the said offence; and I adjudge him, the said A. B., for his said offence, to be imprisoned in the (and there kept to hard labour) for the term of

Given under my hand and seal, the day and year first above mentioned, at aforesaid.

J. S., [SEAL.]

*J. P.*, (*Name of county*).

SS. — (*Section* 807).

CERTIFICATE OF DISMISSAL.

Canada, }
Province of , }
County of }

I, the undersigned, , of the city (*or as the case may be*) of , certify that on the day of , in the year , at aforesaid, A. B., being charged before me (and consenting to my trying the charge summarily), for that he, the said A. B., (*&c., stating the offence charged, and the time and place when and where alleged to have been committed*), I did, after having summarily tried the said charge, dismiss the same.

Given under my hand and seal, this day of , in the year , at aforesaid.

J. S., [SEAL.]

*J. P.*, (*Name of county*).

## PART LVI.

## TRIAL OF JUVENILE OFFENDERS FOR INDICTABLE OFFENCES.

**809. Definitions.** — In this part, unless the context otherwise requires, —

(*a*) The expression "two or more justices," or "the justices" includes, —

(i) in the provinces of Ontario and Manitoba any Judge of the county court being a Justice of the Peace, Police Magistrate or Stipendiary Magistrate, or any two Justices of the Peace, acting within their respective jurisdictions;

(ii) in the province of Quebec any two or more Justices of the Peace, the Sheriff of any district, except Montreal and Quebec, the Deputy Sheriff of Gaspé, and any Recorder, Judge of the Sessions of the Peace, Police Magistrate, District Magistrate or Stipendiary Magistrate acting within the limits of their respective jurisdictions;

(iii) in the provinces of Nova Scotia, New Brunswick, Prince Edward Island, and British Columbia, and in the district of Keewatin, any functionary or tribunal invested by the proper legislative authority with power to do acts usually required to be done by two or more Justices of the Peace;

(iv) in the North-West Territories, any Judge of the Supreme Court of the said Territories, any two Justices of the Peace sitting together, and any functionary or tribunal having the powers of two Justices of the Peace;

(*b*) The expression "the common gaol or other place of confinement" includes any reformatory prison provided for the reception of juvenile offenders in the province in which the conviction referred to takes place, and to which by the law of that province, the offender may be sent. R.S.C., c. 177, s. 2.

**810. Punishment for stealing.** — Every person charged with having committed, or having attempted to commit any offence which is theft, or punishable as theft, and whose age, at the period of the commission or attempted commission of such offence, does not, in the opinion of the justice before whom he is brought or appears, exceed the age of sixteen years, shall upon conviction thereof in open Court upon his own confession or upon proof, before any two or more justices, be committed to the common gaol or other place of confinement within the jurisdiction of such justices, there to be imprisoned, with or without hard labour, for any term not exceeding three months, or, in the discretion of such justices, shall forfeit and pay such sum, not exceeding twenty dollars, as such justices adjudge. R.S.C., c. 177, s. 3.

**811. Procuring Appearance of Accused.**—Whenever any person whose age is alleged not to exceed sixteen years, is charged with any offence mentioned in the next proceeding section, on the oath of a credible witness, before any justice of the peace, such justice may issue his summons or warrant, to summon or to apprehend the person so charged, to appear before any two justices of the peace, at a time and place to be named in such summons or warrant. R.S.C., c. 177, s. 4.

**812. Remand of Accused.** — Any justice of the peace, if he thinks fit, may remand for further examination or for trial, or suffer to go at large, upon his finding sufficient sureties, any such person charged before him with any such offence as aforesaid.

2. Every such surety shall be bound by recognizance conditioned for the appearance of such person before the same or some other justice or justices of the peace for further examination, or for trial before two or more justices of the peace as aforesaid, or for trial by indictment at the proper Court of Criminal Jurisdiction, as the case may be.

3. Every such recognizance may be enlarged, from time to time, by any such justice or justices to such further time as he or they appoint; and every such recognizance not so enlarged shall be discharged without fee or reward, when the person has appeared according to the condition thereof. R.S.C., c. 177, ss. 5, 6 and 7.

**813. Accused to elect how he shall be tried.** — The justices before whom any person is charged and proceeded against under the provisions of this part before such person is asked whether he has any cause to show why he should not be convicted, shall say to the person so charged, these words, or words to the like effect;

"We shall have to hear what you wish to say in answer to the charge against you; but if you wish to be tried by a Jury, you must object now to our deciding upon it at once."

2. And if such person, or a parent or guardian of such person, then objects, no further proceedings shall be had under the provisions of this part; but the justices may deal with the case according to the provision set out in Parts XLIV., and XLV., as if the accused were before them thereunder. R.S.C., c. 177, s. 8.

See section 550, *ante*, which provides that persons under sixteen shall not be tried publicly, and that while in custody they shall be kept separate from older prisoners; and see pp. 645 and 646, with reference to Dominion and provincial statutes relating to Children's Homes, Industrial Schools and Houses of Refuge for boys and girls and relating to female reformatories, etc. And see, also, section 550*a*, *ante*.

**814. When Accused shall not be tried summarily.** — If the justices are of opinion, before the person charged has made his defence, that the charge is, from any circumstance, a fit subject for prosecution by indictment, or if the person charged, upon being called upon to answer the charge, objects to the case being summarily disposed of under the provisions of this part, the justices shall not deal with it summarily, but may proceed to hold a preliminary inquiry as provided in Parts XLIV., and XLV.

2. In case the accused has elected to be tried by a jury, the justices shall state in the warrant of commitment the fact of such election having been made. R.S.C., c. 177, s. 9.

**815. Summons to witness.** — Any Justice of the Peace may, by summons, require the attendance of any person as a witness upon the hearing of any case before two Justices, under the authority of this part, at a time and place to be named in such summons. R.S.C., c. 177, s. 10.

**816. Binding over witness.** — Any such Justice may require and bind by recognizance every person whom he considers necessary to be examined, touching the matter of such charge, to attend at the time and place appointed by him and then and there to give evidence upon the hearing of such charge. R.S.C., c. 177, s. 11.

**817. Warrant against witness.** — If any person so summoned or required or bound, as aforesaid, neglects or refuses to attend in pursuance of such summons or recognizance, and if proof is given

of such person having beeen duly summoned, as hereinafter mentioned, or bound by recognizance, as aforesaid, either of the Justices before whom any such person should have attended, may issue a warrant to compel his appearance as a witness. R.S.C., c. 177, s. 12.

**818. Service of summons.** — Every summons issued under the authority of this part may be served by delivering a copy thereof to the person, or to some inmate, apparently over sixteen years of age, at such person's usual place of abode, and every person so required by any writing under the hand or hands of any Justice or Justices to attend and give evidence as aforesaid, shall be deemed to have been duly summoned. R.S.C., c. 177, s. 13.

See comments and authorities, under section 502, at p. 673, *ante*, as to service of summons.

**819. Discharge of accused.** — If the Justices, upon the hearing of any such case deem the offence not proved, or that it is not expedient to inflict any punishment, they shall dismiss the person charged, — in the latter case on his finding sureties for his future good behaviour, and in the former case without sureties, and then make out and deliver to the person charged a certificate in the form TT in schedule one to this Act, (1) or to the like effect, under the hands of such Justices, stating the fact of such dismissal. R.S.C., c. 177, s. 14.

**820. Form of conviction.** — The Justices before whom any person is summarily convicted of any offence hereinbefore mentioned, may cause the conviction to be drawn up in the form UU in schedule one hereto, (2) or in any other form to the same effect, and the conviction shall be good and effectual to all intents and purposes.

2. No such conviction shall be quashed for want of form, or be removed by *certiorari* or otherwise into any Court of record; and no warrant of commitment shall be held void by reason of any defect therein, if it is therein alleged that the person has been convicted, and there is a good and valid conviction to sustain the same. R.S.C., c. 177, ss. 16 and 17.

**821. Further proceeding barred.** — Every person who obtains such certificate of dismissal, or is so convicted, shall be released from all further or other criminal proceedings for the same cause. R.S.C., c. 177, s. 15.

See comments and authorities at pp. 271, 272, 766 and 767, *ante*, also form of plea of summary conviction at p. 771, *ante*; and see, also, sections 797, 798, 799 *ante*, and 865 and 867 *post*.

(1) For Form TT, see p. 897, *post*.
(2) For Form UU, see p. 898, *post*.

**822. Conviction and recognizances to be filed.** — The Justices before whom any person is convicted under the provisions of this part shall forthwith transmit the conviction and recognizances to the clerk of the peace or other proper officer, for the district, city, county or union of counties wherein the offence was committed, there to be kept by the proper officer among the records of the Court of General or Quarter Sessions of the Peace, or of any other Court discharging the functions of a Court of General or Quarter Sessions of the Peace. R.S.C., c. 177, s. 18.

**823. Quarterly returns.** — Every clerk of the peace, or other proper officer, shall transmit to the Minister of Agriculture a quarterly return of the names, offences and punishments mentioned in the convictions, with such other particulars as are, from time to time, required. R.S.C., c. 177, s. 19.

**824. Restitution of property.** — No conviction under the authority of this part shall be attendel with any forfeiture, except such penalty as is imposed by the sentence; but whenever any person is adjudged guilty under the provisions of this part, the presiding Justice may order restitution of property in respect of which the offence was committel, to the owner thereof or his representatives.

2. If such property is not then forthcoming, the Justices, whether they award punishment or not, may inquire into and ascertain the value thereof in money; and, if they think proper, order payment of such sum of money to the true owner, by the person convicted, either at one time or by instalments, at such periods as the Justices deem reasonable.

3. The person ordered to pay such sum may be sued for the same as a debt in any Court in which debts of the like amount are, by law, recoverable, with costs of suit, according to the practice of such Court. R.S.C., c. 177, ss. 20, 21 and 22.

**825. Proceeding on non-payment of penalty imposed.** — Whenever the Justices adjudge any offender to forfeit and pay a pecuniary penalty under the authority of this part, and such penalty is not forthwith paid they may, if they deem it expedient, appoint some future day for the payment thereof, and order the offender to be detained in safe custody until the day so appointed, unless such offender gives security to the satisfaction of the Justices, for his appearance on such day; and the Justices may take such security by way of recognizance or otherwise in their discretion.

2. If at any time so appointed such penalty has not been paid, the same or any other Justices of the Peace may, by warrant under their hands and seals, commit the offender to the common gaol or other place of confinement within their jurisdiction, there

to remain for any time not exceeding three months, reckoned from the day of such adjudication. R.S.C., c. 177, ss. 23 and 24.

**826. Costs.** — The Justices before whom any person is prosecuted or tried for any offence cognizable under this part may, in their discretion, at the request of the prosecutor or of any other person who appears on recognizance or summons to prosecute or give evidence against such person, order payment to the prosecutor and witnesses for the prosecution, of such sums as to them seem reasonable and sufficient, to reimburse such prosecutor and witnesses for the expenses they have severally incurred in attending before them, and in otherwise carrying on such prosecution, and also to compensate them for their trouble and loss of time therein, — and may order payment to the constables and other Peace officers for the apprehension and detention of any person so charged.

2. The Justices may, although no conviction takes place, order all or any of the payments aforesaid to be made, when they are of opinion that the persons, or any of them, have acted in good faith. R.S.C., c. 177, ss. 25 and 26.

**827. Application of fines.** — [This section has been repealed by the *Criminal Code Amendment Act 1900*, which has substituted, for the subject matter of it, the general provisions, (as amended), of section 927, *post*].

**828. Costs to be certified by Justices.**—The amount of expenses of attending before the Justices and the compensation for trouble and loss of time therein, and allowances to the constables and other peace officers for the apprehension and detention of the offender, and the allowances to be paid to the prosecutor, witnesses and constables for attending at the trial or examination of the offender, shall be ascertained by and certified under the hands of such Justices; but the amount of the costs, charges and expenses attending any such prosecution, to be allowed and paid as aforesaid, shall not in any one case exceed the sum of eight dollars.

2. Every such order of payment to any prosecutor or other person, after the amount thereof has been certified by the proper Justices of the Peace as aforesaid, shall be forthwith made out and delivered by the said Justices or one of them, or by the Clerk of the Peace or other proper officer, as the case may be, to such prosecutor or other person, upon such clerk or officer being paid his lawful fee for the same, and shall be made upon the officer to whom fines imposed under the authority of this part are required to be paid over in the district, city, county or union of counties in which the offence was committed, or was supposed to have been committed, who, upon sight of every such order, shall forthwith pay to the person named therein, or to any other person duly autho-

rized to receive the same on his behalf, out of any moneys received by him under this part, the money in such order mentioned and he shall be allowed the same in his accounts of such moneys. R S.C., c. 177, ss. 28 and 29.

**829. Application of this Part.** — The provisions of this Part shall not apply to any offence committed in the Provinces of Prince Edward Island or British Columbia, or the district of Keewatin, punishable by imprisonment for two years and upwards; and in such provinces and district it shall not be necessary to transmit any recognizance to the clerk of the peace or other proper officer. R.S.C., c. 177, s. 30.

**830. No Imprisonment in Reformatory under this Part.** — The provisions of this Part shall not authorize two or more justices of the peace to sentence offenders to imprisonment in a reformatory in the Province of Ontario. R.S.C., c. 177, s. 31.

**831. Other proceedings against Juvenile Offenders.** — Nothing in this Part shall prevent the summary conviction of any person who may be tried thereunder before one or more justices of the peace, for any offence for which he is liable to be so convicted under any other Part of this Act or under any other Act. R.S.C., c. 177, s. 8, part.

## FORMS UNDER PART LVI.

FROM SCEDULE ONE.

TT. — (*Section* 819).

CERTIFICATE OF DISMISSAL.

Canada, Province of County of } , justices of the peace for the of , (*or if a recorder; &c.*, I, a , of the of , *as the case may be*), do hereby certify that on the day of , in the year at , in the said of , A. B., was brought before us, the said justices (*or* me, the said ) charged with the following offence, that is to say (*here state briefly the particulars of the charge*), and that we, the said justices, (*or* I, the said ) thereupon dismissed the said charge.

Given under our hands and seals, (*or* my hand and seal) this day of , in the year , at aforesaid.

J. P. [SEAL.]
J. R. [SEAL.]
*or* S. J. [SEAL.]

UU. — (*Section* 820).

CONVICTION.

Canada,
Province of
County of

Be it remembered that on the day of , in the year , at , in the county of , A. B. is convicted before us, J. P. and J. R., Justices of the Peace for the said county (*or* me, S. J., *recorder*, of the , of , *or as the case may be*) for that he, the said A. B., did (*specify the offence and the time and place when and where the same was committed, as the case may be, but without setting forth the evidence*), and we, the said J. P. and J. R. (*or* I, the said S. J.), adjudge the said A. B., for his said offence, to be imprisoned in the (*or* to be imprisoned in the , and there kept at hard labour), for the space of , (*or* we) (*or* I) adjudge the said A. B., for his said offence, to forfeit and pay (*here state the penalty actually imposed*), and in default of immediate payment of the said sum, to be imprisoned in the (*or* to be imprisoned in the and kept at hard labour) for the term of unless the said sum is sooner paid

Given under our hands and seals (*or* my hand and seal), the day and year first above mentioned.

J. P. [SEAL.]

J. R. [SEAL.]

*or* S. J. [SEAL.]

PART LVII.

## COSTS AND PECUNIARY COMPENSATION — RESTITUTION OF PROPERTY.

**832. Costs.** — Any Court by which and any Judge under Part LIV., or Magistrate under LV., (1) by whom judgment is pronounced or recorded, upon the conviction of any person for treason or any indictable offence, in addition to such sentence as may otherwise by law be passed, may condemn such person to the payment of the whole or any part of the costs or expenses incurred

(1) Part LIV relates to *Speedy* Trials of Indictable offences, and comprises sections 762 to 781, *ante*; and Part LV relates to the *Summary* Trial of Indictable offences, and comprises sections 782 to 808 *ante*.

in and about the prosecution and conviction for the offence of which he is convicted, if to such Court or judge it seems fit so to do; and the court or judge may include in the amount to be paid such moderate allowance for loss of time as the court or judge, by affidavits or other inquiry and examination, ascertains to be reasonable; and the payment of such costs and expenses, or any part thereof, may be ordered by the Court or judge to be made out of any moneys taken from such person on his apprehension (*if such moneys are his own*), or may be enforced at the instance of any person liable to pay or who has paid the same in such and the same manner (subject to the provisions of this Act) as the payment of any costs ordered to be paid by the judgment or order of any Court of competent jurisdiction in any civil action or proceeding may for the time being be enforced: Provided, that in the meantime, and until the recovery of such costs and expenses from the person so convicted as aforesaid, or from his estate, the same shall be paid and provided for in the same manner as if this section had not been passed; and any money which is recovered in respect thereof from the person so convicted, or from his estate, shall be applicable to the reimbursement of any person or fund by whom or out of which such costs and expenses have been paid or defrayed. 33-34 V. (U. K.) c. 23, s. 3. (As amended by the *Criminal Code Amendment Act 1900*).

It will be seen by this section that costs may be awarded against a defendant when convicted of treason or any indictable offence.

This provision is to the same effect as the Imperial statute 33-34 Vict. c. 23, s. 3, except that the latter only covers cases of treason and felony and does not apply to convictions for misdemeanor: and the English Act does not contain the words "if such moneys are his own" above italicised. In a case where a prisoner, arrested on the 4th of April, was convicted at the following May Sessions of the Central Criminal Court, the Court, after passing sentence made under the above provision of the Imperial statute an order for the payment of the costs of the prosecutor out of the money taken from him at the time of his apprehension. On the 24th of April, — between the time of his apprehension and his conviction, — he had been adjudged bankrupt; and it was held, — without deciding what would have been the case if the money in question, though in the possession of, had not really belonged to the prisoner, or if the act of bankruptcy had been previous to his apprehension, — that the order was valid, on the ground that the subsequent bankruptcy could not affect the right of the Criminal Court to make the order, such right having vested at the time of the apprehension and before the bankruptcy. (2)

**833. Costs in cases of Libel.**—In the case of an indictment or information by a private prosecutor for the publication of a defamatory libel if judgment is given for the defendant, he shall be entitled to recover from the prosecutor the costs incurred by him by reason of such indictment or information either by warrant of distress issued out of the said Court, or by action or suit as for an ordinary debt. R.S.C., c. 124, ss. 153 and 154.

(2) R. v. Roberts, 43 L. J. (M. C.) 17.

**834. Costs on Conviction for Assault.** — If a person convicted on an indictment for assault, whether with or without battery and wounding, is ordered to pay costs as provided in section eight hundred and thirty-two he shall be liable unless the said costs are sooner paid, to three months' imprisonment, in addition to the term of imprisonment, if any, to which he is sentenced for the offence, and the Court may, by warrant in writing, order the amount of such costs to be levied by distress and sale of the goods and chattels of the offender, and paid to the prosecutor, and the surplus, if any, arising from such sale, to the owner; and if such sum is so levied, the offender shall be released from such imprisonment. R.S.C., c. 174, ss. 248 and 249.

**835. Taxation of costs.** — Any costs ordered to be paid by a Court pursuant to the foregoing provisions shall, in case there is no tariff of fees provided with respect to criminal proceedings, be taxed by the proper officer of the Court according to the lowest scale of fees allowed in such Court in a civil suit.

2. If such Court has no civil jurisdiction, the fees shall be those allowed in civil suits in a Superior Court of the province according to the lowest scale.

**836. Compensation for loss of property.** — A Court on the trial of any person on an indictment may, if it thinks fit, upon the application of any person aggrieved and immediately after the conviction of the offender, award any sum of money, not exceeding one thousand dollars, by way of satisfaction or compensation for any loss of property suffered by the applicant through or by means of the offence of which such person is so convicted; and the amount awarded for such satisfaction or compensation shall be deemed a judgment debt due to the person entitled to receive the same from the person so convicted, and the order for payment of such amount may be enforced in such and the same manner as in the case of any costs ordered by the Court to be paid under section eight hundred and thirty-two. 33-34 V. (U. K.) c. 23, s. 4.

This section is derived from and extends, — to *all cases* of *persons tried upon an indictment*, — the provisions of sec. 4 of the Imperial Act, 33-34 Vict., c. 23, upon which Archbold comments as follows: —

"The discretionary power given by this section is far more extensive than the power conferred by the 24-25 Vict. c. 96, s. 100; (3), and, if exercised in every case to which it may in strictness be applicable, will compel a Criminal Court at the close of many trials for felony to enter upon complicated enquiries involving the expenditure of a large amount of time and labor. It is probable, however, that Criminal Courts will decline to exercise the powers thus conferred upon them, except in very simple cases,

(3) For provisions similar to those contained in the Imperial statute 24 and 25, Vict. c. 96, sec. 100, see section 838 *post*, which is a re-enactment, (with certain changes), of R. S. C., c. 174, sec. 250.

and will, in the majority of instances, leave the applicant to enforce his right by the ordinary civil procedure." (4)

It will be seen that the power conferred by the above section is limited to the awarding of compensation for a *loss of property*. It would appear, therefore, as pointed out by Archbold, that, in the case of serious *personal injuries* caused by an indictable offence, no compensation could, under this section, be awarded in respect of such personal injuries, and that even where the personal injuries caused by the indictable offence may have incapacited the prosecutor from earning his livelihood, it would not be such a loss of property as would form the subject of compensation under this section. (5)

For the meaning of the expression 'PROPERTY' see section 3 (v), *ante*.

**837. Compensation to bonâ fide purchaser of stolen property.** — When any prisoner has been convicted, either summarily or otherwise, of any theft or other offence, including the stealing or unlawfully obtaining any property, and it appears to the Court, by the evidence, that the prisoner sold such property or part of it to any person who had no knowledge that it was stolen or unlawfully obtained, and that money has been taken from the prisoner on his apprehension, the Court may, on application of such purchaser and on restitution of the property to its owner, order that, out of the money so taken from the prisoner, (if it is his), a sum, not exceeding the amount of the proceeds of the sale, be delivered to such purchaser. R.S.C., c. 174, s. 251.

**838. Restitution of stolen property.** — If any person who is guilty of any indictable offence in stealing, or knowingly receiving, any property, is indicted for such offence, by or on behalf of the owner of the property, or his executor or administrator, and convicted thereof, or is tried before a Judge or justice for such offence under any of the foregoing provisions and convicted thereof, the property shall be restored to the owner or his representative.

2. In every such case, the Court or Tribunal before which such person is tried for any such offence shall have power to award, from time to time, writs of restitution for the said property or to order the restitution thereof in a summary manner; and the Court or Tribunal may also, if it sees fit, award restitution of the property taken from the prosecutor, or any witness for the prosecution, by such offence, *although the person indicted is not convicted thereof*, if the jury declares, as it may do, or if, in case the offender is tried without a jury, it is proved to the satisfaction of the Court or Tribunal by whom he is tried, that such property belongs to such prosecutor or witness, and that he was unlawfully deprived of it by such offence.

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(4) Arch. Cr. Pl. & Ev. 21 Ed., 206.
(5) *Ib.*

3. If it appears before any award or order is made, that any valuable security has been *bonâ fide* paid or discharged by any person liable to the payment thereof, or being a negotiable instrument, has been *bonâ fide* taken or received by transfer or delivery, by any person, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had, by any indictable offence, been stolen, or if appears that the property stolen has been transferred to *an innocent purchaser for value who has acquired a lawful title thereto*, the Court or Tribunal shall not award or order the restitution of such security or property.

4. Nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker or other agent intrusted with the possession of goods or documents of title to goods, for any indictable offence under sections three hundred and twenty, or three hundred and sixty-three of this Act. R.S.C., c. 174, s. 250. (As amended by 56 Vic., c. 32).

Clause 3 of this section makes an exception in favor of an innocent third party who has purchased, for value, the stolen property, and *who has acquired a lawful title thereto*, that is, a lawful title according to the law, as to civil rights, of the province where the offence has been committed. For instance, by the law of the province of Quebec, "If a thing lost or stolen be bought in good faith, in a fair or market or at a public sale, or from a trader dealing in similar articles, the owner cannot reclaim it, without re-imbursing to the purchaser the price he has paid for it:" and "If the thing lost or stolen be sold under the authority of law, it cannot be reclaimed." (6)

The power to award restitution of property under the above section extends to the *proceeds* of the property as well as to the property itself. Therefore, if the property stolen, has been sold before the conviction, an application may be made to the Court, before which the criminal is convicted, for the restitution of the proceeds, which if they are in the hands of the criminal or of an agent who holds them for him, should be granted. (7)

Where, after the trial and conviction of a prisoner for larceny, the judges who presided at the trial ordered property found in his possession, when arrested, to be disposed of in a particular manner, such property not being part of that stolen nor connected therewith, it was held that the order was bad, as the Judges had no jurisdiction to make it. (8)

## PART LVIII.

## SUMMARY CONVICTIONS.

**839. Interpretation.** — In this part, unless the context otherwise requires, —

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(6) See Articles 1489 and 1490 Civil Code of Lower Canada.

(7) R. v. Justices Cent. Crim. Ct., 17 Q. B. D., 598; 55 L. J. (Q. B.) 183; *affirmed* 18 Q. B. D., 314; 56 L. J. (M. C.) 25. See section 3 (*v.*) *ante*.

(8) R. v. Corporation of City of London, E. B. & E. 509; 27 L. J. (M. C.) 231; R. v. Pierce, Bell, 235.

(*a*) the expression "Justice" means a Justice of the Peace and includes two or more Justices if two or more Justices act or have jurisdiction, and also a Police Magistrate, a Stipendiary Magistrate and any person having the power or authority of two or more Justices of the Peace;

(*b*) the expression "Clerk of the Peace" includes the proper officer of the Court having jurisdiction in appeal under this part, as provided by section eight hundred and seventy-nine;

(*c*) the expression "territorial division" means district, county, union of counties, township, city, town, parish or other judicial division or place;

(*d*) the expression "district" or "county" includes any territorial or judicial division or place in and for which there is such Judge, Justice, Justice's Court, officer or prison as is mentioned in the context;

(*e*) the expression "common gaol" or "prison" means any place other than a penitentiary in which persons charged with offences are usually kept and detained in custody. R.S.C., c. 178, s. 2.

As to necessity of persons appointed to judicial offices taking the oaths of allegance and of office before acting, see cases cited under section 785, *ante*.

**Disqualifying Interest or Bias.** — No justice of the peace and no magistrate has any right to act judicially in any case in which he himself is a party, or in which he has any direct or indirect pecuniary or other substantial interest, however small.

The plain principle of justice, that no one can be a judge in his own cause, pervades every branch of the law, and is as ancient as the law itself. (1)

Even where an interested magistrate had decided *against* his own interest, it was held, nevertheless, that, in cases where he is directly or indirectly interested, a magistrate should not interfere. (2)

Although the fact that a suit is pending, in which the magistrate is suing the defendant, may disqualify the magistrate as being biassed, it has been held that it cannot be inferred from the mere fact of the magistrate having obtained a judgment in an action by him against the defendant, that he has such a bias as disqualifies him. (3)

Relationship may be a ground of disqualification. Thus, where the convicting justice was the son of the complainant, and the latter was entitled to one-half of the penalty imposed, the conviction was quashed on the ground that the justice had such an interest as made the existence of real bias likely or gave ground for a reasonable apprehension of bias; it being held that it is not necessary, in order to invalidate a conviction, on the

(1) Co. Litt. 141*a*.
(2) R. v. Gudridge, 5 B. & C., 459.
(3) R. v. Ryan, 32 N. B. R., 377.

ground of bias, that actual bias should be proved, but that it is sufficient if there is a reasonable apprehension of bias. (4)

It has been held that the alleged consanguinity of the justice to the prosecutor, — where it is denied by the justice and was unknown by the defendant until the trial, — does not disqualify the justice. (5)

A magistrate is not disqualified from trying a charge, of unlawfully selling liquors, laid by a chief license inspector, because the assistant license inspector's wife is a niece of the magistrate, if the assistant had, in fact, nothing to do with the laying of the charge and took no part in the prosecution. (6)

Not only should persons interested in a decision take no part in it, but they should avoid giving any ground for the belief that they influence others in arriving at a decision. (7)

Where, during the hearing of an appeal from a refusal to grant a license, one of the justices who had refused the license was present on the bench and conversed with some of the magistrates, who were hearing the appeal, on some matter unconnected with it, it was held that, being present, he formed part of the Court, and that, although he did not, in reality, act in the hearing or determination of the appeal, the order of the appeal magistrates was invalid. (8)

The Court will not enter into a discussion as to the extent of influence exercised by the interested party. (9)

The proper course to be pursued in order to *prevent* a magistrate from acting in and adjudicating upon a case in which he is interested is to apply for a writ of prohibition. (10) But when this course by prohibition is not adopted, and the case goes on to conviction, the objection of the magistrate's interest may be used as a ground to attack and set aside the conviction. (11)

The objection should be raised before the evidence is taken, if it be then known to the defendant, or it may be waived; for if a party to a criminal proceeding, knowing of the magistrate's interest, do not raise the objection, but consent to the interested magistrate acting and allow the case to go on,—taking the chance of a decision in his favor,—there will be a waiver of the objection, and the proceedings will not be void on the ground of such interest. (12)

But the objection is not waived by reason of its not being taken at the hearing, unless the party entitled to take the objection was then aware of the justice's interest. (13)

In some few cases, from necessity, an interested party is allowed to adjudicate, it being considered a less evil that he should do so than that there should be a failure of justice altogether. Under such circumstances

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(4) R. v. Steel, 26 O. R., 540; 2 Can. Cr. Cas., 433. (R. v. Huggins, [1895] 1 Q. B., 563, followed.)

(5) *Ex parte* Victory, 32 N. B. R., 249.

(6) *Ex parte* Flanagan, 2 Can. Cr. Cas., 513.

(7) Pal. Sum. Conv., 7th Ed., 45.

(8) R. v. Surrey, J. J., 21 L. J., M. C., 195.

(9) R. v. Hertford, J. J., 6 Q. B., 753.

(10) Hutton v. Fowke, Keb., 648; Anon, Salk., 336.

(11) Dimes v. Grand Junc. Canal Co., 3 H. of L. Cas., 759.

(12) R. v. Cheltenham Commrs., 1 Q. B., 467; R. v. Allen, 33 L. J., M. C., 98; *Ex parte* Barbere, 12 C. L. T., 449; R. v. Stone, 23 O. R., 46.

(13) R. v. Recorder of Cambridge, 27 L. J., M. C., 160; R. v. Sheriff of Warwickshire, 24 L. J., 211.

"it becomes the unfortunate duty of the Court to act as both party and judge." (14)

Thus, if a magistrate should be assaulted or abused to his face (while engaged in the execution of his duty) and no other magistrate be present, it seems that he may commit the offender until he find sureties for keeping the peace or for good behaviour as the cases may require. (14*a*)

And, sometimes a magistrate is *expressly* empowered by statute to adjudicate, although to a certain extent interested in the result of the decision. (15)

**840. Application.** — Subject to any special provision otherwise enacted with respect to such offence, act or matter, this part shall apply to —

(*a*) Every case in which any person commits, or is suspected of having committed, any offence or act over which the Parliament of Canada has legislative authority, and for which such person is liable, on summary conviction, to imprisonment, fine, penalty or other punishment;

(*b*) Every case in which a complaint is made to any justice in relation to any matter over which the Parliament of Canada has legislative authority, and with respect to which such justice has authority by law to make any order for the payment of money or otherwise. R.S.C., c. 178, s. 3.

**Ouster of Summary Jurisdiction.** — Whenever property or title is in question or there is a *bona fide* claim of legal right to do the act complained of, justices are ousted of their summary jurisdiction. (16)

This principle is not founded upon any legislative provision, but is a qualification which the law itself raises in the execution of penal statutes, and it is always implied in their construction. (17)

It is, sometimes, also, the subject of special statutory enactment. For instance, it is provided, by subsection 8 of section 842, *post*, that no justice shall hear and determine any case of assault or battery in which any question arises as to title to any lands, etc.

The jurisdiction of a justice is not to be ousted, however, by any mere *pretence* of title, (18) or even by a *bona fide* claim of a right which cannot, in law, exist. (19)

There must be some shew of reason in the claim; and it is not sufficient unless the defendant satisfy the justices that there is some reasonable ground for his assertion of title. (20)

Where, in an action of trespass to land, tried before a justice of the peace, the defendant set up a title, and offered a deed in evidence, and the

(14) Per Lord Denman, C. J., Carus Wilson's Case, 7 Q. B., 1015.
(14*a*) R. v. Revel, 1 Str., 420, 421.
(15) Pal. Sum. Conv., 7 Ed., 49; R. v. Fleming, 17 C. L. T., 122.
(16) Pal. Sum. Conv., 7 Ed., 145.
(17) *Ib.*
(18) Reece v. Miller, 8 Q. B. D., 626.
(19) Hargreaves v. Diddams, 44 L. J., M. C., 178.
(20) Per Cockburn, C. J., in Cornwell v. Saunders, 3 B. & S., 206.

plaintiff also produced evidence of deeds and of a title arising by estoppel, on which the justices undertook to decide, it was held that the title was *bona fide* in question, and that the justice's jurisdiction was ousted. (21)

Where in a prosecution for an injury, amounting to twenty-five cents, done to growing trees, the defendant set up and proved a *bona fide* claim of title, the Court held that the jurisdiction of the justice was ousted. (22) And where a defendant was convicted under a statute which provided that nothing therein contained should extend to any case in which the party acted under a fair and reasonable supposition that he had a right to do the act complained of, and it appeared, by the evidence adduced before the magistrate, that there was a dispute between the parties as to ownership, it was held that a title to land came in question, and that the defendant was improperly convicted, even though the magistrate did not believe that the defendant had a title. (23)

Upon a charge of trespass upon a fishery, the defendants, who claimed a right to fish therein, produced evidence of long user and offered security for costs in case the complainant would institute a civil action; and it was held that this was such a *bona fide* claim of title that the jurisdiction of the magistrates was ousted. (24)

When, in order to constitute an offence, a *mens rea* or criminal intention must be shown, an honest claim of right will avoid a summary conviction; but, where the absence of a criminal intent is not necessarily a defence, the party setting up the claim of right must show some ground for its assertion, and if he fails to do so he is liable to be convicted of the offence charged. (25)

S. owned a lot of land, the west half of which he sold, in 1866, to the complainant, reserving, however, a strip of thirty feet along the north line thereof, as a road, for himself and successors in title, to and from the east half of the lot. S. put up a gate at the west limit of the land, where it met the highway, which gate remained there from 1866 until it was removed by the defendants, the successors in title to S. The defendants were convicted on a charge of having unlawfully and maliciously broken and destroyed the gate as the property of the complainant. *Held*, that in claiming a right to remove the gate, the defendants were acting in good faith and under a fair and reasonable supposition of right to do the act complained of; and the conviction was therefore quashed. *Held*, also, that the question of fair and reasonable supposition of right to do the act complained of was a fact to be determined by the justice, and his decision upon a matter of fact would not, as a rule, be reviewed; but this rule did not apply where, as here, all the facts showed that the matter or charge itself was one in which such reasonable supposition existed; that is, where the case and the evidence were all one way, and in favor of the defendants. (26)

One Ovide Lacoursiere, on being charged with receiving a bedstead, knowing it to be stolen, claimed to be the owner of it, but, being summarily tried and convicted, he signed, in consideration of not being sent to gaol, a written agreement providing for his discharge from conviction on restoring the bedstead and on paying the costs and $50 damages to the prosecutor within fifteen days, he also agreeing that there should be no

(21) R. v. Harshman, 1 Pugs. 346.
(22) R. v. O'Brien, 5 Q. L. R., 161.
(23) R. v. Davidson, 45 U. C. Q. B., 91.
(24) R. v. Magistrate, Bally Castle, 9 L. T. R., N. S., 88.
(25) Watkins v. Major, L. R., 10 C. P., 662; 33 L. T. R., N. S., 352.
(26) R. v. McDonald, 12 O. R., 381.

appeal or proceedings against the conviction Upon an application for a *certiorari*, the court looked to the evidence to see if a criminal offence was committed, and it was held that there was a *bona fide* claim of title which should have ousted the justices' jurisdiction, that the written agreement was without valid consideration and entirely illegal and void, and that the action of the justices was an abuse of the process provided by the criminal law. (27)

The acts of a person's servants under his guidance in asserting a right would not render them liable to conviction, if the master himself be not so liable. (28)

Although, as a rule, justices have no power to enquire into a case involving a question of title to real property, yet when the title is itself the question which they have to decide, or of the very essence of the enquiry before them, their jurisdiction remains. (29) And the jurisdiction of justices is not ousted in cases in which they have power by statute to determine the right to which the claim is made. (30)

**841. Time within which proceedings shall be commenced.** — In the case of any offence punishable on summary conviction, if no time is specially limited for making any complaint, or laying any information in the Act or law relating to the particular case, the complaint shall be made, or the information shall be laid within *six months* from the time when the matter of complaint or information arose, except in the North-west Territories, where the time within which such complaint may be made, or such information may be laid, shall be extended to *twelve months* from the time when the matter of the complaint or information arose. 52 V., c. 45, s. 5.

The laying of the complaint or the making of the information should be followed up, — within the limited time, — by useful proceedings in the shape of a warrant or summons and the arrest of or otherwise bringing the accused before the magistrate or justice.

See authorities and comments, under section 551, at pp. 649 and 650, *ante*.

**842. Jurisdiction.** — Every complaint and information shall be heard, tried, determined and adjudged by one justice or two or more justices as directed by the Act or law, upon which the complaint or information is framed or by any other Act or law in that behalf.

2. If there is no such direction in any Act or law, then the complaint or information may be heard, tried determined and adjudged by any one justice for the territorial division where the matter of the complaint or information arose: Provided that

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(27) R. v. Lacoursiere, 12 C. L. T., 334. *Aff.* in appeal, 8 Man. L. R. 302.

(28) R. v. Thexton, 23 J. P. 323; Birnie v. Marshall, 35 L. T. 373; 41 J. P., 22.

(29) R. v. Llanfillo (Brecknockshire) J. J.; 31 J. P., 7; Williams v. Adams, 31 L. J., M. C., 109.

(30) R. v. Young, 52 L. J., M. C., 55.

every one who aids, abets, counsels or procures the commission of any offence punishable on summary conviction, may be proceeded against and convicted either in the territorial division or place where the principal offender may be convicted, or in that in which the offence of aiding, abetting, counselling or procuring was committed.

3. Any one justice may receive the information or complaint, and grant a summons or warrant thereon, and issue his summons or warrant to compel the attendance of any witnesses for either party, and do all other acts and matters necessary preliminary to the hearing, even if by the statute in that behalf it is provided that the information or complaint shall be heard and determined by two or more Justices.

4. After a case has been heard and determined one justice may issue all warrants of distress or commitment thereon.

5. It shall not be necessary for the Justice who acts before or after the hearing to be the Justice or one of the Justices by whom the case is to be or was heard and determined.

6. If it is required by any Act or law that an information or complaint shall be heard and determined by two or more Justices, or that a conviction or order shall be made by two or more Justices, such Justices shall be present and acting together during the whole of the hearing and determination of the case.

8. No Justice shall hear and determine any case of assault or battery, in which any question arises as to the title to any lands, tenements, hereditaments, or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any court of justice. R.S.C., c. 178, ss. 4, 5, 6, 7, 8, 9, 12 and 73.

Where an accused person is summoned to appear before a justice of the peace having jurisdiction to conduct the proceedings without associate justices, other justices of the peace are not entitled to interfere in the preliminary enquiry or the summary trial or to be associated with the summoning justice, except at the latter's request. (31)

**843. Hearing before justices.**—The provisions of Parts XLIV. and XLV. of this Act relating to compelling the appearance of the accused before the justice receiving an information under section five hundred and fifty-eight and the provisions respecting the attendance of witnesses on a preliminary inquiry and the taking of evidence thereon, shall, so far as the same are applicable, except as varied by sections immediately following, apply to any hearing under the provisions of this part: Provided that whenever a warrant is issued in the first instance against a person charged with

(31) R. v. McRae, 2 Can. Cr. Cas., 49.

an offence punishable under the provisions of this part, the Justice issuing it shall furnish a copy or copies thereof, and cause a copy to be served on the person arrested at the time of such arrest.

2. Nothing herein contained shall oblige any Justice to issue any summons to procure the attendance of a person charged with an offence by information laid before such Justice whenever the application for any order may, by law, be made *ex parte*. R.S.C., c. 178, ss. 13 to 17 and 21.

The wording of this and the proceeding section, 842, indicates that they are to be read in conjunction with and as if the provisions of Parts 54 and 55, *ante*, relating to compelling the appearance of persons charged with *indictable* offences were therein repeated in relation to *non-indictable* offences, and that, therefore, a justice may compel the appearance of an accused person to be tried summarily in any of the cases mentioned in section 554, *ante*.

See section 553, *ante*, as to offences committed on or near the boundary of two or more magisterial jurisdictions, etc.; and see section 560, *ante*, as to offences committed on the high seas or within the jurisdiction of the Admiralty.

See, also, section 555, *ante*, as to offences committed in certain parts of Ontario; and see p. 668, *ante*, for special provisions as to offences committed in territory east of Manitoba and Keewatin and north of Ontario and Quebec.

Upon a motion to quash a summary conviction for selling liquor without a license, it was held that, although the conviction did not shew on its face that the offence was commited at a place within the territorial jurisdiction of the magistrate, yet, as the warrant for the defendant's apprehension shewed the complaint to be that the defendant sold liquor at a place within the magistrate's jurisdiction, and it was to be inferred that the evidence returned was directed to that complaint, sufficient appeared to satisfy the Court that an offence of the nature described in the conviction was committed over which the magistrate had jurisdiction, and that therefore, having regard to section 889, *post*, the conviction should not be held invalid. (32)

See comments and authorities under section 562, *ante*, as to proof of service of summons.

The affidavit or other proof of service of a summons must shew either that the service was made upon the accused, personally, or, if the service has not been made personally it must be shewn that the accused could not be conveniently met with and that the summons was left, for him, at his last or most usual place of abode, with some inmate thereof.

Where, in the case of a conviction for a violation of the *Canada Temperance Act*, the service of the summons was made by leaving it with a Clerk in the hotel of which the defendant was the proprietor and in which the defendant resided, it was held that the evidence did not show that the service upon the Clerk was service upon an *inmate* of the last or most usual place of abode of the defendant, as required by section 562, *ante*, and that the convicting magistrate had no jurisdiction to enter upon the hearing in the absence of the defendant, who did not appear. (33)

Where a copy of the summons had been left with an adult person at the defendant's residence and there was no proof before the magistrate that

(32) R. v. McGregor, 15 C. L. T., 96; 2 Can. Cr. Cas., 410.
(33) *Ex parte* Wallace, 19 C. L. T., 406.

such person was an inmate of the defendant's usual or last place of abode or that any effort was made to serve the defendant personally, it was held, upon *certiorari* proceedings, that the service was insufficient; and the Court refused to admit evidence to supplement that given before the magistrate. (34)

On the return day of summons issued on a charge under the *Canada Temperance Act*, counsel appeared for the defendant and objected that the service of the summons was insufficient, on the ground that the constable who served it was not the constable of the locality where the service was effected. After cross-examining the constable, the defendant's counsel retired; and the magistrate, after hearing evidence as to the commission of the offence charged, adjourned the case to a future day, on which, the defendant not appearing either personally or by counsel, he convicted him and adjudged him to pay a penalty. *Held*, refusing a writ of *certiorari*, that the appearance of the defendant by his counsel on the first day cured any defect, if any, in the service of the summons, and that the fact of the defendant's counsel having left the court did not deprive the magistrate of the right to adjourn, nor of his right to convict the defendant, afterwards, on the day to which the cases was adjourned. (35)

An application was made for a *certiorari* to remove a summary conviction on the ground that the defendant had not been served with the summons a reasonable time before the hearing. There was nothing in the minutes taken at the trial to show when or how the summons was served, although it appeared by affidavit that it was served on the defendant, personally, between 8 and 9 in the evening, requiring him to appear and answer the charge on the following morning at 11. *Held*, that something should appear in the justices minutes to show how and when the summons was served and to show that he had exercised his discretion as to whether the service was sufficient. Rule for *certiorari* made absolute. (36)

A defendant was summarily convicted of a violation of the *Canada Temperance Act*. The summons had been served on his wife at his last place of abode. A rule for a *certiorari* was granted on an affidavit of the defendant that, from a date prior to the date of the information until after the hearing, he had been continuously out of the province in the United States. *Held*, that the convicting justice could not acquire any jurisdiction over the person of the defendant while he was out of the province and that the service was void; and the conviction was set aside. (37)

A defendant was in his absence tried and convicted of an offence against the *Canada Temperance Act*, the proof of service of the summons being the evidence of a constable shewing that a copy of the summons was served on the defendant's wife at the defendant's last place of abode. On motion to quash the conviction on the ground that the evidence of the servive did not shew that the defendant "could not be conveniently met with," in order to make the service on his wife a good one under subsection 2 of section 562, *ante*, it was held that the objection was valid; and the conviction was quashed. (38)

On June 1st 1896, a summons was issued against a defendant on an information charging her with having had liquor for sale without being licensed. On the return day,—June 4th,—an attorney appeared for the defendant and pleaded guilty for the defendant and she was convicted and

(34) *In re* Barron, Can. Ann. Dig., (1897), 51.
(35) R. v. Doherty, 32 N. S. R., 235.
(36) *Ex parte* Hogan, 13 C. L. T., 315; 32 N. B. R., 247.
(37) *Ex parte* Fleming, 14 C. L. T., 106.
(38) R. v. Carrigan, 17 C. L. T., 224. See *Ex parte* Donovan, 3 Can. Cr. Cas., 286.

fined, imprisonment being imposed in default of payment. On *certiorari* proceedings, the conviction was quashed on the ground that the summons had not been served on the defendant personally, and that she had not instructed the attorney to appear for her. Afterwards, a new summons was issued on the same information summoning the defendant for the 4th of November 1896. A motion, for a writ of prohibition to prohibit the justice from proceeding further on the information was dismissed on the ground that there had been no trial nor adjudication of the charge on the merits, and that, until the charge had become *res judicata*, it could not be considered that the information was spent. (39) But, in appeal, the order dismissing the motion was set aside and the writ of prohibition granted; it being held that the information and conviction thereon having been removed by *certiorari*, the jurisdiction of the justice was ousted, and that the conviction having been quashed there was no authority for sending back the information or any part of the record to the convicting justice, and that in consequence no new summons could be issued on the information. (40)

Although the above section, 843, provides that the provisions of Parts 54 and 55 respecting the taking of evidence shall apply to summary trials, it has been held, — on an application for a *certiorari* to remove a summary conviction, because the witnesses had not signed their depositions, and it did not appear that the depositions had been read over to the witnesses, etc., as required by section 590, *ante*, that this was directory and merely a matter of procedure and did not affect the jurisdiction of the justice, and that therefore a *certiorari* would not lie. (41)

**844. Backing warrants.** — The provisions of section five hundred and sixty-five relating to the endorsement of warrants shall apply to the case of any warrant issued under the provisions of this part against the accused, whether before or after conviction, and whether for the apprehension or imprisonment of any such person. R.S.C., c. 178, s. 22; 52 V., c. 45, s. 4.

**845. Informations and complaints.** — It shall not be necessary that any complaint upon which a Justice may make an order for the payment of money or otherwise shall be in writing, unless it is so required by some particular Act or law upon which such complaint is founded.

2. Every complaint upon which a Justice is authorized by law to make an order, and every information for any offence or act punishable on summary conviction, may unless it is herein or by some particular Act or law otherwise provided, be made or had without any oath or affirmation as to the truth thereof.

3. Every complaint shall be for one matter of complaint only, and not for two or more matters of complaint and every information shall be for one offence only, and not for two or more offences; and every complaint or information may be laid or made by the

(39) Hallsworth v. Ziekrick, 17 C. L. T., 37.
(40) R. v. Ziekrick, 17 C. L. T., 128.
(41) *Ex parte* Doherty, 14 C. L. T., 265; 32 N. B. R., 479; 3 Can. Cr. Cas., 310.

complainant or informant in person, or by his counsel or attorney or other person authorized in that behalf. R.S.C., c. 178, ss. 23, 24 and 26.

It appears that a summons may be issued without the information being sworn to, but that, before a warrant can be issued to compel the attendance of the accused, there must be an information in writing and under oath. (42)

An information purported to be made by "J. M. B.", but was signed and sworn to by "A. W. M.", and, at the opening of the case, the magistrate, in A. W. M's presence, erased the words "J. M. B." and wrote over them. "A. W. M."; whereupon the defendant's counsel objected that the information, having been amended, should be resworn. This was not done, and the trial was proceeded with. *Held* that the information was bad, and that the objection, having been taken by the defendant's counsel and noted, was not waived by going to trial. (43)

If a magistrate's summons is issued on an information purporting to be sworn at a specified time and place, and the defendant appears thereon and pleads to the charge, the proceedings will not be quashed, on *certiorari*, on its being afterwards shewn that the information was not in fact sworn at such time and place. (44)

An information stating that the defendant "within the space of thirty days last past, to wit, on the 30th and 31st days of July 1892, did unlawfully sell intoxicating liquor without the license therefor by law required" does not charge two offences but only the single offence of selling unlawfully within the thirty days; but even if an information so worded could be said to contravene section 845, clause 3, *ante*, the defect is one in substance or in form within the meaning of the above section 847 and does not invalidate an otherwise valid conviction for the single offence. (45)

Where a defendant had been charged for that he did *give* and *sell* to an Indian intoxicating liquor, and, at the close of the evidence, the defendant's counsel objected that two offences were charged, the objection was dismissed; and, after the defendant was convicted, it was held, on a case stated by the magistrate, that *to give and sell* were not two offences; and the conviction was affirmed. (46)

Where, in a summary trial, it was objected that the information disclosed two offences and the magistrate maintained the objection and dismissed the case, it was, on a case stated, held that it was impossible to say that, because one of two offences charged may be discarded, the other cannot be proceeded with; and the case was sent back to the magistrate to be so dealt with. (47)

It is contrary to the rules and principles of the criminal law that justices should mix up two charges and convict or acquit in one of them with reference to the facts appearing in the other. (48)

Where an information, laid under the *Indian Act*, charged that the defendant sold intoxicating liquor to two persons on the 5 th of July and to

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(42) R. v. McDonald, 3 Can. Cr. Cas., 287. See McGuinness v. Dafoe, 27 O. R., 117.
(43) R. v. McNutt, 28 N. S. R., 377; 3 Can. Cr. Cas 184.
(44) *Ex parte* Sonier, 2 Can. Cr. Cas., 121.
(45) R. v. Hazen, 13 C. L. T., 397.
(46) R. v. Monaghan, 18 C. L. T., 45.
(47) Rogers v. Richards, [1892] 555, 600.
(48) R. v. Fry, — *Ex parte* Masters, 67 L. J., Q. B., 712.

two persons on the 8th of July, and the justices, — notwithstanding that the defendant's counsel objected to the information on this ground, — proceeded and heard evidence in respect of all the offences so charged, and then amended the information by substituting the 8th of August for the 8th of July, and thereupon proceeded and heard evidence in respect of the substituted charge, and dismissed that charge but convicted the defendant of selling to two persons on the 5 th of July, the conviction was quashed; and it was held that it was the duly of the Justices, when the objection was taken, to have amended the information by striking out one or other of the charges, and to have heard the evidence applicable to the remaining charge only. (49)

Justices having heard evidence on an information preferred against the appellant, under section 4 of the Imperial *Indecent Assaults Act*, 1889, did not then acquit nor convict, but proceeded to hear evidence on another information against the appellants under section 3 of the same Act, and then convicted him on the first information. *Held* that their conviction was bad, and that each case must stand upon its own merits and be decided upon the evidence given in it alone. (50)

By section 20 of the English *Apothecaries' Act* any person who acts or practises as an apothecary without having obtained a certificate is liable to a penalty: and where an accused was charged with three separate acts of practicing by treating and prescribing for three different patients on three separate occasions, it was held that the three acts only constituted one offence of practising for which only one penalty could be recovered, and that bare proof of one individial act would not of itself amount to "practicing," — the provisions of the statute being directed against an habitual or continous course of conduct and not against an individual act. (51)

**846. Certain objections not to vitiate proceedings.** — No information, complaint, warrant, conviction or other proceeding under this part shall be deemed objectionable or insufficient on any of the following grounds; that is to say:

(*a*) that it does not contain the name of the person injured, or intended or attempted to be injured; or

(*b*) that it does not state who is owner of any property therein mentioned; or

(*c*) that it does not specify the means by which the offence was committed; or

(*d*) that it does not name or describe with precision any person or thing:

Provided that the Justice may, if satisfied that it is necessary for a fair trial, order that a particular further describing such means, person, place or thing be furnished by the prosecutor.

2. The description of any offence in the words of the Act, or any order, by-law, regulation or other document creating the offence, or any similar words, shall be sufficient in law. (Added by the *Criminal Code Amendment Act 1900*).

See comments under section 613 at pp. 752, 753, *ante*.

(49) R. v. Alward, 14 C. L. T., 338; 25 O. R., 519.
(50) Hamilton v. Walker, 17 Cox C. C., 539.
(51) Apothecaries' Co. v. Jones, 17 Cox C. C., 588.

The information or complaint is sufficient if, — in terms equivalent to the terms of the statute on which it is based, — it shews the essential elements of the alleged offence. (52)

A person who is charged under a wrong name and who pleads, without objection thereto, is not entitled after conviction to be released, upon a writ of *habeas corpus*, on the ground that she is not the person against whom the commitment issued The proper time to take objection to a wrong name under which an accused is charged, is before pleading to the charge, at which time the mistake may be corrected by an amendment. (53)

**847. Variance.** — No objection shall be allowed to any information, complaint, summons or warrant for any alleged defect therein, in substance or in form, or for any variance between such information, complaint, summons or warrant and the evidence adduced on the part of the informant or complainant at the hearing of such information or complaint.

2. Any variance between the information for any offence or act punishable on summary conviction and the evidence adduced in support thereof as to the time at which such offence or act is alleged to have been committed, shall not be deemed material if it is proved that such information was, in fact laid within the time limited by law for laying the same.

3. Any variance between the information and the evidence adduced in support thereof, as to the place in which the offence or act is alleged to have been committed, shall not be deemed materiial if the offence or act is proved to have been committed within the jurisdiction of the justice by whom the information is heard and determined.

4. If any such variance, or any other variance between the information, complaint, summons or warrant, and the evidence adduced in support thereof, appears to the Justice present and acting at the hearing to be such that the defendant has been thereby deceived or misled, the Justice may upon such terms as he thinks fit, adjourn the hearing of the case to some future day. R.S.C., c. 178, s. 28.

See section 723, and comments, at pp. 842-844, *ante*.

The variance between the information laid and the evidence adduced, referred to in the above section as being immaterial, is merely a difference between the mode of stating and the mode of proving the same thing in substance: and, therefore, where the evidence adduced establishes something ertirely different from that which is charged, the objection to the variance may be taken and allowed.

Where between the information, the summons and the adjudication there is an apparent variance which is satisfactorily explained or which is

(52) Champagne v. Simard, Que. Jud. Rep., 7 S. C., 40.
(53) *Ex parte* Corrigan, 2 Can. Cr. Cas., 591.

manifestly a mere clerical error, the Court will not interfere; such a variance being no ground for setting aside the conviction. (54)

Justices of the peace have no power, on a preliminary investigation before them of a charge of unlawfully wounding, to reduce the charge to one of common assault, over which they would have summary jurisdiction, and then summarily try it; and a conviction recorded by the justices in such a case upon a plea of guilty to the charge as reduced is not a bar to an indictment for unlawful wounding based upon the same facts; (55) and in a civil action of damage arising out of the facts of the cases, it was held on appeal that the certificate of conviction by the justices for common assault and the payment of the fine did not bar the civil action, and that section 866, *post*, did not apply. (56)

Magistrates conducting a preliminary examination in respect of an indictable offence,—for instance, shooting with intent to murder,—have no right, at the conclusion of the enquiry, to summarily convict of a lesser offence over which they have summary jurisdiction, when there is no complaint laid before them in respect of such lesser offence, even though such lesser offence is established by the evidence. (57)

**848. Execution of warrant.**—A summons may be issued to procure the attendance, on the hearing of any charge under the provisions of this part, of a witness who resides out of the jurisdiction of the Justices before whom such charge is to be heard, and such summons and a warrant issued to procure the attendance of a witness, whether in consequence of refusal by such witness to appear in obedience to a summons or otherwise, may be respectively served and executed by the constable or other peace officer to whom the same is delivered or by any other person, as well beyond as within the territorial division of the Justice who issued the same. 51 V., c. 45, ss. 1 and 3.

**849. Hearing to be in Open Court.** — The room or place in which the Justice sits to hear and try any complaint or information shall be deemed an open and public Court, to which the public generally may have access so far as the same can conveniently contain them. R.S.C., c. 178, s. 33.

See section 55*a*, *ante*, as to power to exclude the public from the Court room on the trial of certain offences; and see section 550, *ante*, as to separate trials of persons under sixteen.

**850. Counsel for parties.** — The person against whom the complaint is made or information laid shall be admitted to make his full answer and defence thereto, and to have the witnesses examined and cross-examined by counsel or attorney on his behalf.

2. Every complainant or informant in any such case shall be at liberty to conduct the complaint or information, and to have the witnesses examined and cross-examined, by counsel or attorney on his behalf. R.S.C., c. 178, ss. 34 and 35.

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(54) R. v. Diblee, *Ex parte* Kavanagh, 34 N. B. R., 1.
(55) R. v. Lea, 2 Can. Cr. Cas., 233.
(56) Miller v. Lea, 2 Can. Cr. Cas., 282; 25 Ont. A. R., 428.
(57) R. v. Mines, 1 Can. Cr Cas. 217

As to the defendant's right to give evidence on his own behalf, see sec. 4 of the Canada Evidence Act 1893, *post*, and comments thereon.

**851. Witnesses to be on oath.** — Every witness at any hearing shall be examined upon oath or affirmation, and the Justice before whom any witness appears for the purpose of being examined shall have full power and authority to administer to every witness the usual oath or affirmation. R.S.C., c. 178, s. 47.

As to the different modes of administering the oath to suit the religious persuasion of the witness, see pp. 701-705, *ante*.

**852. Evidence of exemptions, etc.**—If the information or complaint in any case negatives any exemption, exception, proviso or condition in the statute on which the same is founded it shall not be necessary for the prosecutor or complainant to prove such negative, but the defendant may prove the affirmative thereof in his defence if he wishes to avail himself of the same. R.S.C., c. 178, s. 38.

**853. Non-appearance of Accused.** — (As amended by 56 V., c. 32). In case the accused does not appear at the time and place appointed by any summons issued by a Justice on information before him of the commission of an offence punishable on summary conviction then, if it appears to the satisfaction of the Justice that the summons was duly served, a reasonable time before the time appointed for appearance, such Justice may proceed *ex parte* to hear and determine the case *in the absence of the defendant*, as fully and effectually, to all intents and purposes, as if the defendant had personally appeared in obedience to such summons, or the Justice, may, if he thinks fit, issue his warrant as provided by section five hundred and sixty-three of this Act and adjourn the hearing of the complaint or information until the defendant is apprehended. R.S.C., c. 178, s. 39.

Before proceeding in the absence of the defendant, as provided by this section, the service and manner of service of the summons should be sworn to, and the Justice should be satisfied that a reasonable time has elapsed since the service to enable the defendant to obey it. He should have strong grounds for concluding that the summons has reached or come to the knowledge of the defendant and that he is wilfully disobeying it; and the evidence to satisfy him of this should be much stronger where the summons was not served personally than where it was served personally. (58) In case of doubt, the other course of issuing a warrant should be taken.

The justice must determine as to the sufficiency of the service of the summons, and what is a reasonable time as to service, having regard to the nature and circumstances of the charge. But the time between the service of the summons and the hearing must be sufficient for the defendant to prepare his defence. And where a summons was served almost immediately before the time of hearing, the conviction of the defendant was quashed. (59)

(58) Read v. Hunter, 8 C. L. T., 428; R. v. Mabee, 17 O. R., 194.
(59) R. v. Eli, 10 O. R, 727

An information for selling liquor in violation of the *Canada Temperance Act*, was laid and a summons issued and served; and, as the defendant did not appear, the justices, on proof of service of summons, proceeded with the case in his absence. The evidence only established an illegal *keeping for sale*: and, on the application of the informant, the justices amended the information by substituting the latter offence and then convicted the defendant of the substituted offence. *Held* that, although justices have a discretionary power to amend by changing one offence for another, in the event of a variance between the information and the evidence adduced, this power only applies where a magistrate has acquired jurisdiction over the accused, and that as the justices could acquire no jurisdiction over the accused in the present case, except in regard to the offence for which the summons was issued, the amendment in the defendant's absence and without his knowledge was illegal; and the conviction was set aside. (60)

The defendant's appearance either by himself or by attorney waives all irregularity in the service of the warrant or summons. (61)

See comments and authorities at pp. 673 and 910, *ante*, as to proof of service of summons.

**854. Non-appearance of Prosecutor.** — If, upon the day and at the place so appointed, the defendant appears voluntarily in obedience to the summons in that behalf served upon him, or is brought before the Justice by virtue of a warrant, then, if the complainant or informant, having had due notice, does not appear by himself, his counsel or attorney, the Justice shall dismiss the complaint or information, unless he thinks proper to adjourn the hearing of the same until some other day upon such terms as he thinks fit. R.S.C., c. 178, s. 41.

**855. Proceedings when both parties appear.** — If both parties appear, either personally or by their respective counsel or attorneys, before the Justice who is to hear and determine the complaint or information, such Justice shall proceed to hear and determine the same. R.S.C., c. 178, s. 42.

**856. Arraignment of Accused.** — If the defendant is present at the hearing, the substance of the information or complaint shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted, or why an order should not be made against him, as the case may be.

2. If the defendant thereupon admits the truth of the information or complaint, and shows no sufficient cause why he should not be convicted, or why an order should not be made against him, as the case may be, the justice present at the hearing shall convict him or make an order against him accordingly.

3. If the defendant does not admit the truth of the information or complaint, the justice shall proceed to inquire into the charge

(60) *Ex parte* Doherty, 1 Can Cr. Cas., 84.
(61) R. v. Aiken, 3 Burr., 1785.

and for the purposes of such inquiry shall take the evidence of witnesses both for the complainant and accused in the manner provided by Part XLV., in the case of a preliminary inquiry: Provided that the prosecutor or complainant is not entitled to give evidence in reply if the defendant has not adduced any evidence other than as to his general character; provided further, that in a hearing under this section the witnesses need not sign their depositions. R.S.C., c. 178, ss. 43, 44 and 45.

**857. Adjournment.** — Before or during the hearing of any information or complaint the justice may, in his discretion adjourn the hearing of the same to a certain time or place to be then appointed and stated in the presence and hearing of the party or parties, or of their respective solicitors or agents then present, but *no such adjournment shall be for more than eight days.*

2. If, at the time and place to which the hearing or further hearing is adjourned, either or both of the parties do not appear, personally or by his or their counsel or solicitors respectively, before the Justice or such other Justice as shall then be there, the Justice who is then there may proceed to the hearing or further hearing as if the party or parties were present.

3. If the prosecutor or complainant does not appear the Justice may dismiss the information, with or without costs as to him seems fit.

4. Whenever any Justice adjourns the hearing of any case, he may suffer the defendant to go at large or may commit him to the common gaol or other prison within the territorial division for which such Justice is then acting, or to such other safe custody as such Justice thinks fit, or may discharge the defendant upon his recognizance, with or without sureties at the discretion of such Justice, conditioned for his appearance at the time and place to which such hearing or further hearing is adjourned.

5. Whenever any defendant who is discharged upon recognizance, or allowed to go at large, does not appear at the time mentioned in the recognizance or to which the hearing or further hearing is adjourned, the Justice may issue his warrant for his apprehension. R.S.C., c. 178, ss. 48, 49, 50 and 51.

Adjournments cannot exceed eight days, even with the consent of all parties. (62)

Notwithstanding the provisions of Article 1074 of the Quebec *License Law*, a writ of prohibition may be granted in the province of Quebec, as well as in any other province, if a magistrate exceeds his jurisdiction in any criminal case His jurisdiction is exceeded if he hears one of the parties and pronounces sentence on a day to which the hearing had not been adjourned pursuant to the above section, 857. (63)

(62) R. v. French, 13 O. R., 80.
(63) Therien v. McEachren, & Loupret, 4 Rev. de Jur., 87.

Where the hearing of a complaint has been duly adjourned by the justice, such hearing may take place at the time to which it is adjourned, notwithstanding the absence of the accused. (64)

Where, in a summary trial of an information for a third offence, the magistrate,—after hearing the evidence, and arguments of Counsel,—adjourned the case to a future day, for the sole purpose of deciding as to the sufficiency of the evidence and giving judgment, and, on the day so fixed, the magistrate,—in the absence of the defendant and his solicitor and without notice to them,—heard and granted a motion to amend the summons by changing the date of a previous conviction, and after making the amendment, rendered judgment convicting the defendant, it was held that the amendment was illegally made, and the conviction was quashed. (65)

A justice cannot adjourn summary proceedings, *sine die*, for the purpose of considering his judgment. So, that, where a case of assault was tried on the 22nd of November 1895, all the evidence on both sides being heard on that day, but no adjudication being then made, and the justices adjourned without naming any day for giving judgment, it was held that the adjournment, *sine die*, rendered any further proceeding nugatory, the justices thereby losing jurisdiction; and the conviction subsequently rendered by the justices was quashed. (66)

**858. Adjudication by Justice.**—The Justice, having heard what each party has to say and the witnesses and evidence adduced, shall consider the whole matter, and, unless otherwise provided, determine the same and convict or make an order against the defendant, or dismiss the information or complaint, as the case may be. R.S.C., c. 178, s. 52.

The adjudication is confined within the limits of the information or complaint (subject, however, to the provisions of section 847, *ante*, relating to variances between the information and the evidence adduced). Thus, where on an application for sureties to keep the peace, an assault, (as well as a threat,) was proved and the justices not only ordered the defendant to find sureties, but, also,—notwithstanding the protest of the complainant,—convicted the defendant of the assault, a *certiorari* was granted to quash the conviction. (67)

**859. Form of conviction.**—If the Justice convicts or makes an order against the defendant a minute or memorandum thereof shall then be made, for which no fee shall be paid, and the conviction or order shall afterwards be drawn up by the Justice on parchment or on paper, under his hand and seal, in such one of the forms of conviction or of orders from VV to AAA inclusive in schedule one to this Act (68) as is applicable to the case or to the like effect. R.S.C., c. 178, s. 53.

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Denault v. Robida, Que. Jud. Rep., 10 S. C., 199.

(65) R. v. Grant, 30 N. S. R., 368. (R. v. Gough, 22 N. S. R., 516, followed).

(66) R. v. Quinn, 28 O. R., 224; 2 Can. Cr. Cas., 153; R. v. Morse, 11 C. L. T., 342; 22 N. S. R., 298; R. v. Hall, 12 Ont. P. R., 142; R. v. Mitchell, 17 C. L. T., 352; Cairns v. Choquet, & Lambe, 3 Que. P. R., 25.

(67) R. v. Deny, 20 L. J., M., C., 189; R. v. Soper, 3 B. & C., 857.

(68) For Forms VV to AAA, see pp. 956-960, *post*.

The minute or memorandum of the conviction or order, as the case may be, is here required to be made, at once, that is, immediately upon the judgment pronouncing the conviction or order being rendered; and this minute or memorandum should state, in substance, the whole of the adjudication of the justice, as to the punishment inflicted, or the fine or penalty, or the amount of money ordered to be paid or the thing ordered to be done, and the mode of enforcing it, whether by distress or imprisonment. For, the conviction or order, which is the formal record, is to be based upon the minute. It is merely a short statement in writing in any form of words, such as the following: "I find the defendant guilty of the assault herein charged against him, and adjudge him to pay a fine of ten dollars, together with costs to the amount of four dollars, and that in default of payment he be imprisoned for one month."

The defendant is entitled, under the above section, to the minute or memorandum of the conviction or order, without any fee.

The judgment, in case of a conviction, consists of two parts, namely, the adjudication of conviction, and the sentence or award of punishment.

Where the magistrate imposes a fine, and fixes an imprisonment, which are within his discretion and power, the formal conviction must correspond with the adjudication as contained in the minute or memorandum required to be made at the rendering of the judgment; because it must be according to the fact, and the fact is as shown by the minute or memorandum. (69)

Section 982, *post*, provides that the several forms in Schedule One, *post*, varied to suit the case, or forms to the like effect, shall be deemed good, valid and sufficient in law.

The conviction must show the place for which the justice acts: and it must also show either that the offence, of which the offender is convicted was committed within the limits of the justice's jurisdiction or that there are special facts, — which must be mentioned, — giving jurisdiction beyond those limits. (70) For instance, in cases of jurisdiction given to justices of the territorial division in which the offender is found, over an offence committed in another territorial division, it will be necessary to mention where the offence was committed and the fact of the person accused of the offence being *found* within the limits of the convicting justices' jurisdiction. (71) For, an act which declares that, "an offence or a cause of complaint shall be deemed to have been committed or to have arisen either in the place where the same was actually committed or arose, or in any place in which the person charged or complained against is found or happens to be," does not give justices jurisdiction to convict a person summoned from beyond their jurisdiction for an offence that has taken place out of their jurisdiction; for such person, by appearing in answer to their summons, is not *found* and does not *happen to be* within their jurisdiction. (72)

Where the offenders were taken on board a smuggling boat within the harbor of Folkestone, — which had an exclusive local jurisdiction, — and were afterwards taken, with the boat, to the port of Dover, and convicted before two justices of that port and town, the conviction, which merely stated that the offenders had been found in a boat in the harbor of Folkestone, was held to be bad, as not showing jurisdiction. The justices of Folkestone alone had authority to convict, they being the justices of the first port or place into which the vessel was carried. (73)

(69) R. v. Hartley, 20 O. R., 485.
(70) R. v. Young, 5 O. R., 400.
(71) *Re* Peerless, 1 Q. B., 143, 154.
(72) Johnson v. Colam, 44 L. J., M. C., 185.
(73) Kite & Lane's Case, 1 B. & C., 101. See, also, R. v. Nunn, 8 B. & C., 644.

If the law under which the proceedings are taken is directed against a particular description of persons, the conviction, in setting out the offence, must show that the defendant is within the description of persons against whom the law is directed. So, that, where, under the by-laws of a town, no transient trader or other person, occupying a place of business in the town for a temporary period of less than a year and not duly entered on the assessment roll for the current year, was allowed to offer goods for sale within the limits of the town, without having a license, it was held, upon a conviction obtained under this by-law, that the omission in the conviction of an allegation that the defendant was a *transient trader not duly entered on the assessment roll for the current year* was fatal. (74)

A conviction for trading as a hawker and pedlar without a license was held not to be supported by evidence of a single act of selling a parcel of silk handkerchiefs to a particular person; for one bare act of sale, it was held, did not show the defendant to have been such a person as by law is required to take out a license. (75)

Where a defendant was shown to have treated and prescribed for three different patients on three separate occasions, it was held that the three acts only constituted one offence of practicing as an apothecary and that bare proof of one individual act would not of itself amount to proof of "practicing", the statute being directed against an habitual course of conduct. (75*a*)

It has been held that, where the conviction is at variance with the justices' minute of adjudication, it will be quashed. (76)

A *certiorari* was granted to remove a conviction, under the *Indian Act*, for selling intoxicants to an Indian, it being held that, upon the face of the proceedings, it appeared that the justice had acted without jurisdiction, in committing the defendant, by reason of the minute of adjudication not stating any term of imprisonment, while the conviction adjudged the defendant to sixty days' imprisonment. (77)

A conviction in due form will not be quashed because it is based upon a minute of adjudication which does not disclose an offence in law, if the Court is satisfied, upon perusal of the depositions, that the offence for which the formal conviction was made was in fact committed. (78)

We have seen, by section 846, *ante*, that a conviction is not to be deemed insufficient for not containing the name of the person injured, nor for omitting to state who is the owner of any property therein mentioned, nor for omitting to specify the means by which the offence has been committed, nor that it does not name or describe any person or thing with precision. The time when the offence was committed ought to be stated. But the precise day need not be named; and it will be sufficiently certain if the fact be alleged to have happened between such a day and such a day, provided the last of the days specified be within the limited time. Thus, where the information charged the offence to have been committed on the 4th of October and on divers other days and times between that day and the 16th of November, and the conviction stated the offence to have been committed on the 8th of November, it was held to be valid. (79) And, where, in a conviction under the *Canada Temperance Act*, there was a statement alleging

(74) R. v. Caton, 16 O. R., 11.
(75) R. v. Little, 1 Burr., 610.
(75*a*) See Apothecaries' Co. v. Jones, 17 Cox C. C., 588, *cit.* at p. 913, *ante*.
(76) R. v. Perley, 25 N. B. R., 43. And see *Ex parte* Watson, 31 N. B. R., 2.
(77) *Ex parte* Hill, 31 N. B. R., 84.
(78) R. v. Wiffin, 4 Can. Cr. Cas., 141.
(79) Onley v. Gee, 30 L. J. M. C., 222.

that the offence was committed between the thirtieth of June and the thirty-first of July, it was held to be a sufficiently certain statement of the time. (80) And a conviction for keeping a house of ill-fame on the eleventh of October and on other days and times before that day was also held sufficiently certain as to time; the only offence charged by these words being the keeping and maintaining of a house of ill-fame; and the fact that the parties accused kept such a house on the eleventh of October and on other days before that day did not constitute a distinct and separate offence against them upon each of those days. (81)

When the summons alleges the offence to have been committed on a certain day, and at the hearing it is proved to have been, in fact, committed on some other day, the justices should amend the summons by altering the date. (82)

Under the second clause of section 847, *supra*, any variance between the information and the evidence adduced, at the summary trial thereof, as to the time at which such offence is alleged to have been committed is not to be deemed material, if it is proved that the information was in fact laid within the time limited by law for laying it.

Before proceeding to a conviction, the justices should have evidence which is reasonably sufficient to show that the offence charged has been committed. Where, in a case under the *Canada Temperance Act*, the defendant swore at the trial, that he did not sell any intoxicating liquor on the day charged, and there was no other evidence showing positively that the liquor sold was INTOXICATING liquor, the evidence for the Crown being merely that it RESEMBLED intoxicating liquor, it was held that, under these circumstances, there was no evidence on which to found a conviction for selling intoxicating liquor. (83)

So, where, on a conviction, for knowingly harbouring and keeping certain spirits liable to excise duty, it appeared, from the evidence, that search having been made in the defendant's house during the defendant's absence, but in the presence of his wife, the spirits were found concealed in an inner room therein, that the defendant before the convicting justices produced no evidence, but insisted that the room in which the seizure was made was detached from his dwelling-house and had a door always left unlocked, it was held that the evidence was too slight to found a conviction, and that the mere naked fact of the spirits being found in the defendant's house during his absence, could not be considered as satisfactory evidence that the defendant KNOWINGLY harboured or permitted the spirits to remain in the house; and the conviction was quashed. (84)

The defendant, upon being convicted, is entitled, upon application, to a copy of the conviction; (85) and a justice who refuses it may have to pay the costs of a *certiorari* to obtain it. (86) But, the justices are not bound by the copy they deliver; and if it should be found to be defective or informal, from misstating the name of the informer or any other fact, without there being any fraud or intention to mislead, a more correct one may be returned to the sessions; and the court can only take notice of the latter. (87)

It seems, indeed, that the formal conviction may be drawn up at any

(80) R. v. Wallace, 4 Ont. R., 127.
(81) R. v. Williams, 37 U. C. Q. B., 540.
(82) Mayor of Exeter v. Heaman, 37 L. T., 534.
(83) R. v. Bennett, 1 Ont. R., 445.
(84) *Ex parte* Ransley, 3 D. & R., 572.
(85) R. v. Midlam, 3 Burr. 1720.
(86) R. v. Huntingdon, 5 D. & R., 588.
(87) R. v. Allen, 15 East, 333, 346.

time before the return of the *certiorari*, although, such return be after a commitment, (88) or after the penalty has been levied by distress, (89) or after action brought against the magistrates. (90)

A magistrate has even been allowed to return an *amended* conviction to the sessions after having returned an erroneous one; (91) but, it was held that, he could not do this after the conviction as first returned had been quashed either on appeal or by the Court of Queen's Bench, nor after the discharge of the defendant by the Queen's Bench by reason of the conviction recited in the warrant of commitment being bad. (92)

The precept of a warrant of commitment must conform strictly to the directions of the statute which authorizes an incarceration with respect to the conditions upon which a prisoner can obtain his discharge before the expiration of the term to which he has been condemned. Where the authorizing statute states that a person, who is condemned to a term of imprisonment in default of payment of a fine and costs, can obtain his discharge before the expiration of such term *upon paying the fine*, it is illegal to require, in addition, the payment of the costs of the prosecution and of the charges of conveying the prisoner to gaol. In such a case, the warrant of commitment is bad and illegal, not only as regards the part in which such costs and charges are mentioned, but in whole, and must be quashed. (93)

A justice's warrant of commitment for default of payment of a fine imposed under the *Customs Act* for smuggling, and under which the accused is required to pay, also, the expenses of being conveyed to gaol before he can obtain his release, is invalid, if the amount of such expenses are not stated therein. (94)

A conviction, under section 192 of the *Customs Act*, for clandestinely landing spirits in Canada should shew on its face that the goods were subject to duty. (95)

When a penalty is inflicted at the suit of a particular person, the conviction ought to specify to whom the penalty is to be paid; and if it simply provides that the penalty shall be "paid and employed according to law," the conviction will be quashed on *certiorari*. (96)

Where, — in the case of a conviction for a third offence, entailing imprisonment by reason of its being a third offence, — the commitment shewed that the firstly therein recited conviction was for an offence committed after the date of the commission of the offence secondly therein recited, it was held that the commitment did not shew a valid conviction for a third offence, and a writ of *habeas corpus* was granted, and the prisoner released. (97)

Where a warrant of commitment recited that the defendant detained in custody thereon, had been charged before the justice who had issued the warrant of commitment, "for that he did kindle a fire and allow it to escape

(88) Massey v. Johnson, 12 East, 82; R. v. McCarthy, 11 O. R., 657.
(89) R. v. Barker, 1 East, 186.
(90) Lindsay v. Leigh, 11 Q. B., 455; Gray v. Cookson, 16 East, 13.
(91) Sellwood v. Mount, 9 C. & P., 75; 1 Q. B., 729. See R. v. McAnn, 4 B. C. R., 587; 3 Can Cr. Cas., 110; and *Ex parte* Welsh, 4 Rev. de Jur., 437.
(92) Chaney v. Payne, 10 L. J. M. C., 114.
(93) *Ex parte* Lon Kai Long *alias* Long Wing, Tom Hop Lee, and Hum Chung Lung, 1 Can. Cr. Cas., 120.
(94) R. v. Thomas McDonald, 2 Can. Cr. Cas., 504.
(95) *Ib.*
(96) Prevost v. Leclerc & DeMontigny, 1 Que. P. R., 230.
(97) *Ex parte* Robinson, 5 Rev. de Jur., 271.

from his control," but, did not recite any conviction, it was held on a motion for *habeas corpus*, that, as the warrant did not allege any conviction, — (see section 886), *post*, — an order must issue discharging the defendant. *Held*, also, that if the commitment had alleged a conviction, the conviction itself could have been referred to, in order to support the commitment, even though the offence was insufficienty stated in the warrant of commitment, but, that as the warrant contained no such allegation, the conviction could not be referred to. (98)

**860. Disposal of penalties on conviction of joint offenders.** — When several persons join in the commission of the same offence, and upon conviction thereof each is adjudged to pay a penalty which includes the value of the property, or the amount of the injury done, no further sum shall be paid to the person aggrieved than such amount or value, and costs, if any, and the residue of the penalties imposed shall be applied in the same manner as other penalties imposed by a Justice are directed to be applied. R.S.C., c. 178, s. 54.

**861. First conviction in certain cases.** — Whenever any person is summarily convicted before a Justice of any offence against Parts XX., to XXX., inclusive, or Part XXXVII., of this Act and it is a first conviction, the Justice may, if he thinks fit, discharge the offender from his conviction upon his making such satisfaction to the person aggrieved, for damages and costs, or either of them, as are ascertained by the Justice. R.S.C., c. 178, s. 55.

Parts XX to XXIII relate to ASSAULTS, RAPE, LIBEL, etc.; parts XXIV to XXX relate to THEFT, BURGLARY, etc., and part XXXVII relates to MISCHIEF.

**862. Certificate of dismissal.** — If the Justice dismisses the information or complaint he may, when required so to do, make an order of dismissal in the form BBB in schedule one hereto, (99) and he shall give the defendant a certificate in the form CCC in the said schedule, (100) which certificate, upon being afterwards produced, shall, without further proof, be a bar to any subsequent information or complaint *for the same matter*, against the same defendant. R.S.C., c. 178, s. 56.

At common law and independently of statutory enactment a former conviction or acquittal, whether on a summary proceeding or on an indictment, is an answer to an information of a criminal nature founded on the same facts.

See comments and authorities at pp. 271, 272, *ante*, at pp. 726, 727, *ante*, and under sections 797, 798 and 799, at pp. 886, 887, *ante*.

**863. Disobedience to Order of Justice.** — Whenever, by any Act

(98) R. v. Lalonde, 16 C. L. T., 68.
(99) For Forms BBB., see p. 961, *post*.
(100) For Form CCC., see p. 962, *post*.

or law authority is given to commit a person to prison, or to levy any sum upon his goods or chattels by distress, for not obeying an order of a Justice, the defendant shall be served with a copy of the minute of the order before any warrant of commitment or of distress is issued in that behalf; and the order or minute shall not form any part of the warrant of commitment or of distress. R.S. C., c. 178, s. 57.

**864. Assaults.**—Whenever any person is charged with common assault, any Justice may summarily hear and determine the charge

2. If the justice finds the assault complained of to have been accompanied by an attempt to commit some other indictable offence, or is of opinion that the same is, from any other circumstance, a fit subject for prosecution by indictment, he shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as if he had no authority finally to hear and determine the same. (As amended by the *Criminal Code Amendment Act 1900*).

Before this section was amended, it was held that the word "assault", therein, included an aggravated assault; (101) but the amendment expressly restricts the section to common assaults.

By this section as amended, a magistrate has the right, if he thinks proper, to summarily dispose of any case of common assault, without regard to the desire of the parties that it should be sent up for trial under indictment.

**865. Dismissal of complaint for assault.** — If the Justice, upon the hearing of any case of assault or battery upon the merits where the complaint is preferred by or on behalf of the person aggrieved, under the next preceding section, deems the offence not to be proved, or finds the assault or battery to have been justified, or so trifling as not to merit any punishment, and accordingly dismisses the complaint, he shall forthwith make out a certificate under his hand stating the fact of such dismissal, and shall deliver such certificate to the person against whom the complaint was preferred. R.S.C., c. 178, s. 74.

**866. Release from further proceedings.** — If the person against whom any such complaint has been preferred, by or on the behalf of the person aggrieved, obtains such certificate, or having been convicted, pays the whole amount adjudged to be paid or suffers the imprisonment or imprisonment with hard labour, awarded, he shall be released from all further or other proceedings, civil or criminal, *for the same cause*. R.S.C., c. 178, s. 75.

See comments and authorities at pp. 271, 272, 726, 727, and under sections 797-799, at pp. 886, 887, *ante*; and see Form of plea at p. 771, *ante*.

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(101) Hardigan v. Graham, Que. Jud. Rep., 12 S. C., 177; 1 Can. Cr. Cas., 437. But see Peltier v. Martin, Que. Jud. Rep., 8 S. C., 438.

In R. v. Miles, already cited at p. 727, *ante*, a case was stated for the consideration of the English Court of Crown Cases Reserved. The defendant was convicted upon an indictment charging him in different counts with maliciously wounding the prosecutor and with common assault, etc.; and he pleaded a previous summary conviction of assault and battery in respect of the same matter, the summary court having inflicted a nominal punishment by ordering him to furnish security, which he did and was discharged. The question for the opinion of the Court was whether the summary conviction was a bar to the indictment. For the Crown it was contended that the 24-25 Vic., c. 100, s. 45, only operated as a bar, where the defendant has paid the amount adjudged or has suffered the imprisonment awarded; and, in the present case, the summary court had neither fined nor imprisoned the defendant. *Held* that the summary conviction was a good answer at common law, apart altogether from the question of whether the defendant was entitle to the protection afforded by the statute; and the conviction upon the indictment was quashed. (102)

It has been held that the above sections, 865 and 866, are *intra vires* of the Dominion Parliament, and that, if a person assaulted takes his remedy by complaint under the present Code, in a summary way, he foregoes his right of civil action for damages in respect of the same assault. (103)

The above section 866, applies to bar a civil action only where the charge was one triable summarily, under section 864, without regard to the consent of the accused, and does not apply when the offence is an indictable offence tried, under Part LV, by virtue of the accused's election, under section 786, of a summary trial, the certificate of dismissal or a conviction, in such a case being merely a release, under section 799, *ante*, from further criminal proceedings. (104)

The above section, 866, does not apply to bar a civil action for assault, when the defendant has been found guilty of an assault by a petit jury at his trial upon an indictment charging him with unlawful wounding with intent to do grievous bodily harm. (105)

A declaration in an action of damages for assault and battery is not demurrable merely because it shews that the defendant was summarily tried and convicted for the assault and condemned to pay a fine—the mere conviction and condemnation to fine not constituting, under the above section, 866, a ground for releasing the person so condemned from all other proceedings, civil and criminal, unless he has paid the fine. (106)

**867. Costs on conviction or order.** — In every case of a summary conviction, or of an order made by a Justice, such Justice may, in his discretion, award and order, in and by the conviction or order, that the defendant shall pay to the prosecutor or complainant such costs as to the said Justice seem reasonable in that behalf, and not inconsistent with the fees established by law to be taken on proceedings had by and before Justices. R.S.C., c. 178, s. 59.

**868. Costs on dismissal.** — Whenever the Justice, instead of convicting or making an order, dismisses the information or com-

(102) R. v. Miles, 24 Q. B. D., 423; 59 L. J., M. C., 56; 13 L. N., 79.
(103) Flick v. Brisbin, 15 C. L. T., 95; 26 O. R., 423.
(104) Neville v. Ballard, 17 C. L. T., 371; 28 O. R., 588; 1 Can. Cr. Cas., 434.
(105) Clermont v. Legace, 2 Can. Cr. Cas., 1.
(106) Abinovitch v. Legault, Que. Jud. Rep., 8 S. C., 525.

plaint, he may, in his discretion, in and by his order of dismissal, award and order that the prosecutor or complainant shall pay to the defendant such costs as to the said Justice seem reasonable and consistent with law. R.S.C., c. 178, s. 59.

**869. Recovery of costs when penalty is adjudged.** — The sums so allowed for costs shall, in all cases, be specified in the conviction or order, or order of dismissal, and the same shall be recoverable in the same manner and under the same warrants as any penalty, adjudged to be paid by the conviction or order, is to be recovered. R.S.C., c. 178, s. 60.

**870. Recovery of costs in other cases.** — Whenever there is no such penalty to be recovered, such costs shall be recoverable by distress and sale of the goods and chattels of the party, and in default of distress, by imprisonment, with or without hard labour, for any term not exceeding one month. R.S.C., c. 178, s. 61.

**871. Fees.** — (As amended by 57-58 Vic., c. 57). The fees mentioned in the following tariff and no others shall be and constitute the fees to be taken on proceedings before Justices in proceedings under this part: —

*Fees to be taken by Justices of the Peace or their Clerks.*

| | $ cts. |
|---|---|
| 1. Information or complaint and warrant or summons... | 0 50 |
| 2. Warrant where summons issued in first instance..... | 0 10 |
| 3. Each necessary copy of summons or warrant..... | 0 10 |
| 4. Each summons or warrant to or for a witness or witnesses. (Only one summons on each side to be charged for in each case, which may contain any number of names. If the Justice of the case requires it, additional summonses shall be issued without charge)... | 0 10 |
| 5. Information for warrant for witness and warrant.... | 0 50 |
| 6. Each necessary copy of summons or warrant for witness.... .... .... .... .... .... .... .... .... .... .... | 0 10 |
| 7. For every recognizance.... .... .... .... .... .... ..... | 0 25 |
| 8. For hearing and determining case.... .... ..... ..... | 0 50 |
| 9. If case lasts over two hours..... ..... ..... ..... ..... | 1 00 |
| 10. Where one Justice alone cannot lawfully hear and determine the case, the same fee for hearing and determining to be allowed to the associate Justice.. .. | |
| 11. For each warrant of distress or commitment.... .... | 0 25 |
| 12. For making up record of conviction or order where the same is ordered to be returned to sessions or on *certiorari*.... .... .... .... .... .... .... .... .... .... .... | 1 00 |

But in all cases which admit of a summary proceed-

ing before a single Justice and wherein no higher penalty than $20 can be imposed, there shall be charged for the record of conviction not more than. 0 50

13. For copy of any other paper connected with any case, and the minutes of the same if demanded, per folio of 100 words..... 0 05

14. For every bill of costs when demanded to be made out in detail..... 0 10

(Items 13 and 14 to be chargeable only when there has been an adjudication).

*Constables' Fees.*

1. Arrest of each individual upon a warrant..... 1 50
2. Serving summons..... 0 25
3. Mileage to serve summons or warrant, per mile (one way) necessarily travelled..... 0 10
4. Same mileage when service cannot be effected, but only upon proof of due diligence.
5. Mileage taking prisoner to gaol, exclusive of disbursements necessarily expended in his conveyance..... 0 10
6. Attending justices on trial, for each day necessarily employed in one or more cases, when engaged less than four hours..... 1 00
7. Attending justices on trial, for each day necessarily employed in one or more cases, when engaged more than four hours..... 1 50
8. Mileage travelled to attend trial (when public conveyence can be taken only reasonable disbursements to be allowed) one way per mile..... 0 10
9. Serving warrant of distress and returning same..... 1 00
10. Advertising under warrant of distress..... 1 00
11. Travelling to make distress, or, to search for goods to make distress when no goods are found, (one way) per mile..... 0 10
12. Appraisements, whether by one appraiser or more, 2 cents in the dollar on the value of the goods.
13. Commission on sale and delivery of goods, 5 cents in the dollar on the net produce of the goods. 52 V., c. 45, s. 2 and Sch.

*Witnesses' Fees.*

1. Each day attending trial..... 0 75
2. Mileage travelled to attend trial (one way) per mile.. 0 10

**872. Provisions respecting convictions** — (Amended by 57-58 Vic., c. 57). Whenever a conviction adjudges a pecuniary penalty or compensation to be paid, or an order requires the payment of a

sum of money, whether the Act or law authorizing such conviction or order does or does not provide a mode of raising or levying the penalty, compensation or sum of money, or of enforcing the payment thereof, the justice by his conviction, or order after adjudging payment of such penalty, compensation or sum of money, with or without costs, may order and adjudge —

(*a*) that in default of payment thereof forthwith, or within a limited time, such penalty, compensation or sum of money shall be levied by distress and sale of the goods and chattels of the defendant, and, if sufficient distress cannot be found that the defendant be imprisoned in the manner and for the time directed by the Act or law authorizing such conviction or order or by this Act, or for any period not exceeding three months, if the Act or law authorizing the conviction or order does not specify imprisonment, or does not specify any term of imprisonment, unless such penalty, compensation or sum of money and costs, if the conviction or order is made with costs, and the expenses of the distress and of conveying the defendant to gaol are sooner paid; or

(*b*) that in default of payment of the said penalty, compensation or sum of money, and costs, if any, forthwith, or within a limited time, the defendant be imprisoned in the manner and for the time mentioned in the said Act or law, or for any period not exceeding three months, if the Act or law authorizing the conviction or order does not specify imprisonment, or does not specify any term of imprisonment, unless the said sums with the like costs and expenses are sooner paid.

(*c*) Whenever under such Act or law imprisonment with hard labour may be ordered or adjudged in the first instance as part of the punishment for the offence of the defendant, the imprisonment in default of distress or of payment may be with hard labour. (Added by the *Criminal Code Amendment Act 1900*).

2. The Justice making the conviction or order mentioned in the paragraph lettered (*a*) of subsection one of this section may issue a warrant of distress in the form DDD or EEE, as the case requires; (107), and the case of a conviction or order under the paragraph lettered (*b*) of the said subsection, a warrant in one of the forms FFF or GGG (108) may issue;

(*a*) If a warrant of distress is issued and the constable or peace officer charged with the execution thereof returns (form III) that he can find no goods or chattels whereon to levy thereunder, (109)

(107) For Forms DDD. and EEE. see pp. 962 and 963, *post*.
(108) For Forms FFF. and GGG. see pp. 964 and 965, *post*.
(109) For Form III. see p. 967, *post*.

the Justice may issue a warrant of commitment in the form JJJ. (110).

3. Where, by virtue of an Act or law so authorizing, the Justice by his conviction adjudges against the defendant payment of a penalty or compensation, and also imprisonment, as punishment for an offence, he may, if he thinks fit, order that the imprisonment in default of distress or of payment, as provided for in this section shall commence at the expiration of the imprisonment awarded as a punishment for the offence.

4. The like proceeding may be had upon any conviction or order made as provided by this section as if the Act or law authorizing the same had expressly provided for a conviction or order in the above terms. R.S.C., c. 178, ss. 62, 66, 67 and 68.

The amendment made to this section, by the addition of clause (*c*) to the first subsection thereof, does away with some decisions which held that the section, before its amendment, did not authorize an award of imprisonment with *hard labor*, in default of payment of the fine, unless the Act or law, under which the conviction was made, provided for the same in default of payment of the penalty. (111)

When a statute prescribes, as the punishment for an offence, both fine and imprisonment, the punishment is in the discretion of the Court, which is not bound to inflict both fine and imprisonment but may inflict either one or the other or both kinds of punishment. (112)

A conviction under the *Canada Temperance Act* may, by virtue of the above section 872 (*b*), direct imprisonment in default of payment of the fine and costs, without any award of a distress upon the defendant's goods. (113)

A conviction awarding ninety days' imprisonment as an alternative punishment on non payment of a fine where the statute authorized 3 months' imprisonment was held to be bad, as ninety days may possibly be more than 3 months. (114)

Upon conviction and fine for keeping a bawdy house, the powers of a magistrate for enforcing payment of the fine are limited under clause (*b*) of the above section, 872, to directing imprisonment for a period not exceeding 3 months although in the first instance, he might impose, as a substantive punishment, imprisonment for six months instead of a fine. (115)

If a writ of *certiorari* to remove a conviction was served only upon the clerk of the peace with whom the conviction was filed and not upon the convicting magistrate, and the latter, having no knowledge of the certiorari, thereafter enforced the conviction, he is not guilty of contempt of court in so doing. (116)

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(110) For Form JJJ, see p. 967, *post*.
(111) R. v. Horton, 18 C. L. T., 27; 3 Can. Cr. Cas., 84. (R. v. Turnball, 16 Cox, C. C., 110, referred to.) See R. v. Nugent, 33 N. B. R., 22; 1 Can. Cr. Cas., 126; and R. v. McAnn, 3 Can Cr. Cas., 110.
(112) R. v. Robidoux, 2 Can. Cr. Cas., 19.
(113) *Ex parte*, Casson, 34 N. B. R., 331; 2 Can. Cr. Cas., 483; *Ex parte*, Gorman, 4 Can. Cr. Cas., 305.
(114) R. v. Gavin, 1 Can. Cr. Cas., 59.
(115) R. v. Stafford, 1 Can. Cr. Cas., 239.
(116) R. v. Woodyatt, 3 Can. Cr. Cas., 275.

When imprisonment is directed as a mode of punishment for an offence, the defendant must stay in prison for the period ordered. But when imprisonment is directed as a mode of enforcing payment of a penalty or fine, the defendant may pay, and thus avoid the imprisonment; or, if he does not pay at once, and is sent to gaol, he can obtain his release before the end of the time by paying.

When the judgment orders the money to be levied by distress, and that, in default of there being sufficient goods, the defendant shall be imprisoned, the distress warrant should be issued first, and it should be ascertained that there are no sufficient distress upon which to levy, and a return to that effect should be made before the warrant of commitment is issued. And it seems that the defendant's goods cannot be sold for part of the penalty and costs, and the defendant sent to gaol for the balance. So that, if the defendant has paid part of the penalty, it must be returned to him before he can be sent to gaol for non-payment. (117)

**873. Order as to collection of costs.** — When any information or complaint is dismissed with costs the justice may issue a warrant of distress on the goods and chattels of the prosecutor or complainant, in the form KKK, for the amount of such costs; (118), and in default of distress, a warrant of commitment in the form LLL may issued. (119) Provided that the term of imprisonment in such case shall not exceed one month. R.S.C., c. 178, s. 70.

**874. Endorsement of warrant of distress.** — If, after delivery of any warrant of distress issued under this part to the constable or constables to whom the same has been directed to be executed, sufficient distress cannot be found within the limits of the jurisdiction of the Justice granting the warrant, then upon proof being made upon oath or affirmation of the handwriting of the justice granting the warrant, before any Justice of any other territorial division, such justice shall thereupon make an endorsement on the warrant, signed with his hand, authorizing the execution of the warrant within the limits of his jurisdiction, by virtue of which warrant and endorsement the penalty or sum and costs, or so much thereof as has not been before levied or paid, shall be levied by the person bringing the warrant, or by the person or persons to whom the warrant was originally directed, or by any constable or other peace officer of the last mentioned territorial division by distress and sale of the goods and chattels of the defendant therein.

2. Such endorsement shall be in the form HHH in schedule one to this Act. (120) R.S.C., c. 178, s. 63.

**875. Distress not to issue in certain cases.** — Whenever it ap-

(117) Brown v. Luiden, Ont. A. R., 173.
(118) For Form KKK, see p. 968, *post*.
(119) For Form LLL, see p. 969, *post*.
(120) For Form HHH, see p. 966, *post*.

pears to any Justice that the issuing of a distress warrant would be ruinous to the defendant and his family, or whenever it appears to the Justice, by the confession of the defendant or otherwise, that he has no goods and chattels whereon to levy such distress, then the Justice, if he deems it fit, instead of issuing a warrant of distress, may commit the defendant to the common gaol or other prison in the territorial division, there to be imprisoned, with or without hard labour, for the time and in the manner he would have been committed in case such warrant of distress had issued and no sufficient distress had been found. R.S.C., c. 178, s. 64.

**876. Remand of defendant when distress is ordered.** — Whenever a Justice issues a warrant of distress as hereinbefore provided, he may suffer the defendant to go at large, or verbally, or by a written warrant in that behalf, may order the defendant to be kept and detained in safe custody, until return has been made to the warrant of distress, unless the defendant gives sufficient security, by recognizance or otherwise, to the satisfaction of the Justice, for his appearance, at the time and place appointed for the return of the warrant of distress, before him or before such other Justice for the same territorial division as shall then be there. R.S.C., c. 178, s. 65.

**877. Cumulative punishment.** — Whenever a justice, upon any information or complaint, adjudges the defendant to be imprisoned and the defendant is then in prison undergoing imprisonment upon conviction for any other offence, the warrant of commitment for the subsequent offence shall be forthwith delivered to the gaoler or other officer to whom it is directed; and the justice who issued the same, if he thinks fit, may award and order therein that the imprisonment for the subsequent offence shall commence at the expiration of the imprisonment to which the defendant was previously sentenced. R.S.C., c. 178, s. 69.

When the defendant is not already in prison upon some other conviction, the imprisonment upon a warrant of commitment is reckoned from the earliest moment of the day of arrest under the warrant of commitment. (121)

There is no presumption that two or more sentences passed upon one person at one time for different offences are to be concurrent, when nothing is said on the subject by the convicting justice. (122)

**878. Recognizances.** — (As amended by 58-59 Vic., c. 40). Whenever a defendant gives security by or is discharged upon recognizance and does not afterwards appear at the time and place mentioned in the recognizance, the justice who took the recogni-

(121) Bowdler's Case, 12 Q. B., 612; *Ex parte* Foulkes, 15 M. & W., 612.
(122) *Ex parte* Bishop, 33 N. B. R., 428.

zance, or any justice who is then present having certified upon the back of the recognizance the non-appearance of the defendant, may transmit such recognizance to the proper officer in the province appointed by law to receive the same, to be proceeded upon in like manner as other recognizances; and such certificate shall be *primâ facie* evidence of the non-appearance of the said defendant.

2. Such certificate shall be in the form MMM in schedule one to this Act.

3. The proper officer to whom the recognizance and certificate of default are to be transmitted in the province of Ontario, shall be the clerk of the peace of the county for which such justice is acting; and the Court of General Sessions of the Peace for such county shall, at its then next sitting, order all such recognizances to be forfeited and estreated, and the same shall be enforced and collected in the same manner and subject to the same conditions as any fines, forfeitures or amercements imposed by or forfeited before such court. In the province of British Columbia, such proper officer shall be the clerk of the County Court having jurisdiction at the place where such recognizance is taken, and such recognizance shall be enforced and collected in the same manner and subject to the same conditions as any fines, forfeitures or amercements imposed by or forfeited before such County Court; and in the other provinces of Canada such proper officer shall be the officer to whom like recognizances have been heretofore accustomed to be transmitted under the law in force before the passing of this Act; and such recognizances shall be enforced and collected in the same manner as like recognizances have heretofore been enforced and collected.

See Part LIX, *post*, for further provisions as to Recognizances, and see comments and authorities under section 922, *post*.

See p. 970, *post*, for Form. MMM.

**879. Appeal.** — Unless it is otherwise provided in any special Act under which a conviction takes place or an order is made by a Justice for the payment of money or dismissing an information or complaint, any person who thinks himself aggrieved by any such conviction or order, the prosecutor or complainant, as well as the defendant, may appeal, in the province of Ontario, to the Court of General Sessions of the Peace; in the province of Quebec, to the Court of Queen's Bench, Crown side; in the provinces of Nova-Scotia, New-Brunswick and Manitoba, to the county Court of the district or county where the cause of the information or complaint arose; in the province of Prince Edward Island, to the Supreme Court; in the province of British Columbia, to the county or district Court, at the sitting thereof which shall be held nearest to the place where the cause of the information or complaint arose; and in the North-West Territories, to a judge of the Supreme Court of the said territories, sitting without a Jury, at

the place where the cause of the information or complaint arose, or the nearest place thereto where a court is appointed to be held.

2. In the district of Nipissing such person may appeal to the Court of General Sessions of the Peace for the county of Renfrew. 51 V., c. 45, s. 7; 52 V., c. 45, s. 6.

The provisions of the present Part, LVIII, are by section 840, *ante*, restricted to offences within the legislative control of the Dominion Parliament; and no appeal lies, in the province of Quebec, to the Court of King's Bench, (Crown Side), under this section from any summary conviction in respect of an offence over which the Dominion parliament has no legislative authority. Such an appeal cannot be taken where the offence is one against a provincial statute, unless the provincial statute has made the provisions of the present Part, as to appeal, applicable thereto. (123)

There is no right of appeal to the Court of King's Bench (Crown Side) from a conviction by the Recorder's Court, Montreal, in a matter which is under the exclusive legislative authority of the provincial legislature, no right of appeal being conferred by the provincial statute upon which the conviction was based; and this, notwithstanding that Article 503 of the Charter of Montreal makes the present Part, LVIII, of the Criminal Code, — in so far as the procedure to final judgment or conviction and the execution or carrying out of the same are concerned, — applicable to all prosecutions before the Recorders' Court in penal cases the right of appeal being a substantive right in itself and no part of such procedure. (124)

An appeal from a summary conviction under the *Seamen's Act* of Canada, (c. 74 of the R. S. C.), for harboring and secreting a deserting seaman, is expressly taken away by section 118 of that statute. (125)

An appeal against a conviction for an offence under an Ontario statute is to the Sessions, having regard to the R. S. O., c. 74, s. 1. (126)

No appeal lies to the Court of Appeal for Ontario from an order of a Divisional Court quashing a conviction by a police magistrate for breach of a municipal by-law, such by law being passed under a provincial statute. (127)

An order, made by the presiding judge of a superior court of criminal jurisdiction, awarding costs against a private prosecutor in respect of an indictment for assault, on which the Grand Jury found no bill is not subject to review by or appeal to the Court *en banc*. (128)

Where the application for such an order has been made on the last day of the term of the criminal court, and judgment has been reserved thereon, the order may be legally made out of term *nunc pro tunc* as of the day of the application, the delay in such a case being the act of the Court and not being due to the neglect or fault of the applicant. (129)

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(123) Corporation of Scottstown & Beauchesne, Que. Jud. Rep., 5 Q. B., 554; Lecours v. Hurtubise, 2 Can. Cr. Cas., 521.

(124) R. v. Superior, Que. Jud. Rep., 9 Q. B., 139; 3 Can. Cr. Cas., 379.

(125) R. v. O'Dea, 3 Can. Cr. Cas., 402.

(126) R. v. Robert Simpson Co. Lim., 2 Can. Cr. Cas., 272; 17 C. L. T., 50; 28 O. R., 231.

(127) R v. Cushing, 19 C. L. T., 205; 26 Ont. A. R., 248; 3 Can. Cr. Cas., 306.

(128) R. v. Mosher, 3 Can. Cr. Cas., 312.

(129) *Ib.*

**880. Certificate of Appeal.**—Every right of appeal shall, unless it is otherwise provided in any special Act, be subject to the conditions following, that is to say: —

(*a*) If the conviction or order is made more than fourteen days before the sittings of the Court to which the appeal is given, such appeal shall be made to the then next sittings of such Court; but if the conviction or order is made within fourteen days of the sittings of such Court, then to the second sittings next after such conviction or order;

(*b*) The appellant shall give to the respondent, or to the Justice who tried the case for him, a notice in writing, in the form NNN in schedule one to this Act, (130) of such appeal, within ten days after such conviction or order;

(*c*) The appellant, if the appeal is from a conviction adjudging imprisonment, shall either remain in custody until the holding of the Court to which the appeal is given, or shall enter into a recognizance in the form OOO in the said schedule (131) with two sufficient sureties, before a Justice, conditioned personally to appear at the said Court, and to try such appeal, and to abide the judgment of the Court thereupon, and to pay such costs as are awarded by the Court; or, if the appeal is against any conviction or order, whereby only a penalty or sum of money is adjudged to be paid, the appellant (although the order directs imprisonment in default of payment), instead of remaining in custody as aforesaid, or giving such recognizance as aforesaid, may deposit with the Justice convicting or making the order such sum of money as such Justice deems sufficient to cover the sum so adjudged to be paid, together with the costs of the conviction or order, and the costs of the appeal; and upon such recognizance being given, or such deposit being made the Justice before whom such recognizance is entered into or deposit made, shall liberate such person, if in custody;

(*d*) In case of an appeal from the order of a Justice, pursuant to section five hundred and seventy-one, for the restoration of gold or gold-bearing quartz, or silver, or silver ore, the appellant shall give security by recognizance to the value of the said property to prosecute his appeal at the next sittings of the court and to pay such costs as are awarded against him;

(*e*) The Court to which such appeal is made shall thereupon hear and determine the matter of appeal and make such order therein, with or without costs to either party, including costs of the court below, as seems meet to the court, — and, in case of the dismissal of an appeal by the defendant and the affirmance of the

(130) For Form NNN, see p. 970, *post*.
(131) For Form OOO, see p. 971, *post*.

conviction or order, shall order and adjudge the appellant to be punished according to the conviction or to pay the amount adjudged by the said order, and to pay such costs as are awarded, — and shall, if necessary issue process for enforcing the judgment of the court; and whenever, after any such deposit has been made as aforesaid, the conviction or order is affirmed, the Court may order the sum thereby adjudged to be paid, together with the costs of the conviction or order, and the costs of the appeal, to be paid out of the money deposited, and the residue, if any, to be repaid to the appellant; and whenever, after any such deposit, the conviction or order is quashed, the Court shall order the money to be repaid to the appellant;

(*f*) The said Court shall have power, if necessary, from time to time, by order endorsed on the conviction or order, to adjourn the hearing of the appeal from one sittings to another, or others, of the said Court;

(*g*) Whenever any conviction or order is quashed on appeal, as aforesaid, the Clerk of the Peace or other proper officer shall forthwith endorse, on the conviction or order, a memorandum that the same has been quashed; and whenever any copy or certificate of such conviction or order is made, a copy of such memorandum shall be added thereto, and shall, when certified under the hand of the Clerk of the Peace, or of the proper officer having the custody of the same, be sufficient evidence, in all courts and for all purposes, that the conviction or order has been quashed. 51 V., c. 45, s. 8; 53 V., c. 37, s. 24.

The TEN days within which the notice of appeal is to be given under this section must be calculated from the day of the adjudication and not from the time when the formal conviction or order is made up and signed. (132)

In computing the ten days within which the notice of appeal is to be given, the day of the conviction is to be excluded. (133)

A notice of appeal from a summary conviction, when such notice is not addressed to any person is invalid. (133*a*)

Where proceedings are taken before justices of the peace by an agnet of a Society, an appeal from the decision of the justices should be taken by the agent himself and not by the society. (134)

If, before or during the pendency of an appeal, the prosecutor dies, the appeal will not lapse but may be taken or continued against the convicting magistrates. (135)

It is not necessary that the recognizance on an appeal from a summary conviction should be accompanied by affidavits of justification by the sure-

(132) *Ex parte* Johnson, 32 L. J., M. C., 193.
(133) Pellew v. Inhabitants of Montford, 9 B. & C., 134; Freeman v. Reed, 32 L. J., M. C., 226.
(133*a*) Craig v. Lamarsh, 4 Can. Cr. Cas., 246.
(134) Canadian Soc. for Prev. of Cruelty to Animals v. Lauzon, 5 Rev. de Jur., 259.
(135) R. v. Fitzgerald, 29 O. R., 203; 1 Can. Cr. Cas 420.

ties; the sufficiency of the sureties being a matter entirely for the justice before whom the recognizance is given. (135*a*)

It is competent for the judge, by virtue of the provisions of sections 584 and 843, *ante*, to make an order for the issue of a subpœna, to witnesses in another province to compel their attendance upon an appeal under sections 879 and 881. (136)

When a statute confers an authority to do a judicial act, upon the occurrence of certain circumstances, and for the benefit of an interested party, the exercise of the judicial authority so conferred is *imperative*, and not discretionary, when applied for by the interested party. So that, clause (*c*) of the above section, 880 enacting that if the conviction or order appealed from is confirmed, the court "may" order the sum adjudged and costs to be paid out of the money deposited pursuant to clause (*c*), is to be construed as giving the Court no discretion to refuse the application of the party to be benefited by the making of the order. (137)

On an appeal from a summary conviction, in Ontario, under the Act to provide against frauds in the supply of milk to cheese factories, (52 V., c. 43), a county court judge in dismissing the appeal may award such costs, including solicitor's fee, as he may, in his discretion, deem proper; and there is no power, in the High Court, to review such discretion. (138)

**881. Proceedings on appeal.** — When an appeal against any summary conviction or decision has been lodged in due form, and in compliance with the requirements of this part, the Court appealed to shall try, and shall be the absolute judge, as well of the facts as of the law, in respect to such conviction or decision; and any of the parties to the appeal may call witnesses and adduce evidence, whether such witnesses were called or evidence adduced at the hearing before the Justice or not, either as to the credibility of any witness, or as to any other fact material to the inquiry; but any evidence taken before the justice at the hearing below, signed by the witness giving the same and certified by the Justice, may be read on such appeal, and shall have the like force and effect as if the witness was there examined: Provided, that the Court appealed to is satisfied by affidavit or otherwise, that the personal presence of the witness cannot be obtained by any reasonable efforts. 53 V., c. 37, s. 25.

The first step, after the appeal is called, is for the appellant to prove his notice, unless it is admitted.

Where an appeal is called, and then adjourned to the next sittings of the Court appealed to, the respondent's counsel, although the adjournment takes place on his application, may, nevertheless, require proof of due notice of appeal. (139)

After the notice of appeal has been proved or admitted, the clerk of the Court reads the conviction returned by the convicting justice; and, if there are any objections raised as appearing on the face of the conviction, the ap-

(135*a*) Cragg v. Lamarsh, 4 Can. Cr. Cas., 246.
(136) R. v. Gillespie, 14 C. L. T., 307
(137) Fenson v. New Westminster, 2 Can. Cr. Cas., 52.
(138) R. v. McIntosh, 17 C. L. T., 407; 28 O. R., 603; 2 Can Cr. Cas., 114.
(139) R. v. Middlesex, J. J., 2 Dowl. N. S., 719.

pellant usually begins by stating all the objections thereto, in order that they may be met by the other side. But if there are no such objections taken, or if, when taken, they are overruled, the respondent opens his case on the merits and calls witnesses. It is not for the appellant to prove his innocence until the case against him has been substantiated. Then, if the Court thinks the case thus opened and proved requires an answer, the appellant then opens his case and examines his witnesses. And when the appellant's case is closed, the respondent has a general reply upon the whole case. (140)

**882. Appeal on matters of form.** — No judgment shall be given in favour of the appellant if the appeal is based on an objection to any information, complaint or summons, or to any warrant to apprehend a defendant issued upon any such information, complaint or summons, for any alleged defect therein, in substance or in form, or for any variance between such information, complaint, summons or warrant and the evidence adduced in support thereof at the hearing of such information or complaint, unless it is proved before the Court hearing the appeal that such objection was made before the Justice before whom the case was tried and by whom such conviction, judgment or decision was given, or unless it is proved that notwithstanding it was shown to such Justice that by such variance the person summoned and appearing or apprehended had been deceived or misled, such Justice refused to adjourn the hearing of the case to some further day, as herein provided. R.S.C., c. 178, s. 79.

Under the *Summary Convictions Act* of British Columbia, which has a provision similar to the above section 882, it was held that an appeal from a summary conviction, — on the ground that the by law under which the prosecution took place was *ultra vires*, — was not available unless the objection was raised at the hearing before the magistrate. (141)

**883. Judgment to be upon the merits.** — In every case of appeal from any summary conviction or order had or made before any Justice, the Court to which such appeal is made shall, notwithstanding any defect in such conviction or order, and notwithstanding that the punishment imposed or the order made may be in excess of that which might lawfully have been imposed or made, hear and determine the charge or complaint on which such conviction or order has been had or made, upon the merits, and may confirm, reverse or modify the decision of such Justice, or may make such other conviction or order in the matter as the Court thinks just, and may by such order exercise any power which the Justice whose decision is appealed from might have exercised, and such conviction or order shall have the same effect and may be enforced in the same manner as if it had been made by such Justice. The Court may also make such order as to costs to be paid by either party as it thinks fit.

(140) R. v. May, 5 Q. B. D., 382; R. v. Essex, J. J., 49 L. J., M. C., 67.
(141) R. v. Bowman, 2 Can. Cr. Cas., 89.

2. Any conviction or order made by the Court on appeal may also be enforced by process of the Court itself. 53 V., c. 37, s. 26.

The above section, 883, authorizing the Court, on the hearing of an appeal from a summary conviction or order of a justice, to try the case upon its merits to make a new conviction or order, applies to an appeal by the prosecutor from the justice's order dismissing the complaint. (141*a*)

A conviction for illegally practising medicine must shew the exercise of that calling upon more than one occasion and must set out the particular acts of the accused which are held to constitute the illegal practising; and it has been held that a conviction stating the offence as having been committed between dates specified by prescribing for "R. and others" will be set aside if the evidence discloses no offence as regards the attendance upon R., and that it cannot be sustained by proof of altogether separate offences shewn to have been committed within the stated time as regards other persons.

Held, further that a conviction cannot be amended on an appeal in which no new evidence is taken by inserting in lieu of the words "and others" the names of such other persons. (141*b*)

**884. Costs when appeal not prosecuted.** — (As amended by 57-58 V., c. 57). The Court to which an appeal is made, upon proof of the notice of the appeal to such Court having been given to the person entitled to receive the same, whether such notice has been properly given or not, though such appeal was not afterwards prosecuted or entered, may, if such appeal has not been abandoned according to law, at the same sittings for which such notice was given, order to the party or parties receiving the same, such costs and charges as are thought reasonable and just by the Court, to be paid by the party or parties giving such notice; and such costs shall be recoverable in the manner provided by this Act for the recovery of costs upon an appeal against an order or conviction. R.S.C., c. 178, s. 81.

Where an order is made allowing the prosecutor's appeal, and convicting the accused, the costs of the appeal may be included in the costs awarded by the conviction and the payment thereof may be enforced by distress warrant and imprisonment in default. (141*c*)

**885. Proceedings when appeal fails.** — If an appeal against a conviction or order is decided in favour of the respondents, the Justice who made the conviction or order, or any other Justice for the same territorial division, may issue the warrant of distress or commitment for execution of the same, as if no appeal had been brought. R.S.C., c. 178, s. 82.

**886. Conviction not to be quashed for defects of form.** — No conviction or order affirmed, or affirmed and amended, in appeal,

(141*a*) R. v. Hawbolt, 4 Can. Cr. Cas., 229.
(141*b*) R. v. Whelan, 4 Can. Cr. Cas., 277.
(141*c*) R. v. Hawbolt, *supra*.

shall be quashed for want of form, or be removed by *certiorari* into any Superior Court, and no warrant or commitment shall be held void by reason of any defect therein, provided it is therein alleged that the defendant has been convicted, and there is a good and valid conviction to sustain the same. R.S.C., c. 178; s. 83.

**887. Certiorari not to lie when appeal is taken.** — No writ of *certiorari* shall be allowed to remove any conviction or order had or made before any Justice of the Peace if the defendant has appealed from such conviction or order to any Court to which an appeal from such conviction or order is authorized by law, or shall be allowed to remove any conviction or order made upon such appeal. R.S.C., c. 178, s. 84.

## CERTIORARI.

The writ of *certiorari* is a writ issuing out of a Superior Court for the purpose of procuring the inspection of the proceedings of any court of inferior jurisdiction.

It is a prerogative writ which, notwithstanding any statutory provision to the contrary, may be resorted to, to control the action of an inferior jurisdiction and restrain it within the limits prescribed by law, whenever there has been a failure, absence or excess of jurisdiction, and especially whenever an unauthorized penalty has been imposed. (142)

It requires no special law to authorize the *certiorari*; for it is a matter of course that all courts of inferior jurisdiction shall have their proceedings removable for the purpose of being examined by a Superior Court.

In this respect the *certiorari* differs from the right of appeal; for an appeal does not exist, unless expressly given by statute; while a *certiorari* lies unless expressly taken away by statute. (143)

The practice of taking away the *certiorari*, by statute, only began to prevail at the beginning of the reign of William III.

The power of granting a *certiorari* is considered as so beneficial to the subject that it is not allowed to be interfered with by anything short of an express statutory prohibition, and it is not taken away unless there be words to take it away. (144) And, even where a statute in express terms declares that the proceedings shall not be removed by *certiorari*, this does not prevent its issuing at the instance of the prosecutor; (145) for to restrain the prerogative of the Crown, in this particular, there must either be express words for that purpose, or an intention, manifestly appearing upon the Act, that the Crown, as well as the subject, shall be prohibited from removing the proceedings. (146)

It is, in fact, beneficial to the subject that this privilege should exist on the part of the Crown, for, in several instances where the *certiorari* is taken away from the defendant, the Attorney-General has assisted defendants, — where a doubtful judgment has been given below, — to have their cases reconsidered by applying on behalf of the Crown for the *certiorari*.

(142) Mathieu v. Wentworth, Que. Jud. Rep., 15 S. C., 504.
(143) R. v. Hanson, 4 B. & Ald., 521.
(144) R v. Morley & others, 2 Burr., 1041.
(145) R. v. Allan, 15 East, 334, 341, 342.
(146) 15 East, 337; Pal. Sum. Conv., 7th Ed. 350.

Where there is a want or excess of jurisdiction, (147) or where the Court has been illegally constituted, (148) or the conviction has been obtained by fraud, (149) express words taking away the *certiorari* will not be applicable.

A writ of *certiorari* was allowed to issue in a case where the magistrate had convicted of an assault upon a complaint which only asked for sureties to keep the peace,—although, in the statute, there were express words taking away the *certiorari*. (150)

Where a summons is issued under one statute and the defendants is convicted under another, there is an excess of jurisdiction; and a *certiorari* will be granted. (151)

Even where there is a remedy by review or appeal, it has been held that a *certiorari* will be granted, when the convicting justice had no jurisdiction over the subject matter of the conviction. (152)

But where there is a remedy by review or appeal, a *certiorari* should not be granted unless under exceptional circumstances, but the discretion of the Court, as to granting it, should be exercised by refusing it, unless special circumstances are shewn therefor. (153)

The mere filing of a recognizance by the defendant for an appeal from a summary conviction does not deprive him of his right to a writ of *certiorari* for the purpose of having the conviction quashed for want of jurisdiction. (154)

By the above section, 887, no *certiorari* is to be allowed to remove any conviction or order had or made before any justice of the peace, IF THE DEFENDANT HAS APPEALED from such conviction or order. But it appears that, under a proper interpretation of this section, the defendant may waive his right to appeal, and apply for a *certiorari*. (155)

It seems, also, that where the objection taken to a conviction goes to the jurisdiction of the justices, a *certiorari* may issue, even although the party applying for it has induced the magistrate to state a case for the opinion of a superior court, and although such case is still pending before the court. (156)

Still, even where there is no objection to the *certiorari* issuing before the time for appealing has expired, the court in the exercise of its discretion will refuse to grant it, if, upon the affidavits in support of the application, it appears that the ground alleged for it is more properly the subject of appeal (157), or if the defendant before raising the objection to the jurisdiction of the justices endeavored to obtain their decision on the merits; (158) or if the objection is one which ought to have been taken at the hearing, instead of being reserved as a ground for quashing the conviction or order, after it has been made, *e. g.*, the objection of *res judicata*. (159)

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(147) R. v. Sheffield Ry. Co., 11 A. & E. 194.
(148) R. v. Cheltenham Commrs., 1 Q. B., 447
(149) R v. Gillyard, 12 Q. B., 527.
(150) R. v. Deny, 20 L. J., M. C., 189.
(151) R. v. Brickhall, 33 L. J., M. C., 156.
(152) *Ex parte* Lévesque, 32 N. B. R., 174.
(153) R. v. Young, 32 N. B. R. ,178; *Ex parte* Ross, 1 Can. Cr. Cas., 153. And see R. v. Herrell, 3 Can. Cr. Cas., 15.
(154) R. v. Ashcroft, 2 Can. Cr. Cas., 385.
(155) R. v. Harman, Andr., 343.
(156) R. v: Allen & others, 33 L. J., M. C., 98.
(157) Per Lord Mansfield, R. v. Whitehead, Doug., 550.
(158) R. v. Salop, J. J., 29 L. J., M. C., 39.
(159) R. v. Herrington, 12 W. R., 420.

Where the application for a writ of *certiorari* rests on the ground of defective jurisdiction, matters on which the defect depends may be apparent on the face of the proceedings, or may be brought before the Superior Court by affidavit. (160) And objections of this kind may be founded on the character and constitution of the inferior court, the nature of the subject matter of enquiry, or the absence of some preliminary proceeding which was necessary to give jurisdiction to the inferior court. (161)

The magistrate's finding in a summary conviction upon a question of fact within his jurisdiction will not be reviewed upon *certiorari*, and the same can be attacked only by way of *appeal* from the conviction. (161*a*)

The rule for a *certiorari* is sometimes absolute in the first instance, but it is usual to grant it *nisi* only, and the argument thereon generally decides the case; for, if it be made absolute after argument, the conviction is quashed almost as a matter of course when it is afterwards brought up on the *certiorari*. (162)

The rule for the *certiorari* must specify the omission or mistake or other defect objected to in the conviction, order, or judgment sought to be removed.

If a writ of *certiorari* is issued before the right to appeal has lapsed, the other party may ask that the *certiorari* be suspended until the delay for appealing has expired. (163)

Where an appeal is pending from an order granting a writ of certiorari but the writ has, notwithstanding the appeal, been issued and the conviction returned thereunder, the court will postpone the hearing of a motion to quash the conviction until after the appeal is disposed of (164)

For Forms of *certiorari* and recognizances thereon, see *Additional Forms* at the end of this Part, LVIII, *post*.

**888. Conviction to be transmitted to Appeal Court.** — Every Justice before whom any person is summarily tried, shall transmit the conviction or order to the Court to which the appeal is herein given, in and for the district, county or place wherein the offence is alleged to have been committed, before the time when an appeal from such conviction or order may be heard, there to be kept by the proper officer among the records of the Court; and if such conviction or order has been appealed against, and a deposit of money made, such Justice shall return the deposit into the said Court; and the conviction or order shall be presumed not to have been appealed against, until the contrary is shown.

2. Upon any indictment or information against any person for a subsequent offence, a copy of such conviction, certified by the proper officer of the Court, or proved to be a true copy, shall be sufficient evidence to prove a conviction for the former offence. R.S.C., c. 178, s. 86; 51 V., c. 45, s. 9.

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(160) Col. Bank of Australasia v. Willan, L. R., 5 P. C., 417.
(161) *Ib.*
(161*a*) R. v. Urquhart, 4 Can. Cr. Cas., 256.
(162) See R. v. Purdey, 34 L. J., M. C., 4.
(163) Denault v. Robida, Que. Jud. Rep., 10 S. C., 199.
(164) R. v. Hurlburt, 2 Can. Cr. Cas., 331.

**889. Conviction not to be held invalid for irregularity.** — No conviction or order made by any Justice of the peace and no warrant for enforcing the same, shall, on being removed by *certiorari* be held invalid for any irregularity, informality or insufficiency therein, provided that the Court or Judge before which or whom the question is raised is, upon perusal of the depositions, satisfied that an offence of the nature described in the conviction, order or warrant, has been committed, over which such Justice has jurisdiction, and that the punishment imposed is not in excess of that which might have been lawfully imposed for the said offence; and any statement which under this Act or otherwise, would be sufficient if contained in a conviction, shall also be sufficient if contained in an information, summons, order or warrant: Provided that the Court or Judge, where so satisfied as aforesaid, shall, even if the punishment imposed or the order made is in excess of that which might lawfully have been imposed or made, have the like powers in all respects to deal with the case as seems just as are by section eight hundred and eighty-three conferred upon the Court to which an appeal is taken under the provisions of section eight hundred and seventy-nine. R.S.C., c. 178, s. 87; 53 V., c. 37, s. 27.

See cases cited under section 859, *ante*.

Finding of fact by the magistrate are not open to review on motion in *certiorari* proceedings to quash a conviction, if there was evidence from which he might draw the conclusions drawn by him. (165)

When a summary conviction is removed by *certiorari*, and a motion is made to quash the conviction it is the duty of the Court to look at the evidence taken by the magistrate, even where the conviction is valid on its face, in order to see if there is any evidence whatever shewing an offence, and, if there is none, to quash the conviction as made without jurisdiction; but, if there is any evidence at all, it is not the province of the Court, — on a motion in *certiorari* proceedings, — to quash the magistrate's decision thereon. (166)

A conviction which is bad on its face for uncertainty should not be amended by the Court to which it is removed by *certiorari*, except when such court can conclude on the evidence that an offence is thereby proved. (167)

The provisions of the above section, 889, as to reducing a punishment by a justice of the peace where the same is in excess of that which might lawfully have been imposed, apply only to cases of "summary convictions" under the present Part, and not to "summary trials" by a police magistrate under Part 55, *ante*. (167*a*)

**890. Irregularities within the preceding section.** — The follow-

(165) *Ex parte* Coulson, 1 Can. Cr. Cas., 31. See *Ex parte* Daley, 27 N. B. R., 129, and *Re* Girard, Que. Jud. Rep., 14 S. C., 237.

(166) R. v. Coulson 27 O. R., 59; 16 C. L. T., 53; R. v. Cunerty, 2 Can. Cr. Cas., 325

(167) R. v. Coulson, 1 Can. Cr. Cas., 114; R. v. Herrell, 1 Can. Cr. Cas., 510; R. v. Hughes, 2 Can Cr Cas 5

(167*a*) R. v. Randolph, 4 Can. Cr. Cas., 165.

ing matters amongst others shall be held to be within the provisions of the next preceding section: —

(*a*) The statement of the adjudication, or of any other matter or thing, in the past tense instead of in the present;

(*b*) The punishment imposed being less than the punishment by law assigned to the offence stated in the conviction or order, or to the offence which appears by the depositions to have been committed;

(*c*) The omission to negative circumstances, the existence of which would make the act complained of lawful, whether such circumstances are stated by way of exception or otherwise in the section under which the offence is laid, or are stated in another section.

2. But nothing in this section contained shall be construed to restrict the generality of the wording of the next preceding section. R.S.C., c. 178, s. 88.

**891. Protection of Justice whose conviction is quashed.** — If an application is made to quash a conviction or order made by a Justice, on the ground that such Justice has exceeded his jurisdiction, the Court or Judge to which or whom the application is made, may, as a condition of quashing the same, if the Court or Judge thinks fit so to do, provide that no action shall be brought against the Justice who made the conviction, or against any officer acting under any warrant issued to enforce such conviction or order. R.S.C., c. 178, s. 89.

**892. Condition of hearing motion to quash.**—The Court having authority to quash any conviction, order or other proceeding by or before a Justice may prescribe by general order that no motion to quash any conviction, order or other proceeding by or before a Justice and brought before such Court by *certiorari*, shall be entertained unless the defendant is shown to have entered into a recognizance with one or more sufficient sureties, before a Justice or Justices of the county or place within which such conviction or order has been made, or before a Judge or other officer, as may be prescribed by such general order, or to have made a deposit to be prescribed in like manner, with a condition to prosecute such writ of *certiorari* at his own costs and charges, with effect, without any wilful or affected delay, and, if ordered so to do, to pay the person in whose favour the conviction, order or other proceeding is affirmed, his full costs and charges to be taxed according to the course of the Court where such conviction, order or proceeding is affirmed. R.S.C., c. 178, s. 90.

It has been held that a recognizance is only required where the conviction is brought before the Court by a writ of *certiorari*, and that no recognizance is required where such a writ is not necessary or is dispensed with. (168)

(168) R. v. Ashcroft, 2 Can. Cr. Cas., 385.

**893. Imperial Act superseded.** — The second section of the Act of the Parliament of the United Kingdom, passed in the fifth year of the reign of His Majesty King George the Second, and chaptered nineteen, shall no longer apply to any conviction, order or other proceeding by or before a Justice in Canada, but the next preceding section of this Act shall be substituted therefor, and the like proceedings may be had for enforcing the condition of a recognizance taken under the said section as might be had for enforcing the condition of a recognizance taken under the said Act of the Parliament of the United Kingdom. R.S.C., c. 178, s. 91.

**894. Judicial Notice of Proclamation.** — No order, conviction or other proceeding shall be quashed or set aside, and no defendant shall be discharged, by reason of any objection that evidence has not been given of a proclamation or order of the Governor in Council, or of any rules, regulations, or by-laws made by the Governor in Council in pursuance of a statute of Canada, or of the publication of such proclamation, order, rules, regulations or by-laws in the *Canada Gazette*: but such proclamation, order, rules, regulations and by-laws and the publication thereof shall be judicially noticed. 51 V., c. 45, s. 10.

**895. Refusal to quash.** — If a motion or rule to quash a conviction order or other proceeding is refused or discharged, it shall not be necessary to issue a writ of *procedendo*, but the order of the Court refusing or discharging the application shall be a sufficient authority for the registrar or other officer of the Court forthwith to return the conviction, order and proceedings to the Court or Justice from which or whom they were removed, and for proceedings to be taken thereon for the enforcement thereof, as if a *procedendo* had issued, which shall forthwith be done. R.S.C., c. 178, s. 93.

**896. Conviction not to be set aside in certain cases.** — Whenever it appears by the conviction that the defendant has appeared and pleaded, and the merits have been tried, and the defendant has not appealed against the conviction, where an appeal is allowed, or if appealed against, the conviction has been affirmed, such conviction shall not afterwards be set aside or vacated in consequence of any defect of form whatever, but the construction shall be such a fair and liberal construction as will be agreeable to the justice of the case. R.S.C., c. 178, s. 94.

**897. Order as to costs.** — If upon any appeal, the Court trying the appeal orders either party to pay costs, the order shall direct the costs to be paid to the Clerk of the Peace or other proper officer of the Court, to be paid over by him to the person entitled to the same, and shall state within what time the costs shall be paid. R.S.C., 178, s. 95.

**898. Recovery of costs.** — If such costs are not paid within the time so limited, and the person ordered to pay the same has not been bound by any recognizance conditioned to pay such costs, the Clerk of the Peace or his deputy, on application of the person entitled to the costs, or of any person on his behalf, and on payment of any fee to which he is entitled, shall grant to the person so applying, a certificate that the costs have not been paid; and upon production of the certificate to any Justice in and for the same territorial division, such Justice may enforce the payment of the costs by warrant of distress in manner aforesaid, and in default of distress may commit the person against whom the warrant has issued in manner hereinbefore mentioned, for any term not exceeding one month unless the amount of the costs and all costs and charges of the distress and also the costs of the commitment and conveying of the party to prison, if the justice thinks fit so to order (the amount thereof being ascertained and stated in the commitment) are sooner paid. The said certificate shall be in the form PPP and the warrants of distress and commitment in the forms QQQ and RRR respectively in schedule one to this Act. R.S.C., c. 178, s. 96. (169)

The proceedings provided by this section for the enforcement of an order for costs only apply to costs dealt with by a Court on affirming or quashing a summary conviction or order on an appeal to it, and not to proceedings by way of *certiorari* against a summary conviction and therefore costs awarded against a magistrate in respect of an unsuccessful interlocutory application made by him in *certiorari* proceedings are not governed by this section. (170)

**899. Abandonment of appeal.** — An appellant may abandon his appeal by giving to the opposite party notice in writing of his intention six clear days before the sittings of the Court appealed to, and thereupon the costs of the appeal shall be added to the sum, if any adjudged, against the appellant by the conviction or order, and the Justice shall proceed on the conviction or order as if there had been no appeal. R.S.O., (1887), c. 74, s. 8.

**900. Statement of case by Justice for Review.** — In this section the expression "the Court" means and includes any Superior Court of criminal jurisdiction for the province in which the proceedings herein referred to are carried on.

2. Any person aggrieved, the prosecutor or complainant as well as the defendant, who desires to question a conviction, order, determination or other proceeding of a Justice under this part, on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may apply to such Justice to state and sign a case setting

(169) For Forms PPP, QQQ, and RRR., see pp. 972-974, *post*.
(170) R. v. Graham, 1 Can. Cr. Cas., 405.

forth the facts of the case and the grounds on which the proceeding is questioned, and if the Justice declines to state the case, may apply to the Court for an order requiring the case to be stated.

3. The application shall be made and the case stated within such time and in such manner as is, from time to time, directed by rules or orders under section five hundred and thirty-three of this Act.

4. The appellant at the time of making such application, and before a case is stated and delivered to him by the Justice, shall in every instance, enter into a recognizance before such Justice or any other Justice exercising the same jurisdiction, with or without surety or sureties, and in such sum as to the Justice seems meet, conditioned to prosecute his appeal without delay, and to submit to the judgment of the Court and pay such costs as are awarded by the same; and the appellant shall, at the same time, and before he shall be entitled to have the case delivered to him, pay to the Justice such fees as he is entitled to; and the appellant, if then in custody, shall be liberated upon the recognizance being further conditioned for his appearance before the same Justice, or such other Justice as is then sitting, within ten days after the judgment of the Court has been given, to abide such judgment, unless the judgment appealed against is reversed.

5. If the Justice is of opinion that the application is merely frivolous, but not otherwise, he may refuse to state a case, and shall on the request of the applicant sign and deliver to him a certificate of such refusal; provided that the Justice shall not refuse to state a case where the application for that purpose is made to him by or under the direction of Her Majesty's Attorney-General of Canada, or of any province.

6. Where the Justice refuses to state a case, it shall be lawful for the appellant to apply to the Court, upon an affidavit of the facts, for a rule calling upon the Justice, and also upon the respondent, to show cause why such case should not be stated; and such Court may make such rule absolute, or discharge the application, with or without payment of costs, as to the Court seems meet; and the Justice upon being served with such rule absolute, shall state a case accordingly, upon the appellant entering into such recognizance as hereinbefore provided.

7. The Court to which a case is transmitted under the foregoing provisions shall hear and determine the question or questions of law arising thereon, and shall thereupon affirm, reverse or modify the conviction, order or determination in respect of which the case has been stated, or remit the matter to the Justice with the opinion of the Court thereon, and may make such other order in relation to the matter and such orders as to costs, as to the Court seems fit; and all such orders shall be final and con-

clusive upon all parties: Provided always, that any Justice who states and delivers a case in pursuance of this section shall not be liable to any costs in respect or by reason of such appeal against his determination.

8. The Court for the opinion of which a case is stated shall have power, if it thinks fit, to cause the case to be sent back for amendment; and thereupon the same shall be amended accordingly, and judgment shall be delivered after it has been amended.

9. The authority and jurisdiction hereby vested in the Court for the opinion of which a case is stated may, subject to any rules and orders of Court in relation thereto, be exercised by a judge of such Court sitting in chambers, and as well in vacation as in term time.

10. After the decision of the Court in relation to any such case stated for their opinion, the Justice in relation to whose determination the case has been stated, or any other Justice exercising the same jurisdiction, shall have the same authority to enforce any conviction order or determination which has been affirmed, amended or made by such Court as the Justice who originally decided the case would have had to enforce his determination if the same had not been appealed against; and no action or proceeding shall be commenced or had against a Justice for enforcing such conviction, order or determination by reason of any defect in the same.

11. If the Court deems it necessary or expedient any order of the Court may be enforced by its own process.

12. No writ of *certiorari* or other writ shall be required for the removal of any conviction, order or other determination in relation to which a case is stated under this section or otherwise, for obtaining the judgment or determination of a Superior Court on such case under this section.

13. In all cases where the conditions, or any of them, in any recognizance entered into in pursuance of this section have not been complied with such recognizance shall be dealt with in like manner as is provided by section eight hundred and seventy-eight with respect to recognizances entered into thereunder.

14. Any person who appeals under the provisions of this section against any determination of a Justice from which he is entitled to an appeal under section eight hundred and seventy-nine of this Act, shall be taken to have abandoned such last mentioned right of appeal finally and conclusively and to all intents and purposes.

15. Where, by any special Act, it is provided that there shall be no appeal from any conviction or order, no proceedings shall be taken under this section in any case to which such provision in such special Act applies. 53 V., c. 37, s. 28.

The general effect of the provisions of this section is to enable either party, in a matter, determinable by justices in a summary manner, — if dissatisfied with and aggrieved by their decision as being *erroneous in point of law*.—to obtain the opinion thereon of a Superior Court of criminal jurisdiction by means of a case stated and signed by the justices for that purpose.

The procedure by way of "stated case" under this section 900 is a form of appeal; and as the application of the Criminal Code to offences under Ontario statutes is declared by the Ontario Summary Convictions Act (R. S. O., 1897, c. 90, s. 2), not to affect "procedure in appeals," there is no jurisdiction to proceed by "stated case" to review a decision of a magistrate in respect of such an offence, except where the constitutionality of the Provincial Act is involved. (R. S. O., 1897, c. 91.) (171)

It has been held, in England, that an application to state a case, if addressed to the convicting justices generally, without naming them, is not sufficient. And where a Court of summary jurisdiction composed of five justices had convicted a defendant, and an application in writing was made by the latter to two of the justices to state a case, and a copy of the application was delivered to the clerk of the Court, it was held that the application to the two justices was not an application to the Court within the meaning of the English Act and Rules and that therefore there was no jurisdiction to hear a case stated by the two justices to whom the application had been made. (172)

Among the rules and orders made by the Supreme Court of the N. W. T., in reference to the procedure governing the application for and the stating of a case for the opinion of a Superior Court, (under sec. 28 of the 53 Vic., c. 37, now embodied in the above section 900 of the Criminal Code), are to be found the following: —

1. An application to a justice of the peace to state and sign a case shall be delivered to such justice or left with some person for him at his place of abode within FOUR DAYS after the making of the conviction, order, determination or other proceeding questioned. Such application shall state the grounds upon which the proceeding is questioned.

2. Within FOUR DAYS after such application has been so delivered or left for him, the justice shall state and sign and deliver, to the appellant, a case setting forth the facts of the case and the grounds on which the proceeding is questioned, stating —

(*a*) the substance of the information or complaint;

(*b*) the names of the prosecutor (or complainant) and the defendant;

(*c*) the date of the proceeding questioned;

(*d*) the evidence, (if any), in full, as taken before the J. P.;

(*e*) the substance of the conviction, order, determination or other proceeding questioned;

(*f*) the grounds on which the same is questioned;

(*g*) the grounds on which the justice supports the proceeding questioned, if the justice sees fit to state any.

3. Within TWENTY DAYS after the delivery to the appellant of a case stated by a justice, the appellant shall deliver or cause the same to be delivered

(*a*) To the Registrar of the Court in banc; or

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(171) R. v. Robert Simpson Co. Lim., 2 Can. Cr. Cas., 272.
(172) Wetmore (App.) v. Paine (Resp.) 17 Cox C. C., 244.

(*b*) (If he desires the matter to be heard or determined by a Judge in Chambers), to the Clerk of the Court of the judicial district in which the justice resides, provided that upon sufficient cause for the delay being shown, the Court or Judge, as the case may be, may hear and determine the matter, although the case was not delivered within said twenty days. (173)

Although the evidence is set out in the case, the Superior Court does not put itself in the position of the Justices in deciding on the weight or sufficiency of such evidence; but it accepts the findings of the Justices, upon facts within their jurisdiction, as conclusive, whatever the Superior Court's own opinion may be as to the nature of the evidence. (174)

The Superior Court, in such a case, has only to see whether the determination of the Justices is erroneous in point of law. (175) The main question in the case, namely, whether an offence has or has not been committed within the statute is a subject involving a question of law; but the subordinate facts leading up to it are left entirely to the decision of the Justices. The circumstances which lead to the conclusion of law are for the Justices. And it is for the Superior Court to see whether the facts are sufficient to warrant the legal conclusion which the Justices have drawn from them. (176)

## HABEAS CORPUS.

When there is any fault or illegality in the commitment under which a defendant is imprisoned, he may obtain his discharge by means of a writ of HABEAS CORPUS *ad subjiciendum*, which may be obtained from a Superior Court of Criminal Jurisdiction or from a Judge of such Court. Its object being to effect deliverance from illegal confinement, it commands the party detaining the prisoner to produce his body, together with a true statement of the cause of his detention; and it may be applied for, issued, and made returnable in Chambers. (177)

Although the right to remove the conviction by *certiorari* be taken away, yet, in moving for a writ of *habeas corpus*, a certified copy of the conviction may be brought before the Court for the purpose of defeating the commitment. (178) But the certified copy must be verified by affidavit, and the commissioner before whom the affidavit is sworn ought to certify on the exhibit annexed that it is the document referred to in the affidavit. (179)

The application may be for a rule calling on the keeper of the prison to show cause why a writ of *habeas corpus* should not issue to bring up the body of the prisoner, and why in the event of the rule being made absolute he should not be discharged, without the writ of *habeas corpus* actually issuing and without his being personally brought before the Court. (180)

Although, when this course is pursued, and the rule is made absolute, after being opposed and cause shown, the defendant may be released by virtue of the rule thus made absolute, it appears that,—if no cause is shown,—a writ of *habeas corpus* must, in that case, issue, before the prisoner can be discharged. (181)

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(173) McGuire's Magis. Handbook, 75-76.
(174) Cornwell v. Saunders, 3 B. & S. 206; 32 L. J. M. C., 6.
(175) Taylor v. Oram, 31 L. J. M. C., 252.
(176) R. v. Raffles, 45 L. J. M. C., 61
(177) Re Leonard Watson & others, 9 A & E., 731.
(178) R. v. Mellor, 2 Dowl., 173.
(179) Re Allison, 10 Exch. 561.
(180) *Ex parte* Egginton, 23 L. J. M. C., 44; *Re* Geswood, 2 El. & Bl., 952.
(181) *Ex parte*, Jacklin, 5 C. B. 103, (*a.*)

Objections to the writ of *habeas corpus* for any irregularity are to be taken by way of substantive motion to set it aside, and not upon the motion to discharge the prisoner on the return. (182)

Upon receipt of the writ, the gaoler, or other officer having the party in custody, returns, along with the body of the prisoner, the warrant of commitment, which, if it be illegal or insufficient on its face, will be quashed and an order will be made for the defendant's release. (183)

The Court, upon the return to a writ of *habeas corpus* have nothing before them, but the warrant of commitment; but they may, nevertheless, refuse to discharge the prisoner until they have the conviction before them. Thus, where a commitment was "until the party should pay a fine" without specifying any sum, the Court refused to discharge him upon the commitment alone; but when, upon the conviction itself being brought before them, it appeared that no precise sum was thereby awarded, they ordered the defendant's discharge. (184)

As, however, the conviction as recited in the commitment, is *prima facie* taken to be as recited, it is for the party asserting it to be different to bring it before the Court by *certiorari*, or, if that process is not available, by affidavit; and in such a case, if the CONVICTION be right, the defect in the COMMITMENT will be cured, provided the latter shows the like offence as is stated in the conviction. (185)

With regard to the question of whether the truth of the return to a writ of *habeas corpus ad subjiciendum* can be controverted by means of affidavits, a distinction has been drawn, in England, between cases in which the writ is issued at common law and cases in which it is issued under statutes containing or not containing, as the case may be, an express provision on the subject. If the case name within the 31 Car. 2, c. 2, (the object of which was to provide, more particularly, against delays in bringing accused persons to trial), the English Courts would not receive affidavits impeaching the return. (186) But if the case came within the 56 Geo. 3, c. 100, affidavits were received, because they were admissible by the *express* terms of secs. 3 and 4 of that Act. So, that where prisoners, in the custody of a Customs Officer, on a charge of smuggling, were brought up by *habeas corpus* at common law, they were held entitled, under the above sections of 56 Geo. 3, c. 100, to controvert the truth of the return by affidavit. Abbott, C. J., said, "The writs of *habeas corpus* in this instance are not to be considered as writ issuing under the 31 Car 2, but as issuing at common law, under the general authority of the Court, and consequently the discussion of the truth of the return is left open by virtue of the 56 Geo. 3, c. 100, sec. 4. The object of 56 Geo. 3, was to give the party a summary remedy by controverting the truth of a return, instead of putting him to an action for a false return." (187)

But, even in cases within the 56 Geo. 3, c. 100, it does not appear that all statements upon the return may be contradicted by affidavit. There are certain questions which are exclusively within the province of the tribunal issuing the commitment, and which cannot be opened again before another tribunal, except by appeal or upon a case stated. Such, for instance, is the weight of evidence, the innocence or guilt of the defendant, and the adjudication of contempt. No other Court except the Court to which an appeal is

(182) R. v. Baines, 12 A & E. 210, 213.
(183) *See* Bac. Ab., Tit. "*Habeas Corpus*."
(184) R. v. Elwell, Str. 794; 2 Ld. Raym. 1514.
(185) R. v. Taylor, 7 D. & R. 623.
(186) Carus Wilson's Case, 7 Q. B., 984; R. v. Rogers, 3 D. & R., 607; R. v. Sheriff of Middlesex, 11 A. & E., 273.
(187) *Ex parte* Beeching, 6 D. & R., 209.

granted is competent to re-investigate these matters, whether the proceeding be brought before it on return to *habeas corpus*, or *certiorari*, or in an action against the magistrate. (188)

It appears that affidavits, to show a WANT OR EXCESS OF JURISDICTION, are admissible whether the case is one at common law or under the statute of Car. 2, or Geo. 3, although they may directly contradict facts stated in the return which, if true, would show jurisdiction and no excess of it. The rule appears to be the same as that which is applied to proceedings by *certiorari*, where a want or excess of jurisdiction may be shown by affidavits as ground for quashing a conviction or order. The exercise of this privilege does not try the guilt or innocence of the prisoner, upon affidavit; nor does it impugn the rule that matters on which Justices, acting within their jurisdiction, decide shall be held to be conclusive, if found by them; but, on the contrary, it is a consequence of the salutary maxim that no Judge, by misstating facts, can give himself jurisdiction. (189) And, accordingly, on a conviction under the *Master and Servants Act*, (4 Geo. 4, c. 34), affidavits were admitted to show that there was no evidence before the Justice of such facts as were essential to the exercise of his jurisdiction, *namely*, the contract to serve. (190)

The result, briefly stated, of the decisions upon this question seems to be, that, if the fact found be one essential to jurisdiction, or on which jurisdiction depends, it may be shown that there was NO EVIDENCE before the justices to warrant the finding, but, that, if the fact be merely a fact in the case and a part of it, — jurisdiction having attached, — their finding is not, as a general rule, reviewable on affidavit, or in any manner except on appeal or on a case reserved. (191)

After the return is put in and read, it is considered as filed, but the Court may still amend it. (192)

If the return shows a commitment bad upon its face, the Court will not, on the suggestion that the conviction itself is good, adjourn the case for the purpose of having the conviction brought up and of amending the commitment. Nor will the Court look at the conviction unless it is before them, having been brought up by *certiorari*. (193)

If the defect be not on the face of the commitment, but in the conviction, the defendant, besides a writ of *habeas corpus* to bring up the prisoner and the warrant of commitment, must sue out a *certiorari* directed to the convicting magistrate, — or to the sessions or other Court where the conviction has been filed, — to return the conviction into the Court above. (194)

The jurisdiction conferred by section 32 of the *Supreme and Exchequer Courts' Act* upon a judge of the Supreme Court of Canada, in matters of *habeas corpus*, — concurrently with the courts and judges of the several provinces, — has been held to be limited to an enquiry into the cause of commitment, (as disclosed by the warrant of commitment), in any criminal case under any Dominion Act. (195)

For Form of writ of *Habeas Corpus*, see ADDITIONAL FORMS at the end of this Part, LVIII.

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(188) Dimes's Case, 14 Q. B., 554; *Ex parte* Coulson, 1 Can. Cr. Cas., 31; *Re* Girard, Que. Jud. Rep., 14 S. C., 237; R. v. Cunerty, 2 Can. Cr. Cas., 325.
(189) R. v. Bolton, 1 Q. B., 66; R. v. Nunnely, , 27 L. J. M. C., 260.
(190) *Re* Bailey and Collier, 23 L. J. M. C., 161.
(191) R. v. Huntsworth, 33 L. J. M. C., 131; Pal. Sum. Conv., 7th Ed., 347. See, also, *Ex parte* Welsh, 4 Rev. de Jur., 437.
(192) Canadian Prisoners' Case, *nom.* Re Watson, 9 A. & E., 731.
(193) *Ex parte* Timson, L. R. 5 Ex. 257; 39 L. J. M. C., 129.
(194) *Re* Allison, 10 Exch. 661.
(195) *Ex parte* Macdonald, 3 Can. Cr. Cas., 10.

**901. Tender and Payment.** — Whenever a warrant of distress has issued against any person, and such person pays or tenders to the peace officer having the execution of the same, the sum or sums in the warrant mentioned, together with the amount of the expenses of the distress up to the time of payment or tender, the peace officer shall cease to execute the same. R.S.C., c. 198, s. 97.

2. Whenever any person is imprisoned for non-payment of any penalty or other sum, he may pay or cause to be paid to the keeper of the prison in which he is imprisoned, the sum in the warrant of commitment mentioned, together with the amount of the costs and charges and expenses therein also mentioned, and the keeper shall receive the same, and shall thereupon discharge the person, if he is in his custody for no other matter. He shall also forthwith pay over any moneys so received by him to the Justice who issued the warrant. R.S.C., c. 198, s. 98.

**902. Returns respecting convictions and moneys received.** — Every Justice shall, quarterly, on or before the second Tuesday in each of the months of March, June, September and December in each year, make to the Clerk of the Peace or other proper officer of the Court having jurisdiction in appeal, as herein provided, a return in writing, under his hand, of all convictions made by him and of the receipt and application by him of the moneys received from the defendants, — which return shall include all convictions and other matters not included in some previous return, and shall be in the form 88S in schedule one to this Act. (196)

2. If two or more Justices are present, and join in the conviction, they shall make a joint return.

3. In the province of Prince Edward Island such return shall be made to the Clerk of the Court of Assize of the county in which the convictions are made, and on or before the fourteenth day next before the sitting of the said Court next after such convictions are so made.

4. Every such return shall be made in the said district of Nipissing, in the province of Ontario, to the Clerk of the Peace for the county of Renfrew, in the said province. R.S.C., c. 178, s. 99.

5. Every justice, to whom any such moneys are afterwards paid, shall make a return of the receipts and application thereof, to the Court having jurisdiction in appeal as hereinbefore provided, — which return shall be filed by the Clerk of the Peace or the proper officer of such Court with the records of his office. R.S.C., c. 178, s. 100.

(196) For Form 88S, see p. 975, *post*.

6. Every justice, before whom any such conviction takes place or who receives any such moneys, who neglects or refuses to make such return thereof, or wilfully makes a false, partial or incorrect return, or wilfully receives a larger amount of fees than by law he is authorized to receive, shall incur a penalty of eighty dollars, together with costs of suit, in the discretion of the Court, which may be recovered by any person who sues for the same by action of debt or information in any Court of record in the province in which such return ought to have been or is made. R.S.C., c. 178, s. 101.

7. One moiety of such penalty shall belong to the person suing, and the other moiety to Her Majesty, for the public uses of Canada.

**903. Publication, &c., of returns.** — The Clerk of the Peace of the district or county in which any such returns are made, or the proper officer, other than the Clerk of the Peace, to whom such returns are made, shall, within seven days after the adjournment of the next ensuing General or Quarter Sessions, or of the term or sitting of such other Court as aforesaid, cause the said returns to be posted up in the court-house of the district or county, and also in a conspicuous place in the office of such Clerk of the Peace, or other proper officer, for public inspection, and the same shall continue to be so posted up and exhibited until the end of the next ensuing General or Quarter Sessions of the Peace, or of the term or sitting of such other Court as aforesaid; and for every schedule so made and exhibited by such Clerk or Officer, he shall be allowed such fee as is fixed by competent authority. R.S.C., c. 178, s. 103.

2. Such Clerk of the Peace or other officer of each district or county, within twenty days after the end of each General or Quarter Sessions of the Peace, or the sitting of such Court as aforesaid, shall transmit to the Minister of Finance and Receiver General a true copy of all such returns made within his district or county. R.S.C., c. 178, s. 104.

**904. Prosecutions for penalties under the preceding section.** — All actions for penalties arising under the provisions of section nine hundred and two shall be commenced within six months next after the cause of action accrues, and the same shall be tried in the district, county or place wherein such penalties have been incurred; and if a verdict or judgment passes for the defendant, or the plaintiff becomes non-suit, or discontinues the action after issue joined, or if, upon demurrer or otherwise, judgment is given against the plaintiff, the defendant shall, in the discretion of the Court, recover his costs of suit, as between solicitor and client, and shall have the like remedy for the same as any defendant has by law in other cases. R.S.C., c. 178, s. 102.

**905. Remedies saved.** — Nothing in the three sections next preceding shall have the effect of preventing any person aggrieved from prosecuting, by indictment, any Justice, for any offence, the commission of which would subject him to indictment at the time of the coming into force of this Act. R.S.C., c. 178, s. 105.

**906. Defective returns.** — No return purporting to be made by any justice under this Act shall be vitiated by the fact of its including, by mistake, any convictions or orders had or made before him in any matter over which any Provincial Legislature has exclusive jurisdiction, or with respect to which he acted under the authority of any provincial law. R.S.C., c. 178, s. 106.

**907. Certain defects not to vitiate proceedings.** — No information, summons, conviction, order or other proceeding shall be held to charge two offences, or shall be held to be uncertain on account of its stating the offence to have been committed in different modes, or in respect of one or other of several articles, either conjunctively or disjunctively, for example, in charging an offence under section five hundred and eight of this Act it may be alleged that "the defendant unlawfully did cut, break, root up and otherwise destroy or damage a tree, sapling or shrub"; and it shall not be necessary to define more particularly the nature of the act done, or to state whether such act was done in respect of a tree, or a sapling, or a shrub. R.S.C., c. 178, s. 107.

**908. Preserving order in Court.** — Every Judge of Sessions of the Peace, Chairman of the Court of General Sessions of the Peace, Police Magistrate, District Magistrate or Stipendiary Magistrate, shall have such and like powers and authority to preserve order in the said Courts during the holding thereof, and by the like ways and means as now by law are or may be exercised and used in like cases and for the like purposes by any Court in Canada, or by the judges thereof, during the sittings thereof. R.S.C., c. 178, s. 109.

**909. Resistance to execution of process.** — (*Amended by 56 Vic., c. 32*). Every Judge of the Sessions of the Peace, Chairman of the Court of General Sessions of the Peace, Recorder, Police Magistrate, District Magistrate or Stipendiary Magistrate, whenever any resistance is offered to the execution of any summons, warrant of execution or other process issued by him, may enforce the due execution of the same by the means provided by the law for enforcing the execution of the process of other courts in like cases. R.S.C., c. 178, s. 110.

## FORMS UNDER PART LVIII.

FROM SCHEDULE ONE.

FORM LV. — (*Section* 859).

CONVICTION FOR A PENALTY TO BE LEVIED BY DISTRESS AND IN DEFAULT OF SUFFICIENT DISTRESS, BY IMPRISONMENT.

Canada,
Province of
County of

Be it remembered that on the day of , in the year , at , in the said county, A. B. is convicted before the undersigned, , a Justice of the Peace for the said county, for that the said A. B. (*&c., stating the offence, and the time and place when and where committed*), and I adjudge the said A. B. for his said offence to forfeit and pay the sum of $ (*stating the penalty, and also the compensation, if any*), to be paid and applied according to law and also to pay to the said C. D. the sum of , for his costs in this behalf; and if the said several sums are not paid forthwith, (*or* on or before the of next), * I order that the same be levied by distress and sale of the goods and chattels of the said A. B., and in default of sufficient distress, * I adjudge the said A. B. to be imprisoned in the common gaol of the said county, at in the said county of , (there to be kept at hard labour, *if such is the sentence*) for the term of , unless the said several sums and all costs and charges of the said distress (and of the commitment and conveying of the said A. B. to the said gaol) are sooner paid.

Given under my hand and seal, the day and year first above mentioned, at , in the county aforesaid.

J. S., [SEAL.]

*J. P., (Name of county).*

* *Or when the issuing of a distress warrant would be ruinous to the defendant and his family, or it appears he has no goods whereon to levy a distress, then instead of the words between the asterisks * * say,* " inasmuch as it is now made to appear to me that the issuing of a warrant of distress in this behalf would be ruinous to the said A. B. and his family," (*or*, " that the said A. B. has no goods or chattels whereon to levy the said sums by distress ").

WW. — (*Section* 859).

CONVICTION FOR A PENALTY, AND IN DEFAULT OF PAYMENT IMPRISONMENT.

Canada,
Province of ,
County of

Be it remembered that on the day of in the year , at , in the said county, A. B. is convicted before the undersigned, , a Justice of the Peace for the said county for that he the said A. B. (*&c., stating the offence, and the time and place when and where it was committed*), and I adjudge the said A. B. for his said offence to forfeit and pay the sum of (*stating the penalty and the compensation, if any*) to be paid and applied according to law; and also to pay to the said C. D. the sum of for his costs in this behalf; and if the said several sums are not paid forthwith (*or*, on or before next), I adjudge the said A. B. to be imprisoned in the common gaol of the said county, at in the said county of (and there to be kept at hard labour) for the term of , unless the said sums and the costs and charges of conveying the said A. B. to the said common gaol are sooner paid.

Given under my hand and seal, the day and year first above mentioned, at , in the county aforesaid.

J. S., [SEAL.]

*J. P., (Name of county).*

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XX. — (*Section* 859).

CONVICTION WHEN THE PUNISHMENT IS BY IMPRISONMENT, ETC.

Canada,
Province of ,
County of

Be it remembered that on the day of , in the year , at , in the said county, A. B. is convicted before the undersigned, , a Justice of the Peace in and for the said county, for that he the said A. B. (*&c., stating the offence, and the time and place when and where it was committed*); and I adjudge the said A. B. for his said offence to be imprisoned in the common gaol of the said county, at , in the county of , (and there to be kept at hard labour) for

the term of ; and I also adjudge the said A. B. to pay to the said C. D. the sum of , for his costs in this behalf, and if the said sum for costs are not paid forthwith (*or* on or before next), then * I order that the said sum be levied by distress and sale of the goods and chattels of the said A. B.; and in default of sufficient distress in that behalf, * I adjudge the said A. B. to be imprisoned in the said common gaol (and kept there at hard labour) for the term of , to commence at and from the term of his imprisonment aforesaid, unless the said sum for costs is sooner paid.

Given under my hand and seal, the day and year first above mentioned at , in the county aforesaid.

J. S., [SEAL.]

*J. P., (Name of county).*

* *Or when the issuing of a distress warrant would be ruinous to the defendant and his family, or it appears he has no goods whereon to levy a distress, then instead of the words between the asterisks* * * *say,* "inasmuch as it is now made to appear to me that the issuing of a warrant of distress in this behalf would be ruinous to the said A. B. and his family," (*or,* "that the said A. B. has no goods or chattels whereon to levy the said sum for costs by distress").

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YY. — (*Section* 859).

ORDER FOR PAYMENT OF MONEY TO BE LEVIED BY DISTRESS AND IN DEFAULT OF DISTRESS IMPRISONMENT.

Canada,
Province of ,
County of

Be it remembered that on , complaint was made before the undersigned, , a Justice of the Peace in and for the said county of , for that (*stating the facts entitling the complainant to the order, with the time and place when and where they occurred*), and now at this day, to wit, on , at the parties aforesaid appear before me the said Justice (*or* the said C. D. appears before me the said justice, but the said A. B., although duly called, does not appear by himself, his counsel or attorney, and it is now satisfactorily proved to me on oath that the said A. B. was duly served with the summons, in this behalf, which required him to be and appear here on this day before me or such Justice or Justices of the Peace for the county, as should now be here, to answer the said complaint, and to be further dealt with

according to law); and now having heard the matter of the said complaint, I do adjudge the said A. B. to pay to the said C. D. the sum of forthwith (*or* on or before next, *or as the Act or law requires*), and also to pay to the said C. D. the sum of for his costs in this behalf; and if the said several sums are not paid forthwith (*or* on or before next), then, * I hereby order that the same be levied by distress and sale of the goods and chattels of the said A. B. and in default of sufficient distress in that behalf * I adjudge the said A. B. to be imprisoned in the common gaol of the said county, at , in the said county of , (and there kept at hard labour) for the term of , unless the said several sums, and all costs and charges of the said distress (and the commitment and conveyance of the said A. B. to the said common gaol) are sooner paid.

Given under my hand and seal, this day of in the year , at in the county aforesaid.

J. S., [SEAL.]

*J. P., (Name of county).*

* *Or when the issuing of a distress warrant would be ruinous to the defendant and his family, or it appears he has no goods whereon to levy a distress, then instead of the words between the asterisks* * * *say*, "inasmuch as it is now made to appear to me that the issuing of a warrant of distress in this behalf would be ruinous to the said A. B. and his family," (*or*, "that the said A. B. has no goods or chattels whereon to levy the said sums by distress").

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ZZ. — (*Section* 859).

ORDER FOR PAYMENT OF MONEY, AND IN DEFAULT OF PAYMENT IMPRISONMENT.

Canada,
Province of ,
County of

Be it remembered that on , complaint was made before the undersigned, , a Justice of the Peace in and for the said county of , for that (*stating the facts entitling the complainant to the order, with the time and place when and where they occurred*), and now on this day, to wit, on , at , the parties aforesaid appear before me the said Justice (*or* the said C. D. appears before me the said Justice, but the said A. B., although duly called, does not appear by himself, his counsel or attorney, and it is now satisfactorily proved to me upon oath

that the said A. B. was duly served with the summons in this behalf, which required him to be and appear here this day before me, or such Justice or Justices of the Peace for the said county, as should now be here, to answer to the said complaint, and to be further dealt with according to law), and now having heard the matter of the said complaint, I do adjudge the said A. B. to pay to the said C. D. the sum of forthwith (*or* on or before next, *or as the Act or law requires*), and also to pay to the said C. D. the sum of for his costs in this behalf; and if the said several sums are not paid forthwith (*or* on or before next), then I adjudge the said A. B. to be imprisoned in the common gaol of the said county at , in the said county of , (there to be kept at hard labour *if the Act or law authorizes this*) for the term of unless the said several sums (and costs and charges of commitment and conconveying the said A. B. to the said common gaol) are sooner paid.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

*J. P., (Name of county).*

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AAA. — (*Section* 859).

ORDER FOR ANY OTHER MATTER WHERE THE DISOBEYING OF IT IS PUNISHABLE WITH IMPRISONMENT.

Canada,
Province of ,
County of

Be it remembered that on , complaint was made before the undersigned, , a Justice of the Peace in and for the said county of , for that (*stating the facts entitling the complainant to the order, with the time and place where and when they occurred*); and now on this day, to wit, on , at , the parties aforesaid appear before me the said Justice (*or* the said C. D. appears before me the said Justice, but the said A. B., although duly called, does not appear by himself, his counsel or attorney, and it is now satisfactorily proved to me, upon oath, that the said A. B. was duly served with the summons in this behalf, which required him to be and appear here this day before me, or such Justice or Justices of the Peace for the said county, as should now be here to answer to the said complaint and to be further dealt with according to law; and now having heard the matter of the said complaint, I do adjudge the said A. B. to (*here state the matter required to be done*), and if, upon a copy of the

minute of this order being served upon the said A. B., either personally or by leaving the same for him at his last or most usual place of abode, he neglects or refuses to obey the same, in that case I adjudge the said A. B., for such his disobedience, to be imprisoned in the common gaol of the said county, at , in the said county of , (there to be kept at hard labour, (*if the statute authorizes this*), for the term of unless the said order is sooner obeyed, and I do also adjudge the said A. B. to pay the said C. D. the sum of for his costs in this behalf, and if the said sum for costs is not paid forthwith (*or* on or before next), I order the same to be levied by distress and sale of the goods and chattels of the said A. B., and in default of sufficient distress in that behalf I adjudge the said A. B. to be imprisoned in the said common gaol (there to be kept at hard labour) for the space of , to commence at and from the termination of his imprisonment aforesaid, unless the said sum for costs is sooner paid.

Given under my hand and seal, this day of in the year , at , in the county aforesaid.

J. S., [SEAL.]

*J. P., (Name of county).*

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BBB. — (*Section* 862).

FORM OF ORDER OF DISMISSAL OF AN INFORMATION OR COMPLAINT.

Canada,
Province of ,
County of

Be it remembered that on , information was laid (*or* complaint was made) before the undersigned, a Justice of the Peace in and for the said county of , for that (*&c., as in the summons of the defendant*) and now at this day, to wit, on , at , (*if at any adjournment insert here:* "to which day the hearing of this case was duly adjourned, of which the said C. D. had due notice,") both the said parties appear before me in order that I should hear and determine the said information (*or* complaint) (*or* the said A. B. appears before me, but the said C. D., although duly called, does not appear); [whereupon the matter of the said information (*or* complaint) being by me duly considered, it manifestly appears to me that the said information (*or* complaint) is not proved, and] (*if the informant or complainant does not appear, these words*

*may be omitted,*) I do therefore dismiss the same, and do adjudge that the said C. D. do pay to the said A. B. the sum of , for his costs incurred by him in defence in his behalf; and if the said sum for costs is not paid forthwith (*or* on or before ), I order that the same be levied by distress and sale of the goods and chattels of the said C. D., and in default of sufficient distress in that behalf, I adjudge the said C. D. to be imprisoned in the common gaol of the said county of , at , in the said county of (and there kept at hard labour) for the term of , unless the said sum for costs, and all costs and charges of the said distress (and of the commitment and conveying of the said C. D. to the said common gaol) are sooner paid.

Given under my hand and seal, this day of in the year , at , in the county aforesaid.

J. S., [SEAL.]

*J. P., (Name of county).*

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CCC. — (*Section* 862).

FORM OF CERTIFICATE OF DISMISSAL.

Canada,
Province of ,
County of

I hereby certify that an information (*or* complaint) preferred by C. D. against A. B. for that (*&c., as in the summons*) was this day considered by me, a Justice of the Peace in and for the said county of , and was by me dismissed (with costs).

Dated at , this day of , in the year

J. S.,

*J. P., (Name of county).*

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DDD. — (*Section* 872).

WARRANT OF DISTRESS UPON A CONVICTION FOR A PENALTY.

Canada,
Province of ,
County of

To all or any of the constables and other peace officers in the said county of

Whereas A. B., late of , (*labourer*), was on this day (*or* on last past) duly convicted before , a Justice of

the Peace, in and for the said County of , for that (*stating the offence, as in the conviction*), and it was thereby adjudged that the said A. B. should for such his offence, forfeit and pay (*&c., as in the conviction*), and should also pay to the said C. D. the sum of , for his costs in that behalf; and it was thereby ordered that if the said several sums were not paid (forthwith) the same should be levied by distress and sale of the goods and chattels of the said A. B., and it was thereby also adjudged that the said A. B., in default of sufficient distress, should be imprisoned in the common gaol of the said county, at , in the said county of (and there kept at hard labour) for the space of unless the said several sums and all costs and charges of the said distress, and of the commitment and conveying of the said A. B. to the said common gaol were sooner paid; * And whereas the said A. B., being so convicted as aforesaid, and being (now) required to pay the said sums of and has not paid the same or any part thereof, but therein has made default: These are, therefore, to command you, in Her Majesty's name forthwith to make distress of the goods and chattels of the said A. B.; and if within days next after the making of such distress, the said sums, together with the reasonable charges of taking and keeping the distress, are not paid, then to sell the said goods and chattels so by you distrained, and to pay the money arising from such sale unto me, the convicting Justice (*or* one of the convicting Justices), that I may pay and apply the same as by law directed, and may render the overplus, if any, on demand, to the said A. B.; and if no such distress is found, then to certify the same unto me, that such further proceedings may be had thereon as to law appertain.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

*J. P.*, (*Name of county*).

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EEE. — (*Section* 872).

WARRANT OF DISTRESS UPON AN ORDER FOR THE PAYMENT OF MONEY.

Canada,
Province of
County of

To all or any of the Peace Officers in the said county of

Whereas on , last past, a complaint was made before , a Justice of the Peace in and for the said county, for

that (*&c., as in the order*), and afterwards, to wit, on , at , the said parties appeared before (*as in the order*), and thereupon the matter of the said complaint having been considered, the said A. B. was adjudged to pay to the said C. D. the sum of , on or before then next, and also to pay the said C. D. the sum of , for his costs in that behalf; and it was ordered that if the said several sums were not paid on or before the said then next, the same should be levied by distress and sale of the goods and chattels of the said A. B.; and it was adjudged that in default of sufficient distress in that behalf, the said A. B. should be imprisoned in the common gaol of the said county, at in the said county of (and there kept at hard labour) for the term of , unless the said several sums and all costs and charges of the distress (and of the commitment and conveying of the said A. B. to the said common gaol) were sooner paid; * And whereas the time in and by the said order appointed for the payment of the said several sums of , and has elapsed, but the said A. B. has not paid the same, or any part thereof, but therein has made default: These are, therefore, to command you, in Her Majesty's name, forthwith to make distress of the goods and chattels of the said A. B. and if within the space of days after the making of such distress, the said last mentioned sums, together with the reasonable charges of taking and keeping the said distress, are not paid, then to sell the said goods and chattels so by you distrained, and to pay the money arising from such sale unto me (*or some other of the convicting Justices, as the case may be*), that I (*or* he) may pay or apply the same as by law directed, and may render the overplus, if any, on demand to the said A. B.; and if no such distress can be found, then to certify the same unto me, to the end that such proceedings may be had therein, as to law appertain.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

*J. P., (Name of county).*

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FFF. — (*Section* 872).

WARRANT OF COMMITMENT UPON A CONVICTION FOR A PENALTY IN THE FIRST INSTANCE.

Canada,
Province of ,
County of

To all or any of the constables and other Peace Officers in the said county of , and to the keeper of the common gaol

of the said county of , at in the said county of

Whereas A. B., late of , (*labourer*), was on this day convicted before the undersigned , a Justice of the Peace in and for the said county, for that (*stating the offence as in the conviction*), and it was thereby adjudged that the said A. B., for his offence, should forfeit and pay the sum of (*&c., as in the conviction*), and should pay to the said C. D. the sum of , for his costs in that behalf; and it was thereby further adjudged that if the said several sums were not paid (forthwith) the said A. B. should be imprisoned in the common gaol of the county, at , in the said county of (and there kept at hard labour) for the term of , unless the said several sums (and the costs and charges of conveying the said A. B. to the said common gaol) were sooner paid: And whereas the time in and by the said conviction appointed for the payment of the said several sums has elapsed, but the said A. B. has not paid the same, or any part thereof, but therein has made default: These are, therefore, to command you, the said Peace Officers, or any one of you, to take the said A. B., and him safely to convey to the common gaol at aforesaid, and there to deliver him to the said keeper thereof, together with this precept; And I do hereby command you, the said keeper of the said common gaol, to receive the said A. B. into your custody in the said common gaol, there to imprison him (and keep him at hard labour) for the term of , unless the said several sums (and costs and charges of carrying him to the said common gaol, amounting to the further sum of ), are sooner paid unto you, the said keeper; and for your so doing, this shall be your sufficient warrant.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

*J. P., (Name of county).*

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GGG. — (*Section 872*).

WARRANT OF COMMITMENT ON AN ORDER IN THE FIRST INSTANCE.

Canada,
Province of
County of

To all or any of the Constables and other Peace Officers in the said county of , and to the keeper of the common gaol of the county of , at , in the said county of

Whereas, on last past, complaint was made before the undersigned , a Justice of the Peace in and for the said county of , for that (*&c., as in the order*), and afterwards, to wit, on the day of , at A. B. and C. D. appeared before me, the said Justice (*or as it is in the order*), and thereupon having considered the matter of the complaint, I adjudged the said A. B. to pay the said C.D. the sum of , on or before the day of then next, and also to pay to the said C. D. the sum of , for his costs in that behalf; and I also thereby adjudged that if the said several sums were not paid on or before the day of then next, the said A. B. should be imprisoned in the common gaol of the county of , at , in the said county of (and there be kept at hard labour) for the term of , unless the said several sums (and the costs and charges of conveying the said A. B. to the said common gaol, *as the case may be*) were sooner paid; And whereas the time in and by the said order appointed for the payment of the said several sums of money has elapsed, but the said A. B. has not paid the same, or any part thereof, but therein has made default: These are, therefore, to command you, the said Peace Officers, or any of you, to take the said A. B. and him safely to convey to the said common gaol, at aforesaid, and there to deliver him to the keeper thereof, together with this precept: And I do hereby command you, the said keeper of the said common gaol, to receive the said A. B. into your custody in the said common gaol, there to imprison him (and keep him at hard labour) for the term of , unless the said several sums (and the cost and charges of conveying him to the said common gaol, amounting to the further sum of ), are sooner paid unto you the said keeper; and for your so doing, this shall be your sufficient warrant.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

*J. P.*, (*Name of county*).

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HHH. — (*Section* 874).

ENDORSEMENT IN BACKING A WARRANT OF DISTRESS.

Canada,
Province of ,
County of

Whereas proof upon oath has this day been made before me , a Justice of the Peace in and for the said county, that

the name of J. S. to the within warrant subscribed is of the handwriting of the Justice of the Peace within mentioned, I do therefore authorize W. T., who brings me this warrant, and all other persons to whom this warrant was originally directed, or by whom the same may be lawfully executed, and also all Peace Officers in the said county of , to execute the same within the said county.

Given under my hand, this day of , one thousand eight hundred and

O. K.,

*J. P., (Name of county).*

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III. — (*Section* 872).

CONSTABLE'S RETURN TO A WARRANT OF DISTRESS.

I. W. T., constable, of , in the county of , hereby certify to J. S., Esquire, a Justice of the Peace in and for the county of , that by virtue of this warrant I have made diligent search for the goods and chattels of the within mentioned A. B., and that I can find no sufficient goods or chattels of the said A. B. whereon to levy the sums within mentioned.

Witness my hand, this day of , one thousand eight hundred and

W. T.

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JJJ. — (*Section* 872).

WARRANT OF COMMITMENT FOR WANT OF DISTRESS.

Canada,
Province of ,
County of

To all or any of the Constables and other Peace officers in the county of , and to the keeper of the common gaol of the said county of , at , in the said county.

Whereas (*&c., as in either of the foregoing distress warrants,* DDD or EEE, *to the asterisk,* * *and then thus*): And whereas, afterwards on the day of , in the year aforesaid, I, the said Justice, issued a warrant to all or any of the Peace

Officers of the county of , commanding them, or any of them, to levy the said sums of and by distress and sale of the goods and chattels of the said A. B.; And whereas it appears to me, as well by the return of the said warrant of distress, by the Peace Officer who had the execution of the same, as otherwise, that the said Peace Officer has made diligent search for the goods and chattels of the said A. B., but that no sufficient distress whereon to levy the sums above mentioned could be found: These are, therefore, to command you, the said Peace Officers, or any one of you, to take the said A. B., and him safely to convey to the common gaol at , aforesaid, and there deliver him to the said keeper, together with this precept: And I do hereby command you, the said keeper of the said common gaol, to receive the said A. B. into your custody, in the said common gaol there to imprison him (and keep him at hard labour) for the term of , unless the said several sums, and all the costs and charges of the said distress (and of the commitment and conveying of the said A. B. to the said common gaol) amounting to the further sum of , are sooner paid unto you, the said keeper; and for so doing this shall be your sufficient warrant.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

*J. P., (Name of county).*

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KKK. — (*Section* 873).

WARRANT OF DISTRESS FOR COSTS UPON AN ORDER FOR DISMISSAL OF AN INFORMATION OR COMPLAINT.

Canada,
Province of ,
District of

To all or any of the constables and other Peace Officers in the said county of

Whereas on last past, information was laid (*or* complaint was made) before a Justice of the Peace in and for the said county of , for that (*&c., as in the order of dismissal*) and afterwards, to wit, on , at , both parties appearing before , in order that (I) should hear and determine the same, and the several proofs adduced to (me) in that behalf, being by (me) duly heard and considered, and it manifestly appearing to (me) that the said information (*or* complaint) was not proved, (I)

therefore dismissed the same and adjudged that the said C. D. should pay to the said A. B. the sum of , for his costs incurred by him in his defence in that behalf; and (I) ordered that if the said sum for costs was not paid (forthwith) the same should be levied on the goods and chattels of the said C. D., and (I) adjudged that in default of sufficient distress in that behalf the said C. D. should be imprisoned in the common gaol of the said county of , at , in the said county of (and there kept at hard labour) for the space of , unless the said sum for costs, and all costs and charges of the said distress, and of the commitment and conveying of the said A. B. to the said common gaol, were sooner paid; * And whereas the said C. D. being now required to pay to the said A. B. the said sum for costs, has not paid the same, or any part thereof, but therein has made default: These are, therefore, to command you, in Her Majesty's name, forthwith to make distress of the goods and chattels of the said C. D., and if within the term of days next after the making of such distress, the said last mentioned sum, together with the reasonable charges of taking and keeping the said distress, shall not be paid, then to sell the said goods and chattels so by you distrained, and to pay the money arising from such sale to (*me*) that (I), may pay and apply the same as by law directed, and may render the overplus (if any) on demand to the said C. D., and if no distress can be found, then to certify the same unto *me* (*or* to any other Justice of the Peace for the same county), that such proceedings may be had therein as to law appertain.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

*J. P.*, (*Name of county*).

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LLL. — (*Section 873*).

WARRANT OF COMMITMENT FOR WANT OF DISTRESS

Canada,
Province of
County of

To all or any of the Constables and other Peace Officers in the said county of , and to the keeper of the common gaol of the said county of , at , in the said county of

Whereas (*&c., as in the form KKK to the asterisk, * and then thus*): And whereas afterwards, on the day of ,

in the year aforesaid, I, the said Justice, issued a warrant to all or any of the Peace Officers of the said county, commanding them, or any one of them, to levy the said sum of , for costs, by distress and sale of the goods and chattels of the said C. D.: And whereas it appears to me, as well by the return to the said warrant of distress of the Peace Officer charged with the execution of the same, as otherwise, that the said Peace Officer has made diligent search for the goods and chattels of the said C. D., but that no sufficient distress whereon to levy the sum above mentioned could be found: These are, therefore, to command you, the said Peace Officers, or any one of you, to take the said C. D., and him safely convey to the common gaol of the said county, at aforesaid, and there deliver him to the keeper thereof, together with this precept: And I hereby command you, the said keeper of the said common gaol to receive the said C. D. into your custody in the said common gaol, there to imprison him (and keep him at hard labour) for the term of , unless the said sum, and all the costs and charges of the said distress (and of the commitment and conveying of the said C. D. to the said common gaol, amounting to the further sum of ), are sooner paid unto you the said keeper; and for your so doing, this shall be your sufficient warrant.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

*J. P., (Name of county).*

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MMM. — (*Section* 878).

CERTIFICATE OF NON-APPEARANCE TO BE ENDORSED ON THE DEFENDANT'S RECOGNIZANCE.

I hereby certify that the said A. B. has not appeared at the time and place in the said condition mentioned, but therein has made default, by reason whereof the within written recognizance is forfeited.

J. S., [SEAL.]

*J. P., (Name of county).*

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NNN. — (*Section* 880).

NOTICE OF APPEAL AGAINST A CONVICTION OR ORDER.

To C. D., of , and (*the names and additions of the parties to whom the notice of appeal is required to be given*).

Take notice, that I, the undersigned, A. B. of intend to enter and prosecute an appeal at the next General Sessions of

the Peace (*or other Court, as the case may be*) to be holden at , in and for the county of , against a certain conviction (*or* order) bearing date on or about the day of , instant, and made by (you) J. S., Esquire, a Justice of the Peace in and for the said county of , whereby I, the said A. B. was convicted of having (*or* was ordered) to pay , (*here state the offence as in the conviction, information, or summons, or the amount adjudged to be paid, as in the order, as correctly as possible*).

Dated at , this day of , one thousand eight hundred and .

A. B.

MEMORANDUM. — *If this notice is given by several defendants, or by an attorney, it may be adapted to the case.*

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OOO. — (*Section* 880).

FORM OF RECOGNIZANCE TO TRY THE APPEAL.

Canada,
Province of ,
County of

Be it remembered that on , A. B., of , (*labourer*), and L. M., of , (*grocer*), and N. O., of , (*yeoman*), personally came before the undersigned , a Justice of the Peace in and for the said county of , and severally acknowledged themselves to owe to our Sovereign Lady the Queen, the several sums following, that is to say, the said A. B. the sum of , and the said L. M. and N. O. the sum of , each, of good and lawful money of Canada, to be made and levied of their several goods and chattels, lands and tenements respectively, to the use of our said Lady the Queen, her heirs and successors, if he the said A. B. fails in the condition endorsed (*or* hereunder written).

Taken and acknowledged the day and year first above mentioned, at , before me.

J. S.,

*J. P., (Name of county).*

The condition of the within (*or* the above) written recognizance is such that if the said A. B. personally appears at the (next) General Sessions of the Peace (*or other Court discharging the functions of the Court of General Sessions, as the case may be*), to be holden at , on the day of , next, in and for the said county of , and tries an appeal against a certain conviction, bearing date the day of (*instant*), and made by (me) the said Justice, whereby he, the said, A. B., was convicted, for that he, the said A. B., did, on the day of , at , in the said county of , (*here set out the offence as stated in the conviction*); and also abides by the judgment of the Court upon such appeal, and pays such costs as are by the Court awarded, then the said recognizance to be void, otherwise to remain in full force and virtue.

FORM OF NOTICE OF SUCH RECOGNIZANCE TO BE GIVEN TO THE APPELLANT AND HIS SURETIES.

Take notice, that you A. B., are bound in the sum of and you L. M. and N. O. in the sum of , each, that you, the said A. B. will personally appear at the next General Sessions of the Peace to be holden at , in and for the said county of , and try an appeal against a conviction (*or* order) dated the day of , (*instant*) whereby you A. B. were convicted of (or ordered, &c.), (*stating offence or the subject of the order shortly*), and abide by the judgment of the court upon such appeal and pay such costs as are by the court awarded, and unless you the said A. B. personally appear and try such appeal and abide by such judgment and pay such costs accordingly, the recognizance entered into by you will forthwith be levied on you and each of you.

Dated at , this day of , one thousand eight hundred and

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PPP. — (*Section* 898).

CERTIFICATE OF CLERK OF THE PEACE THAT THE COSTS OF AN APPEAL ARE NOT PAID.

Office of the Clerk of the PEACE for the county of
*Title of the Appeal.*

I hereby certify that a Court of General Sessions of the Peace, (*or other Court discharging the functions of the Court of General Sessions, as the case may be*), holden at , in and for the said county, on last past, an appeal by A. B. against a conviction (*or* order) of J. S., Esquire, a Justice of the Peace in

and for the said county, came on to be tried, and was there heard and determined, and the said Court of General Sessions (*or other Court, as the case may be*) thereupon ordered that the said conviction (*or* order) should be confirmed (*or* quashed), and that the said (appellant) should pay to the said (respondent) the sum of , for his costs incurred by him in the said appeal, and which sum was thereby ordered to be paid to the Clerk of the Peace for the said county, on or before the day of (*instant*), to be by him handed over to the said (respondent), and I further certify that the said sum for costs has not, nor has any part thereof, been paid in obedience to the said order.

Dated at , this day of , one thousand eight hundred and

G. H.,

*Clerk of the Peace.*

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QQQ. — (*Section* 898).

WARRANT OF DISTRESS FOR COSTS OF AN APPEAL AGAINST A CONVICTION OR ORDER.

Canada,
Province of ,
County of

To all or any of the constables and other peace officers in the said county of

Whereas (*&c., as in the warrants of distress, DDD or EEE, and to the end of the statement of the conviction or order, and then thus*): And whereas the said A. B. appealed to the Court of General Sessions of the Peace (*or other Court discharging the functions of the Court of General Sessions, as the case may be*), for the said county, against the said conviction or order, in which appeal the said A. B. was the appellant, and the said C. D. (*or* J. S., Esquire, the Justice of the Peace who made the said conviction *or* order) was the respondent, and which said appeal came on to be tried and was heard and determined at the last General Sessions of the Peace (*or other Court, as the case may be*) for the said county, holden at , on ; and the said Court thereupon ordered that the said conviction (*or* order) should be confirmed (*or* quashed) and that the said (appellant) should pay to the said (respondent) the sum of , for his costs incurred by him in the said appeal, which said sum was to be paid to the Clerk of the Peace for the said county, on or before the day of , one thousand eight hundred and to be by him handed over

to the said C. D.; and whereas the Clerk of the Peace of the said county has, on the day of (*instant*), duly certified that the said sum for costs had not been paid: * These are, therefore, to command you, in Her Majesty's name, forthwith to make distress of the goods and chattels of the said A. B., and if, within the term of days next after the making of such distress, the said last mentioned sum, together with the reasonable charges of taking and keeping the said distress, are not paid, then to sell the said goods and chattels so by you distrained, and to pay the money arising from such sale to the Clerk of the Peace for the said county of , that he may pay and apply the same as by law directed; and if no such distress can be found, then to certify the same unto me or any other Justice of the Peace for the same county, that such proceedings may be had therein as to law appertain.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

O. K., [SEAL].

*J. P., (Name of county).*

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RRR. — (*Section* 898).

WARRANT OF COMMITMENT FOR WANT OF DISTRESS IN THE LAST CASE.

Canada,
Province of
County of

To all or any of the constables and other peace officers in the said county of

Whereas (*&c., as in form QQQ, to the asterisk * and then thus*): And whereas, afterwards, on the day of , in the year aforesaid, I the undersigned, issued a warrant to all or any of the Peace Officers in the said county of , commanding them, or any of them, to levy the said sum of , for costs, by distress and sale of the goods and chattels of the said A. B.: And whereas it appears to me, as well by the return to the said warrant of distress of the Peace Officer who was charged with the execution of the same, as otherwise, that the said Peace Officer has made diligent search for the goods and chattels of the said A. B., but that no sufficient distress whereon to levy the said sum above mentioned could be found: These are, therefore, to command you, the said Peace Officers, or any one of you, to take the said A. B., and him safely to convey to the common gaol of the

said county of , at aforesaid, and there deliver him to the said keeper thereof together with this precept: And I do hereby command you, the said keeper of the said common gaol, to receive the said A. B. into your custody in the said common gaol, there to imprison him (and keep him at hard labour) for the the term of , unless the said sum and all costs and charges of the said distress (and for the commitment and conveying of the said A. B. to the said common gaol, amounting to the further sum of ), are sooner paid unto you, the said keeper; and for so doing this shall be your sufficient warrant.

Given under my hand and seal, this day of in the year , at , in the county aforesaid.

O. K., [SEAL.]

*J. P., (Name of county).*

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888. — (*Section* 902).

RETURN of convictions made by me (*or* us, *as the case may be*), during the quarter ending , 18 .

| Name of the Prosecutor. | Name of the Defendant. | Nature of the Charge. | Date of Conviction. | Name of Convicting Justice. | Amount of Penalty. Fine or Damage. | Time when paid or to be paid to the said Justice. | To whom paid over by the said Justice. | If not paid, why not, and general observations if any. |
|---|---|---|---|---|---|---|---|---|
| | | | | | | | | |

J. S., Convicting Justice,

*or*

J. S. and O. K., Convicting Justices (*as the case may be*).

## ADDITIONAL FORMS.

### JUDGMENT OF AFFIRMANCE, ON AN APPEAL AGAINST A CONVICTION.

Canada,
Province of ,
County of

At (*Describe the Court appealed to*) held at on the day of in the year of our Lord, 19 , before J. W., of in the (*county*) of aforesaid, (*farmer*) entered an appeal to and against a conviction under the hand and seal of J. S., Esquire, one of His Majesty's justices of the peace, for the county (*or* district) aforesaid, dated and made the day of 19 , for (*Here state the offence as in the conviction*), and by which said conviction, he the said J. S. did adjudge that the said J. W. should, for the said offence, forfeit the sum of together with for costs, and did order the said sums to be paid by the said J. W. on or before the , and that in default of payment on or before that day, he the said J. S. did by the said conviction, adjudge the said J. W. to be imprisoned in the common gaol at in the (*county*) aforesaid for the space of unless the said sums should be sooner paid (*and so on, giving the terms of the conviction*).

Now, therefore, at the said court so holden as aforesaid, upon hearing the said appeal, it is here ORDERED and ADJUDGED, by the said court that the said conviction be and the same is HEREBY, in all things, AFFIRMED, and it is now, here, by the said court FURTHER ORDERED and ADJUDGED that the said J. W. be dealt with and punished according to the said conviction, and also that he the said J. W. do and shall pay to the said , the respondent in the said appeal, the sum of the amount of costs sustained by the said and by him incurred by reason of the said appeal, and now by the said court, here, adjudged to be paid to him by the said J. W., according to the statute in such case made and provided.

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### WRIT OF CERTIORARI TO A JUSTICE OF THE PEACE, TO RETURN A CONVICTION.

Canada,
Province of ,
County of ,

EDWARD THE SEVENTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland, KING, Defender of the Faith.

To one of our justices, assigned to keep our peace, in and for the county (*or* district) of and also to hear and determine divers offences in the said (*county*) committed GREETING:

WE, being willing for certain reasons that all and singular records of conviction of whatsoever trespasses and contempts against the Criminal Code of Canada (*or* against the form of a certain statute, *etc.*), whereof C. D. is before you convicted (as it is said) be sent by you before us, DO COMMAND YOU that you send under your hand and seal before the Honorable in days from (*or* immediately on the receipt of this writ) all and singular the said records of conviction with all things touching the same, as fully and perfectly as they have been made by you and now remain in your custody or power, together with this our writ, that we may further cause to be done therein what of right and according to law we shall see fit.

IN WITNESS WHEREOF, WE have caused the seal of our court of to be hereunto affixed at our (*city*) of this day of in the year of our reign .

*Clerk of the Crown.*

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CERTIORARI—RECOGNIZANCE.

BE IT REMEMBERED, that, on the day of in the year of the reign of Our Sovereign Lord Edward VII (*etc.*), G. H. of (*merchant*), and M. W. of (*gentleman*) came before me, J. S., Esquire, one of the keepers of the peace and justices of Our Lord the King in and for the (*county*) of and acknowledged to owe to Our Sovereign Lord the King the sum of to be levied upon their goods and chattels, lands and tenements to His Majesty's use, upon condition that if C. D. shall prosecute with effect, without any wilful or affected delay, at his own proper costs and charges, a writ of CERTIORARI issued out of the court of our said Lord the King, at to remove into the said court all and singular the records of conviction of whatsoever trespasses and contempts against the Criminal Code of Canada (*or* against the form of a certain statute *etc.*), whereof the said C. D. is convicted before me the said J. S., and shall pay to the prosecutors within next after the said record of conviction (*or* order) shall be confirmed in the said court, all their said full costs and charges to be taxed according to the course of the said court, then this recognizance to be void, or else to remain in full force.

TAKEN and acknowledged the day and year aforesaid, at before me, } G. H. M. W.

J. S.

NOTE. — A blank recognizance is usually transmitted with the writ of *certiorari* from the office of the court issuing it, and when taken and acknowledgsd the recognizance is returned with the writ.

If the conviction be quashed, the recognizance is cancelled by being struck through, and is marked, in the margin "discharged, because the conviction is quashed."

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RETURN TO A WRIT OF CERTIORARI BY A JUSTICE OF THE PEACE

(*To be endorsed on the Certiorari*).

The answer of one of His Majesty's Justices assigned to keep the peace in and for the county (*or* district) of

The execution of this writ appears in the schedule hereunto annexed.

*Justice of the peace.*

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(*The following to be written as a separate document*).

I, one of the keepers of the peace of Our Lord the King, assigned to keep the peace within the said (*county*) of and to hear and determine divers offences committed in the said (*county*), by virtue of this writ of *certiorari* to me delivered, DO, under my seal, CERTIFY unto His Majesty, in His court of , the record of conviction of which mention is made in the said writ.

IN WITNESS WHEREOF, I the said have to these presents set my seal.

GIVEN at in the said (*county*) this day of in the year of our Lord, 19

(*Name of convicting magistrate*).

[L. S.]

NOTE. — The conviction is to be annexed to the writ and returned along with it, but not the information or depositions.

WRIT OF HABEAS CORPUS AD SUBJICIENDUM.

Canada, Province of , County (*or* District) of } EDWARD THE SEVENTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland, KING, Defender of the Faith.

To the keepers of our common gaol for our county (*or* district) of or his deputy or deputies, and to each of them GREETING:

WE COMMAND YOU that you have before the Honorable for at the Judges' Chambers in the Court House in our (*city*) of immediately after the receipt of this writ, the body of being committed and detained in our prison, under your custody (as it is said), together with the day and cause of the taking and detaining of the said by whatsoever name the said be called in the same, to undergo and receive all and singular such things as our said shall then and there consider of him in that behalf, and that you have then and there this writ.

IN WITNESS WHEREOF, we have caused the seal of our Court of King's Bench for Lower Canada (*or, as the case may be*) to be hereunto affixed, at our (*city*) of this day of in the year of our reign.

*Clerk of the Crown.*

## PART LIX.

## RECOGNIZANCES.

**910. Render of accused by surety.** — Any surety for any person charged with any indictable offence may, upon affidavit showing the grounds therefor, with a certified copy of the recognizance, obtain from a Judge of a Superior Court or from a Judge of a County Court having criminal jurisdiction, or in the province of Quebec from a district Magistrate, an order in writing under his hand, to render such person to the common gaol of the county where the offence is to be tried.

2. The sureties, under such order, may arrest such person and deliver him, with the order to the gaoler named therein, who shall receive and imprison him in the said gaol, and shall be charged with the keeping of such person until he is discharged by due course of law. R.S.C., c. 179, ss. 1 and 2.

**911. Bail after render.** — The person rendered may apply to a Judge of a Superior Court, or in cases in which a judge of a

County Court may admit to bail, to a Judge of a County Court, to be again admitted to bail, who may on examination allow or refuse the same, and make such order as to the number of the sureties and the amount of recognizance as he deems meet, — which order shall be dealt with in the same manner as the first order for bail, and so on as often as the case requires. R.S.C., c. 179, s. 3.

**912. Discharge of recognizance.**—On due proof of such render, and certificate of the Sheriff, proved by the affidavit of a subscribing witness, that such person has been so rendered, a Judge of the Superior or County Court, as the case may be, shall order an entry of such render to be made on the recognizance by the Officer in charge thereof, which shall vacate the recognizance, and may be pleaded or alleged in discharge thereof. R.S.C., c. 179, s. 4.

**913. Render in Court.** — The sureties may bring the person charged as aforesaid into the Court at which he is bound to appear, during the sitting thereof, and then, by leave of the Court, render him in discharge of such recognizance at any time before trial, and such person shall be committed to gaol, there to remain until discharged by due course of law; but such Court may admit such person to bail for his appearance at any time it deems meet. R.S.C., c. 179, s. 5.

**914. Sureties not discharged by Arraignment or Conviction.** — The arraignment or conviction of any person charged and bound as aforesaid, shall not discharge the recognizance, but the same shall be effectual for his appearance for trial or sentence, as the case may be; nevertheless the Court may commit such person to gaol upon his arraignment or trial, or may require new or additional sureties for his appearance for trial or sentence, as the case may be, notwithstanding such recognizance; and such commitment shall be a discharge of the sureties. R.S.C., c. 179, s. 6.

**915. Right of surety to render not affected.** — Nothing in the foregoing provisions shall limit or restrict any right which a surety now has of taking and rendering to custody any person charged with any such offence, and for whom he is such surety. R.S.C., c. 179, s. 7.

**916. Entry of Fines &c. on record and recovery thereof.** — (As amended by the *Criminal Code Amendment Act 1900*). Unless otherwise provided, all fines, issues, amercements and forfeited recognizances, the disposal of which is within the legislative authority of the Parliament of Canada, set, imposed, lost or forfeited before any Court of criminal jurisdiction shall, within twenty-one days after the adjournment of such Court be fairly

entered and extracted on a roll by the Clerk of the Court, or in case of his death or absence, by any other person, under the direction of the Judge who presided at such Court, which roll shall be made in duplicate and signed by the Clerk of the Court, or in case of his death or absence, by such Judge.

2. If such Court is a Superior Court having criminal jurisdiction one of such rolls shall be filed with the Clerk, Prothonotary, Registrar or other proper Officer —

(*a*) in the province of Ontario, of the High Court of Justice;

(*b*) in the provinces of Nova Scotia, New Brunswick and British Columbia, of the Supreme Court of the province;

(*c*) in the province of Prince Edward Island, of the Supreme Court of Judicature of that province;

(*d*) in the province of Manitoba, of the Court of Queen's Bench of that province; and

(*e*) in the North-west Territories, of the Supreme Court of the said territories, —

on or before the first day of the term next succeeding the Court by or before which such fines or forfeitures were imposed or forfeited.

3. If such Court is a Court of General Sessions of the Peace, or a County Court, one of such rolls shall remain deposited in the office of the clerk of such Court.

4. The other of such rolls shall, as soon as the same is prepared, be sent by the Clerk of the Court making the same, or in case of his death or absence, by such Judge as aforesaid, with a writ of *fieri facias and capias*, according to the form TTT in schedule one to this Act, (1) to the Sheriff of the county in and for which such Court was holden; and such writ shall be authority to the Sheriff for proceeding to the immediate levying and recovering of such fines, issues, amercements and forfeited recognizances, on the goods and chattels, lands and tenements of the several persons named therein, or for taking into custody the bodies of such persons respectively, in case sufficient goods and chattels, lands or tenements cannot be found, whereof the sums required can be made; and every person so taken shall be lodged in the common gaol of the county, until satisfaction is made or until the Court into which such writ is returnable, upon cause shown by the party, as hereinafter mentioned, makes an order in the case, and until such order has been fully complied with.

5. The Clerk of the Court shall, at the foot of each roll made out as herein directed, make and take an affidavit in the following form, that is to say:

(1) For form TTT, see p. 988, *post*.

"I, A. B. (*describing his office*), make oath that this roll is truly "and carefully made up and examined, and that all fines, issues, "amercements, recognizances and forfeitures which were set, lost, "imposed or forfeited, at or by the Court therein mentioned, and "which, in right and due course of law, ought to be levied and "paid, are, to the best of my knowledge and understanding, in- "serted in the said roll; and that in the said roll are also con- "tained and expressed all such fines as have been paid to or re- "ceived by me either in Court or otherwise, without any wilful "discharge, omission, misnomer or defect whatsoever. So help "me God;"

Which oath any Justice of the Peace for the county is hereby authorized to administer. R.S.C., c. 179, ss. 8, 9 and 15.

A recognizance does not require to be signed by the party bound. (2)

Where, on a trial upon an indictment, a verdict of guilty was returned, but a reserved case was granted upon a question of law, and the accused was admitted to bail, — the condition of the recognizance taken being that the accused would appear at the next sittings of the Court "to receive sentence," — the condition of the recognizance is not broken, if after judgment on the reserved case is given quashing the conviction and ordering a new trial, the accused does not appear. The conviction having been set aside, the accused was entitled to presume that he would not be called on for sentence; and the sureties were not bound for his appearance for any other purpose than to receive sentence. In such a case, a roll of estreated recognizance and a writ of *fieri facias* against the sureties thereon will, on motion to the full Court, be set aside. (3)

A recognizance entered into on a committal for trial was conditioned for the accused to appear at the *next* Court of competent jurisdiction to be holden at Toronto. The next competent court commenced its sittings on the 30th of April 1895; but no indictment was then preferred. Afterwards at the Sessions of the Peace commencing on the 14th of May 1895, an indictment was preferred and a true bill found against the prisoner; and as neither the prisoner nor his bail, appeared, the recognizance was, on the last day of the Sessions, forfeited and the surety arrested, the writ of *fieri facias* having been returned *nulla bona*. *Held*, that the order forfeiting the recognizance, the estreat roll, the writ of *fieri facias* and the *capias* were illegal: and they were quashed. (4)

**917. Officer to prepare lists of persons under recognizance making default.** — If any person bound by recognizance for his appearance (or for whose appearance any other person has become so bound) to prosecute or give evidence on the trial of any indictable offence, or to answer for any common assault, or to articles of the peace, makes default, the Officer of the Court by whom the estreats are made out, shall prepare a list in writing, specifying the name of every person so making default, and the nature of the

(2) R. v. Corbett, & Corbett et al., petrs., Que. Jud. Rep., 7 S. C., 465.
(3) R. v. Hamilton, 12 Man. L. R., 507; 3 Can. Cr. Cas., 1. (R. v. Wheeler, 1 C. L. J. N. S., 272, followed.)
(4) *In re* Cohen's Bail, 16 C. L. T., 217.

offence in respect of which such person, or his surety, was so bound, together with the residence, trade, profession or calling of every such person and surety, — and shall, in such list, distinguish the principals from the sureties, and shall state the cause, if known, why each such person did not appear and whether, by reason of the non-appearance of such person, the ends of Justice have been defeated or delayed. R.S.C., c. 179, s. 10.

**918. Proceeding on forfeited recognizance not to be taken except by order of Judge, etc.** — Every such Officer shall, before any such recognizance is estreated, lay such list before the Judge or one of the Judges who presided at the Court, or if such Court was not presided over by a Judge, before two Justices of the Peace who attended at such Court, and such Judge or Justices shall examine such list, and make such order touching the estreating or putting in process any such recognizance as appears just, subject, in the province of Quebec, to the provisions hereinafter contained; and no Officer of any such Court shall estreat or put in process any such recognizance without the written order of the Judge or Justices of the Peace before whom respectively such list has been laid. R.S.C., c. 179, s. 11.

**919. Recognizance need not be estreated in certain cases.** — Except in the cases of persons bound by recognizance for their appearance, or for whose appearance any other person has become bound to prosecute or give evidence on the trial of any indictable offence, or to answer for any common assault, or to articles of the Peace, in every case of default whereby a recognizance becomes forfeited, if the cause of absence is made known to the Court in which the person was bound to appear, the Court, on consideration of such cause, and considering also, whether, by the non-appearance of such person the ends of Justice have been defeated or delayed, may forbear to order the recognizance to be estreated; and, with respect to all recognizances estreated, if it appears to the satisfaction of the Judge who presided at such Court that the absence of any person for whose appearance any recognizance was entered into, was owing to circumstances which rendered such absence justifiable, such Judge may make an order directing that the sum forfeited upon such estreated recognizance shall not be levied.

2. The Clerk of the Court shall for such purpose, before sending to the sheriff any roll, with a writ of *fieri facias* and *capias*, as directed by section nine hundred and sixteen, submit the same to the Judge who presided at the Court, and such Judge may make a minute on the said roll and writ of any such forfeited recognizances and fines as he thinks fit to direct not to be levied; and the sheriff shall observe the direction in such minute written upon such roll and writ, or endorsed thereon, and shall forbear accordingly to levy any such forfeited recognizance or fine. R.S.C., c. 179, ss. 12 and 13.

**920. Sale of lands by Sheriff**
If upon any writ issued under section nine hundred and sixteen, the Sheriff takes lands or tenements in execution, he shall advertise the same in like manner as he is required to do before the sale of lands in execution in other cases; and no sale shall take place in less than twelve months from the time the writ came to the hands of the Sheriff . R.S.C., c. 179, s. 14.

**921. Discharge from custody on giving security.** — If any person on whose goods and chattels a Sheriff, Bailiff or other Officer is authorized to levy any such forfeited recognizance, gives security to the said Sheriff or other Officer for his appearance at the return day mentioned in the writ, in the Court into which such writ is returnable, then and there to abide the decision of such Court, and also to pay such forfeited recognizance, or sum of money to be paid in lieu or satisfaction thereof, together with all such expenses as are adjudged and ordered by the Court, such Sheriff or Officer shall discharge such person out of custody, and if such person does not appear in pursuance of his undertaking, the Court may forthwith issue a writ of *fieri facias* and *capias* against such person and the surety or sureties of the person so bound as aforesaid. R.S.C., c. 179, s. 16.

**922. Discharge of forfeited recognizance.** — The Court into which any writ of *fieri facias* and *capias* issued under the provisions of this part is returnable, may inquire into the circumstances of the case, and may in its discretion, order the discharge of the whole of the forfeited recognizance, or sum of money paid or to be paid in lieu or satisfaction thereof, and make such order thereon as to such Court appears just; and such order shall accordingly be a discharge to the Sheriff, or to the party, according to the circumstances of the case. R.S.C., c. 179, s. 17.

An order made under this section for the discharge of a forfeited recognizance is a civil and not a criminal proceeding. (5)

Where a recognizance for the appearance at trial of an accused, charged with cattle stealing, was, on his failure to appear, estreated, and a writ of *fieri facias* and *capias* issued and levied against the sureties, an application, on behalf of the latter, was made, under this section, 922, — to the judge who presided at the Court at which the accused had been bound over to appear, — for an order discharging the forfeited recognizance. The judge made an order that, upon payment of certain costs and compensation to the owner of the stolen cattle, the sheriff should withdraw from seizure and return all moneys or securities deposited with him by the sureties, and discharging the sheriff from all duties and liabilities in connection with the writ. On an appeal by the Crown from that portion of the order directing withdrawal from the seizure, return of moneys and securities, the discharge of the recognizance and the discharge of the sheriff, it was held that, the order in question being a civil proceeding, the Court *en banc* had juris-

(5) *In re* Talbot's Bail, 23 O. R., 65.

diction to hear the appeal from it, and further, that orders under section 922 can be made by the Court *en banc* only, and that a single judge has no jurisdiction to make such an order as the one in question. (6)

**923. Return of writ by Sheriff.**—The Sheriff, to whom any writ is directed under this Act, shall return the same on the day on which the same is made returnable, and shall state, on the back of the roll attached to such writ, what has been done in the execution thereof; and such return shall be filed in the Court into which such return is made. R.S.C., c. 179, s. 18.

**924. Roll and return to be transmitted to Minister of Finance.** — A copy of such roll and return, certified by the Clerk of the Court into which such return is made, shall be forthwith transmitted to the Minister of Finance and Receiver-General, with a minute thereon of any of the sums therein mentioned, which have been remitted by order of the Court, in whole or in part, or directed to be forborne, under the authority of section nine hundred and nineteen. R.S.C., c. 179, s. 19.

**925. Appropriation of moneys collected by Sheriff.** — The Sheriff or other Officer shall, without delay, pay over all moneys collected under the provisions of this part by him, to the Minister of Finance and Receiver-General, or other person entitled to receive the same. R.S.C., c. 179, s. 20.

**926. Quebec.** — The provisions of sections nine hundred and sixteen and nine hundred and nineteen to nine hundred and twenty-four, both inclusive, shall not apply to the province of Quebec, and the following provisions shall apply to that province only:

2. Whenever default is made in the condition of any recognizance lawfully entered into or taken in any criminal case, proceeding or matter, in the province of Quebec, within the legislative authority of the Parliament of Canada, so that the penal sum therein mentioned becomes forfeited and due to the Crown, such recognizance shall thereupon be estreated or withdrawn from any record or proceeding in which it then is — or where the recognizance has been entered into orally in open court — a certificate or minute of such recognizance, under the seal of the court, shall be made from the records of such court;

(*a*) Such recognizance, certificate or minute, as the case may be, shall be transmitted by the court, recorder, justice of the peace, magistrate or other functionary before whom the cognizor, or the principal cognizor, where there is a surety or sureties, was bound to appear, or to do that, by his default to do which the

(6) *Re* McArthur's Bail, 3 Can. Cr. Cas., 195.

condition of the recognizance is broken, to the Superior Court in the district in which the place where such default was made is included for civil purposes, with the certificate of the court, recorder, justice of the peace, magistrate or other functionary as aforesaid, of the breach of the condition of such recognizance, of which and of the forfeiture to the Crown of the penal sum therein mentioned, such certificate shall be conclusive evidence;

(*b*) The date of the receipt of such recognizance or minute and certificate by the prothonotary of the said court, shall be endorsed thereon by him, and he shall enter judgment in favour of the Crown against the cognizor for the penal sum mentioned in such recognizance, and execution may issue therefor after the same delay as in other cases, which shall be reckoned from the time when the judgment is entered by the prothonotary of the said court;

(*c*) Such execution shall issue upon fiat or *præcipe* of the Attorney-General, or of any person thereunto authorized in writing by him; and the Crown shall be entitled to the costs of execution and to costs on all proceedings in the case subsequent to execution, and to such costs, in the discretion of the court, for the entry of the judgment, as are fixed by any tariff.

(*d*) The cognizor shall be liable to coercive imprisonment for the payment of the judgment and costs.

(*e*) When sufficient goods and chattels, lands or tenements cannot be found to satisfy the judgment against a cognizor and the same is certified in the return to the writ of execution or appears by the report of distribution, a warrant of commitment addressed to the sheriff of the district may issue upon the fiat or praecipe of the Attorney General, or of any person thereto authorized in writing by him, and such warrant shall be authority to the sheriff to take into custody the body of the cognizor so in default and to lodge him in the common jail of the district until satisfaction is made, or until the court which issued such warrant, upon cause shown as hereinafter mentioned, makes an order in the case and such order has been fully complied with.

(*f*) Such warrant shall be returned by the sheriff on the day on which it is made returnable and the sheriff shall state in his return what has been done in execution thereof.

(*g*) On petition of the cognizor, of which notice shall be given to the clerk of the Crown of the district, the court may inquire into the circumstances of the case and may in its discretion order the discharge of the amount for which he is liable or make such order with respect thereto and to his imprisonment as may appear just, and such order shall be carried out by the sheriff.

3. Nothing in this section contained shall prevent the recovery of the sum forfeited by the breach of any recognizance from being

recovered by suit in the manner provided by law, whenever the same cannot, for any reason, be recovered in the manner provided in this section;

(*a*) In such case the sum forfeited by the non-performance of the conditions of such recognizance shall be recoverable, with costs, by action in any court having jurisdiction in civil cases to the amount, at the suit of the Attorney-General of Canada or of Quebec, or other person or officer authorized to sue for the Crown; and in any such action it shall be held that the person suing for the Crown is duly empowered so to do, and that the conditions of the recognizance were not performed, and that the sum therein mentioned is, therefore, due to the Crown, unless the defendant proves the contrary.

(*b*) The cognizor for the recovery of the judgment in any such action shall be liable to coercive imprisonment in the same manner as a surety is in the case of judicial suretyship in civil matters.

4. In this section unless the context otherwise requires, the expression "cognizor" includes any number of cognizors in the same recognizance, whether as principals or sureties.

5. When a person has been arrested in any district for an offence committed within the limits of the province of Quebec, and a justice of the peace has taken recognizances from the witnesses heard before him or another justice of the peace, for their appearance at the next session or term of the court of competent criminal jurisdiction, before which such person is to undergo his trial, there to testify and give evidence on such trial, and such recognizances have been transmitted to the office of the clerk of such court, the said court may proceed on the said recognizances in the same manner as if they had been taken in the district in which such court is held. R.S.C., c. 179, ss. 21, 22 and 23. (*As amended by 57-58 Vic., c. 57*).

Where a recognizance entered into becomes forfeited to the Crown and is transmitted to the prothonotary of the Superior Court under subsection 2 of this section, 926, in order that judgment in favor of the Crown may be entered thereon, such proceeding is not in the nature of a trial; and the cognizor is not entitled to prior notice of the registration of the forfeiture in the civil tribunal. (7)

Where a recognizance has been forfeited and judgment has been entered in favor of the Crown against cognizors who are jointly and severally liable, one of the cognizors is not subject to coercive imprisonment until it is established that sufficient goods and chattels lands and tenements cannot be found belonging to his co-cognizors to satisfy the judgment. (8)

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(7) R. v. Corbett, & Corbett et al., petrs, Que. Jud. Rep., 7 S. C., 465.
(8) R. v. Ferris et al., & Johnson, petr. Que. Jud. Rep., 9 S. C., 376.

## FORM UNDER PART LIX.

FROM SCEDULE ONE.

TTT. — (*Section* 916).

WRIT OF FIERI FACIAS.

Victoria, by the Grace of God, &c.

To the Sheriff of Greeting:

You are hereby commanded to levy of the goods and chattels, lands and tenements, of each of the persons mentioned in the roll or extract to this writ annexed, all and singular the debts and sums of money upon them severally imposed and charged, as therein is specified; and if any of the said several debts cannot be levied, by reason that no goods or chattels, lands or tenements can be found belonging to the said persons, respectively, then, and in all such cases, that you take the bodies of such persons, and keep them safely in the gaol of your county, there to abide the judgment of our court (*as the case may be*) upon any matter to be shown by them, respectively, or otherwise to remain in your custody as aforesaid, until such debt is satisfied unless any of such persons respectively gives sufficient security for his appearance at the said court, on the return day hereof, for which you will be held answerable; and what you do in the premises make appear before us in our Court (*as the case may be*), on the day of term next, and have then and there this writ.

Witness, &c., G. H., clerk (*as the case may be*).

## PART LX.

## FINES AND FORFEITURES.

**927. Appropriation of Fines, &c.**—Whenever no other provision is made by any law of Canada for the application of any fine, penalty or forfeiture imposed for the violation of any such law or of the proceeds of an estreated recognizance, the same shall be paid over by the magistrate or officer receiving the same to the treasurer of the province in which the same is imposed or recovered, to be by him paid over to the municipal or local authority, if any, which wholly or in part bears the expenses of administering the law under which the same was imposed or recovered, or to be applied in any other manner deemed best adapted to attain the objects of such law and secure its due administration, except that —

(*a*) all fines, penalties and forfeitures imposed in respect of the breach of any of the revenue laws of Canada, or imposed upon any officer or employee of the Government of Canada in respect of any breach of duty or malfeasance in his office or employment, and the proceeds of all recognizances estreated in connection with proceedings for the prosecution of persons charged with such breaches or malfeasance, and

(*b*) all fines, penalties and forfeitures imposed for whatever cause in any proceeding instituted at the instance of the Government of Canada or of any department thereof in which that Government bears the cost of prosecution, and the proceeds of all recognizances estreated in connection with such proceedings, shall belong to Her Majesty for the public uses of Canada, and shall be paid by the magistrate or officer receiving the same to the Receiver General and form part of the Consolidated Revenue Fund of Canada.

Provided that nothing in this section contained shall affect any right of a private person suing as well for Her Majesty as for himself, to the moiety of any fine, penalty or forfeiture recovered in his suit. (As amended by the *Criminal Code Amendment Act 1900*).

"His Majesty" should be substituted for "Her Majesty."

**928. Application of Fines, &c. by Order in Council.** — The Governor in Council may from time to time direct that any fine, penalty or forfeiture, or any portion thereof, which would otherwise belong to the Crown for the public uses of Canada, be paid to any provincial, municipal or local authority, which wholly or in part bears the expenses of administering the law under which such fine, penalty or forfeiture is imposed, or that the same be applied in any other manner deemed best adapted to attain the objects of such law and to secure its due administration. R.S.C., c. 180, s. 3.

**929. Recovery of penalty or forfeiture.** — Whenever any pecuniary penalty or any forfeiture is imposed for any violation of any Act, and no other mode is prescribed for the recovery thereof, such penalty or forfeiture shall be recoverable or enforceable, with costs, in the discretion of the Court, by civil action or proceeding at the suit of Her Majesty only, or of any private party suing as well for Her Majesty as for himself — in any form allowed in such case by the law of that province in which it is brought — before any Court having jurisdiction to the amount of the penalty in cases of simple contract — upon the evidence of any one credible witness other than the plaintiff or party interested; and if no other provision is made for the appropriation of any penalty or forfeiture so recovered or enforced, one moiety shall belong to

Her Majesty, and the other moiety shall belong to the private party suing for the same, if any, and if there is none, the whole shall belong to Her Majesty. R.S.C., c. 180, s. 1.

"His Majesty" should be substituted for "Her Majesty."

**930. — Limitation of actions.** — No action, suit or information shall be brought or laid for any penalty or forfeiture under any such Act except within two years after the cause of action arises or after the offence is committed, unless the time is otherwise limited by such Act. R.S.C., c. 180, s. 5.

# TITLE VIII.

## PROCEEDINGS AFTER CONVICTION.

### PART LXI.

### PUNISHMENTS GENERALLY.

**931. Punishment to be after conviction only.** — Whenever a person doing a certain act is declared to be guilty of any offence, and to be liable to punishment therefor, it shall be understood that such person shall only be deemed guilty of such offence and liable to such punishment after being duly convicted of such act. R.S.C., c. 181, s. 1.

**932. Degrees in punishment.** — Whenever it is provided that the offender shall be liable to different degrees or kinds of punishment, the punishment to be inflicted shall, subject to the limitations contained in the enactment, be in the discretion of the Court or Tribunal before which the conviction takes place. R. S.C., c. 181, s. 2.

**933. Liability under different provisions.** — Whenever any offender is punishable under two or more Acts or two or more sections of the same Act, he may be tried and punished under any of such Acts or sections; but no person shall be twice punished for the same offence. R.S.C., c. 181, s. 3.

**934. Fine imposed shall be in the discretion of the Court.** — Whenever a fine may be awarded or a penalty imposed for any offence, the amount of such fine or penalty shall, within such limits, if any, as are prescribed in that behalf, be in the discretion of the Court or person passing sentence or convicting, as the case may be. R.S.C., c. 181, s. 33.

### PART LXII.

### CAPITAL PUNISHMENT.

**935. Punishment to be the same on conviction by verdict or by confession.** — Every one who is indicted as principal or accessory for any offence made capital by any statute, shall be liable to the same punishment, whether he is convicted by verdict or on confession, and this as well in the case of accessories as of principals. R.S.C., c. 181, s. 4.

**936. Form of Sentence of Death.** — In all cases where an offender is sentenced to death the sentence or judgment to be pronounced against him shall be, that he be hanged by the neck until he is dead. R.S.C., c. 181, s. 5.

**937. Sentence of Death to be reported to Secretary of State.** — In the case of any prisoner sentenced to the punishment of death, the Judge before whom such prisoner has been convicted shall forthwith make a report of the case to the Secretary of State, for the information of the Governor General; and the day to be appointed for carrying the sentence into execution shall be such as, in the opinion of the Judge, will allow sufficient time for the signification of the Governor's pleasure before such day, and if the Judge thinks such prisoner ought to be recommended for the exercise of the Royal Mercy, or if, from the non-decision of any point of law reserved in the case, or from any other cause, it becomes necessary to delay the execution, he, or any other Judge of the same Court, or who might have held or sat in such Court may, from time to time, either in term or in vacation, reprieve such offender for such period or periods beyond the time fixed for the execution of the sentence as are necessary for the consideration of the case by the Crown. R.S.C., c. 181, s. 8.

**938. Prisoner under Sentence of Death to be confined apart.** — Every one who is sentenced to suffer death shall, after judgment, be confined in some safe place within the prison, apart from all other prisoners; and no person except the gaoler and his servants, the Medical Officer or Surgeon of the prison and a Chaplain or a Minister of Religion, shall have access to any such convict, without the permission, in writing, of the Court or Judge before whom such convict has been tried, or of the Sheriff. R.S.C., c. 181, s. 9.

**939. Place of execution.** — Judgment of death to be executed on any prisoner shall be carried into effect within the walls of the prison in which the offender is confined at the time of execution. R.S.C., c. 181, s. 10.

**940. Persons who shall be present at execution.** — The Sheriff charged with the execution, and the gaoler and Medical Officer or Surgeon of the prison, and such other Officers of the prison and such persons as the Sheriff requires, shall be present at the execution. R.S.C., c. 181, s. 11.

**941. Persons who may be present at execution.** — Any Justice of the Peace for the district, county or place to which the prison belongs, and such relatives of the prisoner or other persons as it seems to the Sheriff proper to admit within the prison for the purpose, and any minister of religion who desires to attend, may also be present at the execution. R.S.C., c. 181, s. 12.

**942. Certificate of death.** — As soon as may be after judgment of death has been executed on the offender, the Medical Officer or Surgeon of the prison shall examine the body of the offender, and shall ascertain the fact of death, and shall sign a certificate thereof, in the form UUU in schedule one hereto, and deliver the same to the Sheriff.

2. The Sheriff and the gaoler of the prison, and such Justices and other persons present, if any, as the Sheriff requires or allows, shall also sign a declaration in the form VVV in the said schedule to the effect that judgment of death has been executed on the offender. (1) R.S.C., c. 181, ss. 13 and 14.

**943. When deputies may Act.** — The duties imposed upon the Sheriff, Gaoler, Medical Officer or Surgeon by the three sections next preceding, may be and, in his absence, shall be performed by his lawful deputy or assistant, or other officer or person ordinarily acting for him, or conjointly with him, or discharging the duties of any such Officer. R.S.C., c. 181, s. 15. (As amended by the *Criminal Code Amendment Act 1900*).

**944. Inquest to be held.** — A Coroner of a district county or place to which the prison belongs, wherein judgment of death is executed on any offender, shall, within twenty-four hours after the execution, hold an inquest on the body of the offender; and the Jury at the inquest shall inquire into and ascertain the identity of the body, and whether judgment of death was duly executed on the offender; and the inquisition shall be in duplicate, and one of the originals shall be delivered to the Sheriff.

2. No officer of the prison and no prisoner confined therein shall, in any case, be a Juror on the inquest. R.S.C., c. 181, ss. 16 and 17.

**945. Place of Burial.** — The body of every offender executed shall be buried within the walls of the prison within which judgment of death is executed on him, unless the Lieutenant Governor in Council orders otherwise. R.S.C., c. 181, s. 18.

**946. Certificate to be sent to Secretary of State and exhibited at Prison.**—Every certificate and declaration, and a duplicate of the inquest required by this Act, shall in every case be sent with all convenient speed by the Sheriff to the Secretary of State, or to such other Officer as is, from time to time, appointed for the purpose by the Governor in Council; and printed copies of such several instruments shall as soon as possible, be exhibited and shall

(1) For Forms UUU, and VVV, see p. 1010, *post*.

for twenty-four hours at least, be kept exhibited on or near the principal entrance of the prison within which judgment of death is executed. R.S.C., c. 181, s. 20.

**947. Omissions not to invalidate execution.** — The omission to comply with any provision of the preceding sections of this part shall not make the execution of judgment of death illegal in any case in which such execution would otherwise have been legal. R.S.C., c. 181, s. 21.

**948. Other proceeding in Executions not affected.** — Except in so far as is hereby otherwise provided, judgment of death shall be carried into effect in the same manner as if the above provisions had not been passed. R.S.C., c. 181, s. 22.

**949. Rules and Regulations as to Execution.** — The Governor in Council may, from time to time, make such rules and regulations to be observed on the execution of judgment of death in every prison, as he, from time to time, deems expedient for the purpose, as well of guarding against any abuse in such execution, as also of giving greater solemnity to the same, and of making known without the prison walls the fact that such execution is taking place.

2. All such rules and regulations shall be laid upon the tables of both Houses of Parliament within six weeks after the making thereof, or, if Parliament is not then sitting, within fourteen days after the next meeting thereof. R.S.C., c. 181, ss. 44 and 45.

## PART LXIII.

## IMPRISONMENT.

**950. Offences not capital, — How punished.** — Every one who is convicted of any offence not punishable with death shall be punished in the manner, if any, prescribed by the Statute especially relating to such offence. R.S.C., c. 181, s. 23.

**951. Imprisonment in cases not specially provided for.**—(*Amended by 56 Vic. c. 32*). Every person convicted of any indictable offence for which no punishment is specially provided, shall be liable to imprisonment for five years.

2. Every one who is summarily convicted of any offence for which no punishment is specially provided, shall be liable to a penalty not exceeding fifty dollars, or to imprisonment, with or without hard labour, for a term not exceeding six months, or to both. R.S.C., c. 181, s. 24.

**952. Punishment for offence committed after previous conviction.** — Every one who is convicted of an indictable offence, not

punishable with death, committed after a previous conviction for an indictable offence, is liable to imprisonment for ten years unless some other punishment is directed by any statute for the particular offence, — in which case the offender shall be liable to the punishment thereby awarded, and not to any other. R.S.C., c. 181, s. 25.

**953. Imprisonment may be for shorter term than that prescribed.** — Every one who is liable to imprisonment for life, or for any term of years, or other term, may be sentenced to imprisonment for any shorter term: Provided, that no one shall be sentenced to any shorter term of imprisonment than the minimum term, if any, prescribed for the offence of which he is convicted. R.S.C., c. 181, s. 26.

**954. Cumulative Punishments.** — When an offender is convicted of more offences than one, before the same Court or person at the same sitting, or when any offender, under sentence or undergoing punishment for one offence, is convicted of any other offence, the Court or person passing sentence may, on the last conviction, direct that the sentences passed upon the offender for his several offences shall take effect one after another. R.S.C., c. 181, s. 27.

**955. Imprisonment in Penitentiary, etc.** — Every one who is sentenced to imprisonment for life, or for a term of years, not less than two, shall be sentenced to imprisonment in the penitentiary for the province in which the conviction takes place.

2. Every one who is sentenced to imprisonment for a term less than two years shall, if no other place is expressly mentioned, be sentenced to imprisonment in the common gaol of the district, county or place in which the sentence is pronounced, or if there is no common gaol there, then in that common gaol which is nearest to such locality, or in some lawful prison or place of confinement, other than a penitentiary, in which the sentence of imprisonment may be lawfully executed.

3. Provided that where any one is sentenced to imprisonment in a penitentiary, and at the same sittings or term of the Court trying him is sentenced for one or more other offences to a term or terms of imprisonment less than two years each, he may be sentenced for such shorter terms to imprisonment in the same penitentiary, such sentences to take effect from the termination of his other sentence: and provided further that where any one is sentenced for any offence who is, at the date of such sentence, serving a term of imprisonment in a penitentiary for another offence, he may be sentenced for a term shorter than two years to imprisonment in the same penitentiary, such sentence to take effect from the termination of his existing sentence or sentences. (As amended by the *Criminal Code Amendment Act 1900*).

4. Provided further that any prisoner sentenced for any term by any Military, Naval or Militia Court-Martial, or by any Military or Naval authority under any Mutiny Act, may be sentenced to imprisonment in a penitentiary; and if such prisoner is sentenced to a term less than two years, he may be sentenced to imprisonment in the common gaol of the district, county or place in which the sentence is pronounced, or in such other prison or place of confinement as is provided by subsection two of this section with respect to persons sentenced thereunder.

5. Imprisonment in a penitentiary, in the Central Prison for the province of Ontario, in the Andrew Mercer Ontario Reformatory for females, and in any reformatory prison for females in the province of Quebec, shall be with hard labour, whether so directed in the sentence or not.

6. Imprisonment in a common gaol, or a public prison, other than those last mentioned, shall be with or without hard labour, in the discretion of the Court or person passing sentence, if the offender is convicted on indictment, or under the provisions of Parts LIV., or LV., or before a Judge of the Supreme Court of the North-West Territories, and in other cases may be with hard labour, if hard labour is part of the punishment for the offence of which such offender is convicted, — and if such imprisonment is to be with hard labour, the sentence shall so direct.

7. The term of imprisonment, in pursuance of any sentence, shall unless otherwise directed in the sentence, commence on and from the day of passing such sentence, but no time during which the convict is out on bail shall be reckoned as part of the term of imprisonment to which he is sentenced.

8. Every one who is sentenced to imprisonment in any penitentiary, gaol, or other public or reformatory prison, shall be subject to the provisions of the Statutes relating to such penitentiary, gaol or prison, and to all rules and regulations lawfully made with respect thereto. R.S.C., c. 181, s. 28; 53 V., c. 37, s. 31.

**956. Imprisonment in Reformatories.** — The Court or person before whom any offender whose age at the time of his trial does not, in the opinion of the Court, exceed sixteen years, is convicted, whether summarily or otherwise, of any offence punishable by imprisonment, may sentence such offender to imprisonment in any reformatory prison in the province in which such conviction takes place, subject to the provisions of any Act respecting imprisonment in such reformatory; and such imprisonment shall be substituted, in such case, for the imprisonment in the penitentiary or other place of confinement by which the offender would otherwise be punishable under any Act or law relating thereto: Provided, that in no case shall the sentence be less than two years' or more than five years' confinement in such reformatory prison;

and in every case where the term of imprisonment is fixed by law to be more than five years, then such imprisonment shall be in the penitentiary.

2. Every person imprisoned in a reformatory shall be liable to perform such labour as is required of such person. R.S.C., c. 181, s. 29.

## PART LXIV.

## WHIPPING.

**957. Sentence of punishment by whipping.** — (As amended by the *Criminal Code Amendment Act 1900*). Whenever whipping may be awarded for any offence, the Court may sentence the offender to be once, twice or thrice whipped, within the limits of the prison, under the supervision of the medical officer of the prison, or if there be no such officer, or if the medical officer be for any reason unable to be present, then, under the supervision of a surgeon or physician to be named by the Minister of Justice, in the case of prisons under the control of the Dominion, and in the case of other prisons by the Attorney General of the province in which such prison is situated.

2. The unmber of strokes shall be specified in the sentence; and the instrument to be used for whipping shall be a cat of nine tails unless some other instrument is specified in the sentence.

3. Whenever practicable, every whipping shall take place not less than ten days before the expiration of any term of imprisonment to which the offender is sentenced for the offence.

4. Whipping shall not be inflicted on any female.

### THE TICKET OF LEAVE ACTS.

The 62-63 Vic., c. 49, provides for the conditional liberation of *Penitentiary* convicts; and by the 63-64 Vic., c. 48, the provisions of the Act are extended to all persons convicted of any offence and being under sentence of imprisonment in *any jail* or *other* public or reformatory *prison*; and the Governor General is thereby empowered to grant to any person so convicted and being under imprisonment in any jail or other public or reformatory prison a license to be at large in Canada upon the like terms and conditions as are by the said Act prescribed and authorized with respect to penitentiary convicts.

The 62-63 Vic., c. 49, consists of 12 sections and a schedule of forms, as follows: —

**1. License. — Revocation.** — It shall be lawful for the Governor General by an order in writing under the hand and seal of the Secretary of State to grant to any convict under sentence of im-

prisonment in a penitentiary a license to be at large in Canada, or in such part thereof as in such license shall be mentioned, during such portion of his term of imprisonment, and upon such conditions in all respects as to the Governor General may seem fit; and the Governor General may, from time to time, revoke or alter such license by a like order in writing.

**2. Effect of license.** — So long as such license continues in force and unrevoked such convict shall not be liable to be imprisoned by reason of his sentence, but shall be allowed to go and remain at large according to the terms of such license.

**3. Effect of revocation.** — If any such license is revoked, it shall be lawful for the Governor General by warrant under the hand and seal of the Secretary of State to signify to the Commissioner of Dominion Police at Ottawa that such license has been revoked, and to require the said Commissioner to issue his warrant under his hand and seal for the apprehension of the convict, to whom such license was granted, and the said Commissioner shall issue his warrant accordingly, and such warrant shall and may be executed by the constable to whom the same is given for that purpose in any part of Canada, and shall have the same force and effect in all parts of Canada as if the same had been originally issued or subsequently endorsed by a justice or other lawful authority having jurisdiction in the place where the same is executed, and such convict, when apprehended under such warrant, shall be brought as soon as conveniently may be before a justice of the peace of the county in which the same is executed, and such justice shall thereupon make out his warrant under his hand and seal for the recommitment of such convict to the penitentiary from which he was released by virtue of the said license, and such convict shall be so recommitted accordingly, and shall thereupon be remitted to his original sentence, and shall undergo the residue thereof as if such license had been not granted. Provided that if the place where such convict is apprehended is not within the province, territory or district for which such penitentiary is the penitentiary, such convict shall be committed to the penitentiary for the province, territory or district within which he is so apprehended and shall there undergo the residue of his sentence.

**4. Form of License.** — A license under section 1 may be in the form A in the schedule to this Act, or to the like effect, or may, if the Governor General thinks proper, be in any other form different from that given in the schedule which he may think it expedient to adopt, and contain other and different conditions.

2. A copy of any conditions annexed to any such license, other than the conditions contained in form A shall be laid before both Houses of Parliament within twenty-one days after the making

thereof, if Parliament be then in session, or if not, then within fourteen days after the commencement of the next session of Parliament.

**5. Forfeiture of License on conviction of holder of another offence.** — If any holder of a license under this Act is convicted of any indictable offence his license shall be forthwith forfeited.

**6. Reports to be made by licensee.** — Every holder of such a license who is at large in Canada shall notify the place of his residence to the chief officer of police or the sheriff of the city, town, county or district in which he resides, and shall, whenever he changes such residence within the same city, town, county or district, notify such change to the said chief officer of police or sheriff, and whenever he is about to leave a city, town, county or district he shall notify such his intention to the chief officer of police or sheriff of that city, town, county or district, stating the place to which he is going, and also, if required, and so far as is practicable, his address at that place, and whenever he arrives in any city, town, county or district he shall forthwith notify his place of residence to the chief officer of police or the sheriff of such last-mentioned city, town, county or district.

2. Every male holder of such a license shall, once in each month report himself at such time as may be prescribed by the chief officer of police or sheriff of the city, town, county or district in which such holder may be, either to such chief officer or sheriff himself, or to such other person as he may direct, and such report may according as such chief officer or sheriff directs be required to be made personally or by letter.

3. If any person to whom this section applies fails to comply with any of the requirements of this section, he shall in any such case be guilty of an offence against this Act, unless he proves to the satisfaction of the court before whom he is tried, either that being on a journey he tarried no longer in the place in respect of which he is charged with failing to notify his place of residence than was reasonably necessary, or that, otherwise, he did his best to act in conformity with the law; and on summary conviction of such offence he shall be liable in the discretion of the justice either to forfeit his license or to imprisonment with or without hard labour for a term not exceeding one year.

4. The Governor General may, by order under the hand of the Secretary of State, remit any of the requirements of this section either generally or in the case of any case of any particular holder of a license.

**7. Offences with respect to license.** — Any holder of a license under this Act who —

(*a*) fails to produce the same whenever required so to do by any judge, police or other magistrate, or justice of the peace, before whom he may be brought charged with any offence, or by any peace officer in whose custody he may be, and fails to make any reasonable excuse for not producing the same; or

(*b*) breaks any of the other conditions of his license by an act which is not of itself punishable either upon indictment or upon summary conviction, is guilty of an offence upon summary conviction of which he shall be liable to imprisonment for three months with or without hard labour.

**8. Summary arrest of licensee, trial, and forfeiture of license.**— Any peace officer may take into custody without warrant any convict who is the holder of such a license,

(*a*) whom he reasonably suspects of having committed any offence, or

(*b*) if it appears to such peace officer that such convict is getting his livelihood by dishonest means;

and may take him before a justice to be dealt with according to law.

2. If it appears from the facts proved before the justice that there are reasonable grounds for believing that the convict so brought before him is getting his livelihood by dishonest means such convict shall be deemed guilty of an offence against this Act, and his license shall be forfeited.

3. Any convict so brought before a justice of the peace may be convicted of getting his livelihood by dishonest means although he has been brought before the justice on some other charge, or not in the manner provided for in this section.

**9. Certificate of conviction.** — When any holder of a license under this Act is convicted of an offence punishable on summary conviction under this or any other Act the justice or justices convicting the prisoner shall forthwith forward by post a certificate in the form B in the schedule to this Act to the Secretary of State, and thereupon the license of the said holder may be revoked in manner aforesaid.

**10. Sentence in force during license.** — The conviction and sentence of any convict to whom a license is granted under this Act shall be deemed to continue in force while such license remains unforfeited and unrevoked, although execution thereof is suspended.

**11. Effect of forfeiture by conviction.** — When any such li-

cense as aforesaid is forfeited by a conviction of an indictable offense or other conviction, or is revoked in pursuance of a summary conviction or otherwise, the person whose license is forfeited or revoked shall, after undergoing any other punishment to which he may be sentenced for any offence in consequence of which his license is forfeited or revoked, further undergo a term of imprisonment equal to the portion of the term to which he was sentenced that remained unexpired at the time his license was granted, and shall for the purpose of undergoing such last mentioned punishment be removed from the jail or other place of confinement in which he is, if it be not a penitentiary, to a penitentiary by warrant under the hand and seal of any justice having jurisdiction at the place where he is confined; and if he is confined in a penitentiary shall undergo such term of imprisonment in that penitentiary, and in every case such convict shall be liable to be dealt with in all respects as if such term of imprisonment had formed part of his original sentence.

**12. Duty of Minister of Justice.**— It shall be the duty of the Minister of Justice to advise the Governor General upon all matters connected with or affecting the administration of this Act.

**Schedule.** — The schedule of the Act contains two forms, which are as follows: —

FORM A. — LICENSE.

Ottawa day of 18

His Excellency the Governor General is graciously pleased to grant to , who was convicted of at the for the , on the and was then and there sentenced to imprisonment in the penitentiary for the term of , and is now confined in the , license to be at large from the day of his liberation under this order during the remaining portion of his term of imprisonment, unless the said shall before the expiration of the said term be convicted of an indictable offence within Canada, or shall be summarily convicted of an offence involving forfeiture, in which case such license will be immediately forfeited by law, or unless it shall please His Excellency sooner to revoke or alter such license.

This license is given subject to the conditions endorsed upon the same upon the breach of any of which it will be liable to be revoked whether such breach is followed by a conviction or not.

And His Excellency hereby orders that the said be set at liberty within thirty days from the date of this order.

Given under my hand and seal )
at..... the..... )
day of..... 18.... )

*Secretary of State.*

CONDITIONS.

1. The holder shall preserve his license and produce it when called upon to do so by a magistrate or a peace officer.

2. He shall abstain from any violation of the law.

3. He shall not habitually associate with notoriously bad characters, such as reputed thieves and prostitutes.

4. He shall not lead an idle and dissolute life without visible means of obtaining an honest livelihood.

If his license is forfeited or revoked in consequence of a conviction for any offence he will be liable to undergo a term of imprisonment equal to the portion of his term of years which remained unexpired when his license was granted, viz: — the term of.....years.

## FORM B. — CERTIFICATE OF CONVICTION.

I do hereby certify that A. B., the holder of a license under the *Act to provide for the conditional liberation of Penitentiary Convicts* was on the.....day of.....in the year.....duly convicted by and before.....of the offence of.....and sentenced to.....

.....

J. P., Co.....

## REMARKS.

The license issued under the authority of this Act may be revoked by the Governor General, either with or without cause assigned.

The Crown's revocation of the license, without cause assigned, works no interruption in the running of the sentence, which, in such a case, terminates at the same time as if such license had never been granted. So, that, where a convict, who was sentenced on the 3rd of January 1896, to five years' imprisonment, was, on the 9th of March 1900, liberated under a license issued under the above Act, and, on the 9th of July 1900, the Crown, in the exercise of its discretionary power under section 1 of the Act revoked the license without assigning any cause or reason therefor, — the convict being, thereupon, re-committed to the penitentiary by a Judge of the Sessions, "there to undergo the residue of his original sentence as if such license had not been granted," — it was held, upon a petition for *habeas corpus*, that the period of time during which the prisoner was conditionally allowed out of the penitentiary should be counted as part of his sentence, which thus expired, by effluxion of time, on the 3rd of January 1901; and the petition (which was after that date) was granted, and the prisoner released. (1)

(1) R. v. Johnson, 4 Can. Cr. Cas., 178.

PART LXV.

## SURETIES FOR KEEPING THE PEACE, AND FINES.

**958. Persons convicted may be fined and bound over to keep the peace.** — (As amended by the *Criminal Code Amendment Act 1900*). Every Court of criminal jurisdiction and every Magistrate under Part LV., before whom any person is convicted of an offence and is not sentenced to death, shall have power in addition to any sentence imposed upon such person, to require him forthwith to enter into his own recognizances, or to give security to keep the peace, and be of good behaviour for any term not exceeding two years, and that such person in default shall be imprisoned for not more than one year after the expiry of his imprisonment under his sentence, or until such recognizances are sooner entered into or such security sooner given, and any person convicted, by any such court or magistrate of any indictable offence punishable with imprisonment for five years or less may be fined in addition to or in lieu of any punishment otherwise authorized, in which case the sentence may direct that in default of payment of his fine the person so convicted shall be imprisoned until such fine is paid, or for a period not exceeding five years, to commence at the end of the term of imprisonment awarded by the sentence, or forthwith as the case may require.

2. Any person convicted of an indictable offence punishable with imprisonment for more than five years may be fined, in addition to, but not in lieu of, any punishment otherwise ordered, and in such case, also, the sentence may in like manner direct imprisonment in default of payment of any fine imposed.

**959. Recognizance to keep the Peace.** — (*As Amended by 56 Vict. c. 32*). Whenever any person is charged before a Justice with an offence triable under Part LVIII which, in the opinion of such Justice, is directly against the peace, and the Justice after hearing the case is satisfied of the guilt of the accused, and that the offence was committed under circumstances which render it probable that the person convicted will be again guilty of the same or some other offence against the peace unless he is bound over to good behaviour, such Justice may, in addition to, or in lieu of, any other sentence which may be imposed upon the accused, require him forthwith to enter into his own recognizances, or to give security to keep the peace and be of good behaviour for any term not exceeding twelve months.

2. Upon complaint by or on behalf of any person that on account of threats made by some other person or on any other account, he, the complainant, is afraid that such other person will do him, his wife or child some personal injury, or will burn or set

fire to his property, the Justice before whom such complaint is made, may, if he is satisfied that the complainant has reasonable grounds for his fears, require such other person to enter into his own recognizances, or to give security, to keep the peace, and to be of good behaviour, for a term not exceeding twelve months.

3. The provisions of Part LVIII shall apply so far as the same are applicable to proceedings under this section, and the complainant and the defendant and witnesses may be called and examined, and cross-examined, and the complainant and defendant shall be subject to costs as in the case of any other complaint.

4. If any person so required to enter into his own recognizances or give security as aforesaid, refuses or neglects so to do, the same or any other Justice may order him to be imprisoned for any term not exceeding twelve months.

5. The forms WWW, XXX and YYY, with such variations and additions as the circumstances may require, may be used in proceedings under this section. (1)

A warrant of commitment by a justice, under clause 4 of this section, for default to find sureties to keep the peace, must shew on its face that the complainant feared bodily injury because of the defendant's threats, and that the complaint was not made nor sureties required by the complainant from any malice or ill-will but merely for the preservation of his person from injury. (2)

When a justice makes an order requiring a person to give security to keep the peace, he must fix the amount for which the recognizance is to be given. A justice's order that the accused give security to keep the peace for one year, but fixing no amount and no term of imprisonment in default, will not support a commitment thereunder. And a commitment under the above section, 959, and form YYY, *post*, can only be issued after the defendant's refusal or neglect to furnish the required security, proved and recorded subsequently to the order requiring the security, and it must recite such refusal and neglect. (3)

**960. Proceedings for not finding sureties to keep the peace.** — Whenever any person who has been required to enter into a recognizance with sureties to keep the peace and be of good behaviour has, on account of his default therein, remained inprisoned for two weeks, the Sheriff, Gaoler or Warden shall give notice, in writing, of the facts to a Judge of a Superior Court, or to a Judge of the County Court of the county or district in which such gaol or prison is situate, and in the cities of Montreal and Quebec to a Judge of the Sessions of the Peace for the district, or, in the North-west Territories, to a Stipendiary Magistrate,—and such Judge or Magistrate may order the discharge of such person, thereupon or at a subsequent time, upon notice to the complai-

(1) For Forms WWW, XXX, and YYY, see pp. 1010-1012, *post*.
(2) R. v. John McDonald, 2 Can. Cr. Cas., 64.
(3) *Re* John Doe, 3 Can. Cr. Cas., 370.

nant or otherwise, or may make such other order as he sees fit, respecting the number of sureties, the sum in which they are to be bound and the length of time for which such person may be bound. R.S.C., c. 181, s. 32; 51 V., c. 47, s. 2.

## PART LXVI.

## DISABILITIES.

**961. Consequences of conviction of public official.**—If any person hereafter convicted of treason or any indictable offence for which he is sentenced to death, or imprisonment for a term exceeding five years, holds at the time of such conviction any office under the Crown or other public employment, or is entitled to any pension or superannuation allowance payable by the public, or out of any public fund, such office or employment shall forthwith become vacant, and such pension or superannuation allowance or emolument shall forthwith determine and cease to be payable, unless such person receives a free pardon from Her Majesty, within two months after such conviction, or before the filling up of such office or employment, if given at a later period; and such person shall become, and (until he suffers the punishment to which he is sentenced, or such other punishment as by competent authority is substituted for the same, or receives a free pardon from Her Majesty) shall continue thenceforth incapable of holding any office under the Crown, or other public employment, or of being elected, or sitting or voting, as a member of either House of Parliament, or of exercising any right of suffrage or other parliamentary or municipal franchise. 33-34 V. (U. K.) c. 23, s. 2.

2. The setting aside of a conviction by competent authority shall remove the disability herein imposed.

The words "His Majesty" should be substituted for "Her Majesty" in this section.

## PART LXVII.

## PUNISHMENTS ABOLISHED.

**962. Outlawry.** — Outlawry in criminal cases is abolished.

Formerly, when an indictment was found against a person who — having fled to foreign parts, — could not be apprehended, process of outlawry, — equivalent to conviction, — was issued.

**963. Solitary Confinement. — Pillory.** — The punishment of solitary confinement or of the pillory shall not be awarded by any Court. R.S.C., c. 181, s. 34.

**964. Deodand.** — There shall be no forfeiture of any chattels,

which have moved to or caused the death of any human being, in respect of such death. R.S.C., c. 181, s. 35.

Under the old common law of England a deodand was any personal chattel, — such as a cart, a horse, a wheel, a sword, *etc.*, — which was the immediate cause of the death of any human being; and all the owner's property in "*the unhappy instrument*," as Hawkins terms it, was forfeited to the Crown to be applied to pious uses by the High Almoner. (1) By the laws of the ancient Saxons, "If one in hewing a tree happened to kill a man, the relations were entitled to the tree, provided they took it within 30 days. This was in the nature and might perhaps be the origin of *deodanda*." (2) A deodand was not a forfeiture for felony or treason; but was allowed only where the killing was by misadventure, or accidental, not felonious. (3)

**965. Attainder.** — From and after the passing of this Act no confession verdict, inquest, conviction or judgment of or for any any treason or indictable offence or *felo de se* shall cause any attainder or corruption of blood, or any forfeiture or escheat; Provided that nothing in this section shall affect any fine or penalty imposed on any person by virtue of his sentence, or any forfeiture in relation to which special provision is made by any Act of the Parliament of Canada. 33-34. V., (U. K.) c. 23, ss. 1, 6 and 5.

In the primary sense of the word, ATTAINDER was the status, or, according to the old law, the taint, or stain, or corruption of blood of one condemned, by the judgment of the Court, for treason or felony; in the secondary sense, it was the judgment itself. The judgment must have been final, and rendered either after conviction or outlawry: and then the offender was said to be attaint or attainted. (4)

The consequences of attainder were by the ancient common law, wide and sweeping. All the property real and personal of one attainted was forfeited, his blood was corrupted, so that nothing could pass by inheritance to, from, or through him; he could not sue in a Court of Justice; and his wife, children and collateral relations suffered with him, so that the tree, falling, came down with all its branches. (5)

## PART LXVIII.

## PARDONS.

**966. Pardon by the Crown.** — The Crown may extend the Royal Mercy to any person sentenced to imprisonment by virtue of any Statute, although such person is imprisoned for non-payment of money to some person other than the Crown.

2. Whenever the Crown is pleased to extend the Royal Mercy to any offender convicted of an indictable offence punishable with

Rule pardon may be pleaded in bar to an indictment. 13 Eliz. Chap. Bract. f. 124. R. 4.00.

(1) 1 Hawk, P. C. ss. 3, 6, p. 74; 1 Bl. Com. 300.
(2) 1 Reeves Hist. Eng. Law, 3 Ed. 17.
(3) R. v. Polwart, 1 Gale & D. 211; 1 Q. B. 818.
(4) R. v. Earbery, Fort. 37; 4 Bl. Com. 380, 381; 2 Inst. 212.
(5) Co. Lit. 392, 130*a*; Coombes v. Queen's Proctor, 16 Jur. 820; 24 Eng. L. & Eq. 598.

death or otherwise, and grants to such offender either a free or a conditional pardon, by warrant under the Royal sign manual, countersigned by one of the principal Secretaries of State, or by warrant under the hand and seal-at-arms of the Governor-General, the discharge of such offender out of custody, in case of a free pardon, and the performance of the condition in the case of a conditional pardon, shall have the effect of a pardon of such offender, under the great seal, as to the offence for which such pardon has been granted; but no free pardon, nor any discharge in consequence thereof, nor any conditional pardon, nor the performance of the condition thereof, in any of the cases aforesaid, shall prevent or mitigate the punishment to which the offender might otherwise be lawfully sentenced, on a subsequent conviction for any offence other than that for which the pardon was granted. R.S.C., c. 181, ss. 38 and 39.

**967. Commutation of sentence.** — The Crown may commute the sentence of death passed upon any person convicted of a capital offence to imprisonment in the penitentiary for life, or for any term of years not less than two years, or to imprisonment in any gaol or other place of confinement for any period less than two years, with or without hard labour; and an instrument under the hand and seal-at-arms of the Governor-General, declaring such commutation of sentence, or a letter or other instrument under the hand of the Secretary of State or of the Under Secretary of State, shall be sufficient authority to any Judge or Justice, having jurisdiction in such case, or to any Sheriff or Officer to whom such letter or instrument is addressed, to give effect to such commutation, and to do all such things and to make such orders, and to give such directions, as are requisite for the change of custody of such convict, and for his conduct to and delivery at such gaol or place of confinement or penitentiary, and his detention therein, according to the terms on which his sentence has been commuted. R.S.C., c. 181, s. 40.

As to the powers of the Lieutenant Governors of the provinces to commute and remit sentences, *etc.* for offences against provincial laws, the question came before the Supreme Court of Canada, in a case involving the legality or illegality of an Ontario statute, — 51 Vic., c. 5, — which declares that, in matters *within the jurisdiction* of the legislature of Ontario, all powers, *etc.*, which were vested in or exerciseable by the Governors or Lieutenant-Governors of the several provinces before Confederation, shall be vested in and exerciseable by the Lieutenant-Governor of the province of Ontario. In the Chancery Division of the High Court of Justice of Ontario, and in the Court of Appeal of that province it was declared that, that Act was valid, and that the power of commuting and remitting sentences for offences against the laws of the province or offences over which the legislative authority of the province extends, which power is by the terms of the Act, included in the powers above mentioned, does not affect offences against the criminal laws which are the subject of Dominion legislation, but refers only to offences within the Jurisdiction of the provincial legislature. (1)

(1) Atty. Gen. for Can. v. Atty. Gen. of Ont., 20 Ont. Rep. 222; 19 Ontario App. Cas. 31.

And, in the Supreme Court of Canada, the decision was confirmed, it being there held that the provincial legislatures have the right and power to impose punishment by fine and imprisonment as sanction for laws which they have power to enact, and that the Lieutenant Governor of a province is as much the representative of the Sovereign for all purposes of provincial government as the Governor General is for Dominion government. (2)

**968. Undergoing sentence equivalent to a pardon.** — When any offender has been convicted of an offence not punishable with death, and has endured the punishment to which such offender was adjudged, — or if such offence is punishable with death and the sentence has been commuted, then if such offender has endured the punishment to which his sentence was commuted, the punishment so endured shall, as to the offence whereof the offender was so convicted, have the like effect and consequences as a pardon under the great seal; but nothing herein contained, nor the enduring of such punishment, shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced, on a subsequent conviction for any other offence. R. S.C., c. 181, s. 41.

**969. Satisfying Judgment.** — When any person convicted of any offence has paid the sum adjudged to be paid, together with costs, if any, under such conviction or has received a remission thereof from the Crown, or has suffered the imprisonment awarded for non-payment thereof, or the imprisonment awarded in the first instance, or has been discharged from his conviction by the Justice of the Peace in any case in which such Justice of the Peace may discharge such person, he shall be released from all further or other criminal proceedings for the same cause. R.S.C., c. 181, s. 42.

**970. Royal prerogative.** — Nothing in this part shall in any manner limit or affect Her Majesty's Royal Prerogative of Mercy. R.S.C., c. 181, s. 43.

In this section the words "His Majesty's" should be substituted for "Her Majesty's."

**971. Conditional release of first offenders in certain cases.** — (As amended by the *Criminal Code Amendment Act 1900*). In any case in which a person is convicted before any Court of any offence punishable with not more than two years' imprisonment, and no previous conviction is proved against him, if it appears to the Court before which he is so convicted, that, regard being had to the age, character, and antecedents of the offender, to the trivial nature of the offence and to any extenuating circumstances under which the offence was committed, it is expedient that the offender be released on probation of good conduct, the Court may instead of sentencing him at once to any punishment, direct that

(2) Atty. Gen. for Can. v. Atty. Gen. of Ont., 23 S. C. R., 458.

he be released on his entering into a recognizance, with or without sureties, and during such period as the Court directs, to appear and receive judgment when called upon, and in the meantime to keep the Peace and be of good behaviour.

2. Where the offence is punishable with more than two years' imprisonment the court shall have the same power as aforesaid with the concurrence of the counsel acting for the Crown in the prosecution of the offender.

3. The Court may, if it thinks fit, direct that the offender shall pay the costs of the prosecution, or some portion of the same, within such period and by such instalments as the Court directs.

**972. Condition of Release.** — The Court, before directin the release of an offender under the next preceding section, shall be satisfied that the offender or his surety has a fixed place of abode or regular occupation in the county or place for which the Court acts, or in which the offender is likely to live during the period named for the observance of the conditions. 52 V., c. 44, s. 4.

**973. Proceeding on Default of Recognizance.** — If a Court having power to deal with such offender in respect of his original offence or any Justice of the Peace is satisfied by information on oath that the offender has failed to observe any of the conditions of his recognizance, such Court or Justice of the Peace may issue a warrant for his apprehension.

2. An offender, when apprehended on any such warrant, shall, if not brought forthwith before the Court having power to sentence him be brought before the Justice issuing such warrant or before some other Justice in and for the same territorial division, and such Justice shall either remand him by warrant until the time at which he was required by his recognizance to appear for judgment, or until the sitting of a Court having power to deal with his original offence, or admit him to bail (with a sufficient surety) conditioned on his appearing for judgment.

3. The offender when so remanded may be committed to a prison, either for the county or place in or for which the Justice remanding him acts, or for the county or place where he is bound to appear for judgment; and the warrant of remand shall order that he be brought before the Court before which he was bound to appear for judgment, or to answer as to his conduct since his release. 52 V., c. 44, s. 3.

**974. Interpretation.** — In the three next preceding sections the expression Court means and includes any Superior Court of criminal jurisdiction, any "Judge" or Court within the meaning of Part LV., and any "Magistrate" within the meaning of Part LVI., of this Act. 52 V., c. 44, s. 1.

## FORMS UNDER TITLE VIII.

FROM SCHEDULE ONE.

UUU. — (*Section* 942).

CERTIFICATE OF EXECUTION OF JUDGMENT OF DEATH.

I, A. B., surgeon (*or as the case may be*) of the (*describe the prison*), hereby certify that I, this day, examined the body of C. D., on whom judgment of death was this day executed in the said prison; and that on such examination I found that the said C. D. was dead.

(Signed), A. B.

Dated this day of , in the year .

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VVV. — (*Section* 942).

DECLARATION OF SHERIFF AND OTHERS.

We, the undersigned, hereby declare that judgment of death was this day executed on C. D., in the (*Describe the prison*) in our presence.

Dated this day of , in the year .

E. F., Sheriff of——

L. M., Justice of the Peace for——

G. H., Gaoler of——

&c., &c.

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WWW. — (*Section* 959).

COMPLAINT BY THE PARTY THREATENED, FOR SURETIES FOR THE PEACE.

Canada,
Province of ,
County of ,

The information (*or* complaint) of C. D., of in the said county of , (*labourer*), (*if preferred by an attorney or agent say* — by D. E., his duly authorized agent (*or* attorney), in this behalf), taken upon oath, before me, the undersigned, a Justice of the Peace, in and for the said county of , at in the said county of , this day of , in the year ,

who says that A. B., of in the said county, did, on the day of (instant *or* last past), threaten the said C. D. in the words or to the effect following, that is to say: (*set them out, with the circumstances under which they were used*); and that from the above and other threats used by the said A. B. towards the said C. D., he, the said C. D., is afraid that the said A. B., will do him some bodily injury, and therefore prays that the said A. B., may be required to find sufficient sureties to keep the peace and be of good behaviour towards him, the said C. D.; and the said C. D., also says that he does not make this complaint against nor require such sureties from the said A. B., from any malice or ill-will, but merely for the preservation of his person from injury.

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XXX. — (*Section* 959).

FORM OF RECOGNIZANCE FOR THE SESSIONS.

Canada, }
Province of , }
County of , }

Be it remembered that on the day of in the year , A. B., of , (*labourer*), L. M. of , (*grocer*), and N. O., of , (*butcher*), personally came before (*us*) the undersigned, (*two*) Justices of the Peace for the county of , and severally acknowledged themselves to owe to our Lady the Queen the several sums following, that is to say: the said A. B. the sum of , and the said L. M. and N. O. the sum of , each of good and lawful money of Canada, to be made and levied of their goods and chattels, lands and tenements respectively, to the use of our said Lady the Queen, her heirs and successors, if he, the said A. B. fails in the condition endorsed (*or* hereunder written).

Taken and acknowledged the day and year first above mentioned at before us.

J. S.,

J. T.,

J. *P.'s* (*Name of county*).

The condition of the within (*or* above) written recognizance is such that if the within bound A. B. (of, &c.), * appears at the next Court of General Sessions of the Peace, (*or other Court discharging the functions of the Court of General Sessions*), to be holden in and for the said county of , to do and receive what is then and there enjoined him by the Court, and in the

meantime * keeps the peace and is of good behaviour towards Her Majesty and her liege people, and specially towards C. D. (of, &c). for the term of now next ensuing, then the said recognizance to be void, otherwise to stand in full force and virtue.

The words between the asterisks * * to be used only where the principal is required to appear at the sessions of such other Court.

The words "our Lord the King" should be substituted, in the above Form, for "our Lady the Queen."

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YYY. — (*Section* 959).

FORM OF COMMITMENT IN DEFAULT OF SURETIES.

Canada,
Province of ,
County of ,

To all or any of the other Peace Officers in the county of , and to the keeper of the common gaol of the said county, at , in the said county.

Whereas on the day of (*instant*), complaint on oath was made before the undersigned (*or* J. L., Esquire, a Justice of the Peace in and for the said county of , by C. D., of , in the said county, (*labourer*), that A. B., of (&c.), on the day of , at aforesaid, did threaten (&c., *follow to the end of complaint, as in form above, in the past tense, then*): And whereas the said A. B. was this day brought and appeared before me, the said Justice (*or* J. L., Esquire, a Justice of the Peace in and for the said county of ), to answer unto the said complaint; and, having been required by me to enter into his own recognizance in the sum of , with two sufficient sureties in the sum of each, * as well for his appearance at the next General Sessions of the Peace (*or other Court discharging the functions of the Court of General Sessions, or as the case may be*), to be held in and for the said county of , to do what shall be then and there enjoined him by the Court, as also in the meantime * to keep the Peace and be of good behaviour towards Her Majesty and her liege people, and especially towards the said C. D., has refused and neglected, and still refuses and neglects to find such sureties: These are, therefore, to command you, and each of you, to take the said A. B., and him safely to convey to the (common gaol) at aforesaid, and there to deliver him to the keeper thereof, together with this precept: And I do hereby command you, the said keeper of the said (common gaol), to receive the said A. B., into your custody in the said (common

gaol), there to imprison him until the said next General Sessions of the Peace (*or the next term or sitting of the said Court discharging the functions of the Court of General Sessions, or as the case may be*), unless he, in the meantime, finds sufficient sureties as well for his appearance at the said Sessions (*or* Court) as in the meantime to keep the Peace as aforesaid.

Given under my hand and seal, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]

*J. P.*, (*Name of county*).

The words between the asterisks * * to be used when the recognizance is to be so conditioned.

Substitute "His Majesty" for "Her Majesty."

# TITLE IX.

## ACTIONS AGAINST PERSONS ADMINISTERING THE CRIMINAL LAW.

**975. Time and place for action.** — Every action and prosecution against any person for anything purporting to be done in pursuance of any Act of the Parliament of Canada relating to criminal law, shall, unless otherwise provided, be laid and tried in the district, county or other judicial division, where the act was committed, and not elsewhere, and shall not be commenced except within six months next after the act committed. R.S.C., c. 185, s. 1.

**976. Notice of Action.** — Notice in writing of such action and of the cause thereof, shall be given to the defendant one month at least before the commencement of the action. R.S.C., c. 185, s. 2.

**977. Defense.** — In any such action the defendant may plead the general issue, and give the provisions of this title and the special matter in evidence at any trial had thereupon. R.S.C., c. 185, s. 3.

**978. Tender or payment in Court.** — No plaintiff shall recover in any such action if tender of sufficient amends is made before such action brought, or if a sufficient sum of money is paid into Court by or on behalf of the defendant after such action brought. R.S.C., c. 185, s. 4.

**979. Costs.** — If such action is commenced after the time hereby limited for bringing the same or is brought or the venue laid in any other place than as aforesaid, a verdict shall be found or judgment shall be given for the defendant; and thereupon or if the plaintiff becomes nonsuit, or discontinues any such action after issue joined, or if upon demurrer or otherwise judgment is given against the plaintiff, the defendant shall, in the discretion of the Court, recover his full costs as between solicitor and client, and shall have the like remedy for the same as any defendant has by law in other cases; and although a verdict or judgment is given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the Judge, before whom the trial is had, certifies his approval of the action. R.S.C., c. 185, s. 5.

**980. Other remedies saved.** — Nothing herein shall prevent the effect of any Act in force in any province of Canada, for the protection of Justices of the Peace or other officers from vexatious actions for things purporting to be done in the performance of their duty. R.S.C., c. 185, s. 6.

# TITLE X.

## REPEAL, &c.

**981. Statutes Repealed.** — The several Acts set out and described in schedule two to this Act shall, from and after the date appointed for the coming into force of this Act, be repealed to the extent stated in the said schedule.

2. The provisions of this Act which relate to procedure shall apply to all prosecutions commenced on or after the day upon which this Act comes into force, in relation to any offence whensoever committed. The proceedings in respect of any prosecution commenced before the said date otherwise than under the Summary Convictions Act, shall, up to the time of committal for trial, be continued as if this Act had not been passed, and after committal for trial shall be subject to all the provisions of this Act relating to procedure so far as the same are applicable thereto. The proceedings in respect of any prosecutions commenced before the said day, under the Summary Convictions Act, shall be continued and carried on as if this Act had not been passed. (*As amended by 56 Vic. c. 32*).

**982. Forms in schedule one to be valid.** — The several forms in schedule one to this Act, varied to suit the case or forms to the like effect, shall be deemed good, valid and sufficient in law.

**983. Application of Act to N. W. T. and Keewatin. — Not to affect H. M's forces.** — The provisions of this Act extend to and are in force in the North-West Territories and the district of Keewatin except in so far as they are inconsistent with the provisions of the *North-West Territories Act* or *The Keewatin Act* and the amendments thereto.

2. Nothing in this Act shall affect any of the laws relating to the Government of Her Majesty's Land or Naval Forces.

3. Nothing herein contained shall affect the Acts and parts of Acts in the appendix to this Act; And in construing such parts reference may be had to the repealed portions of the Act of which respectively they form parts, as well as to any sections of this Act which have been substituted therefor, or which deal with like matters.

# SCHEDULE ONE—FORMS.

Forms A to J, of this Schedule are placed at the end of Part XLIV. (See pp. 687-693, *ante.*)

Forms K to Z, and AA to DD, are placed at the end of Part XLV. (See pp. 727-740, *ante.*)

Forms EE and FF, are placed at the end of Part XLVI. (See pp. 769 and 770, *ante.*)

Forms GG to JJ, are placed at the end of Part XLVIII. (See pp. 783-785, *ante.*)

Forms KK and LL, are placed under Part LI. (See pp. 851 and 852, *ante.*)

Forms MM to PP, are placed at the end of Part LIV. (See pp. 875-877, *ante.*)

Forms QQ to SS, are placed at the end of Part LV. (See pp. 890, 891, *ante.*)

Forms TT and UU are placed at the end of Part LVI. (See pp. 897, 898, *ante.*)

Forms VV to ZZ, and AAA to SSS, are placed at the end of Part LVIII. (See pp. 956-975, *ante.*)

Form TTT, is placed at the end of Part LIX. (See p. 988, *ante.*)

Forms UUU to YYY, are placed under TITLE VIII. (See pp. 1010-1013, *ante.*)

# SCHEDULE TWO.

## ACTS REPEALED.

| Acts Repealed. | Title. | Extent of Repeal. |
|---|---|---|
| C. S. L. C., c. 10 | An Act respecting seditious and unlawful Associations and oaths. | Secs. 1, 2, 3 & 4. |
| R. S. C., c. 32 | An Act respecting the Customs. | Sec. 213. |
| " 34 | An Act respecting the Inland Revenue. | Secs. 98 & 99. |
| " 35 | An Act respecting the Postal Service. (1) | Secs. 79 to 81, 83 84, 88, 90, 91, 96 103, 107, 110 & 111. |
| " 38 | An Act respecting Government Railways. | Sec. 62. |
| " 41 | An Act respecting the Militia and Defence of Canada. | Sec. 109. |
| " 43 | An Act respecting Indians. | Sec. 106 (ss. 2) & 111. |
| " 65 | An Act respecting Immigration and Immigrants. | Sec. 37. |
| " 81 | An Act respecting Wrecks, Casualties and Salvage. | Secs. 35 to 37. |
| " 141 | An Act respecting Extra-judicial oaths. (2) | Secs. 1 & 2. |
| " 145 | An Act respecting Accessories. | The whole Act. |
| " 146 | An Act respecting Treason and other offences against the Queen's authority. | The whole Act, except Secs. 6 & 7. |
| " 147 | An Act respecting Riots, unlawful assemblies and breaches of the peace. | The whole Act. |
| " 148 | An Act respecting the improper use of firearms and other weapons. | The whole Act, except Sec. 7. |
| " 149 | An act respecting the seizure of arms kept for dangerous purposes. | The whole Act, except Secs. 5 & 7. |
| " 150 | An act respecting Explosive Substances. | The whole Act. |
| " 152 | An Act respecting the preservation of peace at Public Meetings. | The whole Act, except Secs. 1, 2 & 3. |
| " 153 | An Act respecting Prize-fighting. | The whole Act, except Secs. 6, 7 & 10. |
| " 154 | An Act respecting Perjury. | The whole Act, except Sec. 4. |
| " 155 | An Act respecting Escapes and Rescues. | The whole Act. |
| " 156 | An Act respecting offences against Religion. | The whole Act. |
| " 157 | An Act respecting offences against Public Morals and Public Conveniences. (3) | The whole Act, except Sec. 8 (ss. 4). |
| " 158 | An Act respecting Gaming-houses. | The whole Act, except Secs. 9 & 10. |
| " 159 | An Act respecting Lotteries, Betting and Pool-selling. | The whole Act. |
| " 160 | An Act respecting Gambling in public conveyances. | The whole Act. |
| " 161 | An Act respecting offences relating to the law of Marriage. | The whole Act. |
| " 162 | An Act respecting offences against the Person. | The whole Act. |
| " 163 | An Act respecting Libel. | The whole Act, except Secs. 6 & 7. |
| " 164 | An Act respecting Larceny and similar offences. | The whole Act. |
| " 165 | An Act respecting Forgery. | The whole Act. |
| " 167 | An Act respecting offences relating to the Coin. | The whole Act, except Secs. 26 & 29 to 34 inclusive. |
| " 168 | An Act respecting malicious injuries to Property. | The whole Act. |
| " 169 | An Act respecting offences relating to the Army and Navy | The whole Act, except Sec. 9. |
| " 171 | An Act respecting the protection of Property of Seamen in the Navy. | The whole Act. |
| " 172 | An Act respecting Cruelty to Animals. | The whole Act, except Sec. 7. |

(1) As amended by 57-58 Vict., c. 57.
(2) See Sec. 28 of the Canada Evidence Act, 1893, p. 1043, *post*, which repeals the *whole* of Chapter 141, R. S. C.
(3) As amended by 56 Vic., c. 32.

## SCHEDULE TWO. — ACTS REPEALED. — *Continued.*

| Acts Repealed. | | | Title. | Extent of Repeal. |
|---|---|---|---|---|
| R. S. C., | c. | 173 | An Act respecting Threats, Intimidation and other offences. | The whole Act, except Sec. 12 (ss.5). |
| " | | 174 | An Act respecting Procedure in Criminal Cases. | The whole Act. |
| " | | 176 | An Act respecting the summary administration of Criminal Justice. | The whole Act. |
| " | | 177 | An Act respecting Juvenile Offenders. | The whole Act. |
| " | | 178 | An Act respecting summary proceedings before Justices of the Peace. | The whole Act. |
| " | | 179 | An Act respecting Recognizances. | The whole Act. |
| " | | 180 | An Act respecting Fines and Forfeitures. | The whole Act. |
| " | | 181 | An Act respecting Punishments, Pardons and the Commutation of Sentences. | The whole Act. |
| " | | 185 | An Act respecting Actions against persons administering the Criminal Law. | The whole Act. |
| 50-51 V., | c. | 33 | An Act to amend the Indian Act. | Sec. 11. |
| " | | 45 | An Act respecting Public Stores. | The whole Act. |
| " | | 46 | An Act respecting the conveyance of liquors on board Her Majesty's Ships in Canadian Waters. | The whole Act. |
| " | | 48 | An Act to amend the Act respecting offences against Public Morals and Public Conveniences. | The whole Act. |
| " | | 49 | An Act to amend the Revised Statutes, Chapter one hundred and seventy-three, respecting Threats, Intimidation and other offences. | The whole Act. |
| " | | 50 | An Act to amend the law respecting Procedure in Criminal Cases. | The whole Act. |
| 51 V., | c. | 29 | An Act respecting Railways. | Sec. 297. |
| " | | 40 | An Act respecting the advertising of Counterfeit Money. | The whole Act. |
| " | | 41 | An Act to amend the law relating to Fraudulent Marks on Merchandise. | The whole Act, except Secs. 15, 16, 18, 22 & 23. (1) |
| " | | 42 | An Act respecting gaming in Stocks and Merchandise. | The whole Act. |
| " | | 43 | An Act further to amend the Law respecting Procedure in Criminal Cases. | The whole Act. |
| " | | 44 | An Act further to amend *The Criminal Procedure Act*. | The whole Act. |
| " | | 45 | An Act to amend Chapter one hundred and seventy-eight of the Revised Statutes of Canada; *The Summary Convictions Act*. | The whole Act. |
| " | | 47 | An Act to amend the Revised Statutes of Canada, Chapter one hundred and eighty-one, respecting Punishments, Pardons and the Commutation of Sentences. | The whole Act. |
| 52 V., | c. | 22 | An Act to amend the Revised Statutes, Chapter seventy-seven, respecting the safety of Ships. | Sec. 3. |
| " | | 25 | An Act to amend the Revised Statutes respecting the North west Mounted Police Force. | Sec. 4. |
| " | | 40 | An Act respecting Rules of Court in relation to Criminal Matters. | The whole Act. |
| " | | 41 | An Act for the prevention and suppression of Combinations formed in restraint of trade. | The whole Act, except Secs. 4 & 5. |
| " | | 42 | An Act respecting Corrupt Practices in Municipal Affairs. | The whole Act. |
| " | | 44 | An Act to permit the conditional release of first offenders in certain cases. | The whole Act. |
| " | | 45 | An Act to amend *The Summary Convictions Act*, Chapter one hundred and seventy-eight of the Revised Statutes, and the Act amending the same. | The whole Act. |
| " | | 46 | An Act to amend *The Summary Trials Act*. | The whole Act. |
| " | | 47 | An Act to make further provision respecting the Speedy Trial of certain Indictable Offences. | The whole Act. |
| 53 V., | c. | 10 | An Act to prevent the disclosure of official documents and information. | The whole Act. |
| " | | 31 | An Act respecting Banks and Banking. | Sec. 63. |
| " | | 37 | An Act further to amend the Criminal Law. | The whole Act, except Secs. 1, 2, 32 to end. (2) |
| " | | 38 | An Act to amend the Public Stores Act. | The whole Act. |
| 54-55 V., | c. | 23 | An Act respecting Frauds upon the Government. | The whole Act. |

(1) As amended by 56 Vic., c. 32.
(2) Amended by 57-58 Vic., c. 57.

# APPENDIX.

ACTS AND PARTS OF ACTS WHICH ARE NOT AFFECTED BY THIS ACT.

## R.S.C., CHAPTER 50.

### An Act respecting the North-West Territories.

101. In this section —

(*a*) The expression "improved arm" means and includes all arms except smooth bore shot guns;

(*b*) The expression "ammunition" means fixed ammunition or ball cartridge.

2. Every person who, in the territories, —

(*a*) Without the permission in writing (the proof of which shall be on him) of the Lieutenant-Governor, or of a commissioner appointed by him to give such permission, has in his possession or sells, exchanges, trades, barters or gives to, or with any person, any improved arm or ammunition, or —

(*b*) Having such permission, sells, exchanges, trades, barters or gives any such arm or ammunition to any person not lawfully authorized to possess the same —

Shall, on summary conviction before a judge of the Supreme Court or two Justices of the Peace, be liable to a penalty not exceeding two hundred dollars, or to imprisonment for any term not exceeding six months, or to both.

3. All arms and ammunition which are in the possession of any person, or which are sold, exchanged, traded, bartered or given to or with any person in violation of this section, shall be forfeited to the Crown, and may be seized by any Constable or other Peace Officer; and any Judge of the Supreme Court or Justice of the Peace may issue a search warrant to search for and seize the same, as in the case of stolen goods.

4. The Governor in Council may, from time to time, make regulations respecting: —

(*a*) The granting of permission to sell, exchange, trade, barter, give or possess arms or ammunition;

(*b*) The fees to be taken in respect thereof;

(*c*) The returns to be made respecting permissions granted; and —

(*d*) The disposition to be made of forfeited arms and ammunition.

5. The provisions of this section respecting the possession of arms and ammunition shall not apply to any officer or man of Her Majesty's forces, of the Militia force, or of the North-West Mounted Police force.

6. The Governor in Council may, from time to time declare by proclamation that upon and after a day therein named this section shall be in force in the territories, or in any place or places therein in such proclamation designated; and upon and after such day but not before, the provisions of this section shall take effect and be in force accordingly.

7. The Governor in Council may, in like manner, from time to time, declare this section to be no longer in force in any such place or places, and may again, from time to time, declare it to be in force therein.

8. All Courts, Judges and Justices of the Peace shall take judicial notice of any such proclamation.

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## R.S.C., CHAPTER 141.

### An Act respecting Extra-judicial Oaths.

4. Any affidavit, affirmation or declaration required by any fire, life or marine insurance company, authorized by law to do business in Canada, in regard to any loss of property or life insured or assured therein, may be taken before any commissioner authorized to take affidavits, or before any justice of the peace or before any notary public for any province of Canada; and any such officer is hereby required to take such affidavit, affirmation or declaration.

SCHEDULE.

I. A. B., do solemnly declare that (*state the fact or facts declared to*), and I make this solemn declaration conscientiously believing the same to be true, and by virtue of the *Act respecting Extra-judicial Oaths.*

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## R.S.C., CHAPTER 146.

### An Act respecting Treason and other Offences against the Queen's Authority.

6. If any person, being a citizen or subject of any foreign state or country at peace with Her Majesty, is or continues in arms against Her Majesty, within Canada, or commits any act of hostility therein, or enters Canada with design or intent to levy war against Her Majesty, or to commit any felony therein, for which any person would, in Canada, be liable to suffer death, the Governor General may order the assembling of a militia general court-martial for the trial of such person, under *The Militia Act*; and upon being found guilty by such court-martial of offending against the provisions of this section, such person shall be sentenced by such court-martial to suffer death, or such other punishment as the court awards.

7. Every subject of Her Majesty, within Canada, who levies war against Her Majesty, in company with any of the subjects or citizens of any foreign state or country then at peace with Her Majesty, or enters Canada in company with any such subjects or citizens with intent to levy war on Her Majesty, or to commit any such act of felony as aforesaid, or who, with the design or intent to aid and assist, joins himself to any person or persons whomsoever, whether subjects or aliens, who have entered Canada with design or intent to levy war on Her Majesty, or to commit any such felony within the same may be tried and punished by a militia court-martial in the same manner as any citizen or subject of a foreign state or country at peace with Her Majesty may be tried and punished under the next preceding section.

## R.S.C., CHAPTER 148.

### An Act respecting the improper use of Firearms and other Weapons.

7. The Court or Justice before whom any person is convicted of any offence against the provisions of the preceding sections, shall impound the weapon for carrying which such person is convicted, and if the weapon is not a pistol, shall cause it to be destroyed; and if the weapon is a pistol, the Court or Justice shall cause it to be handed over to the corporation of the municipality in which the conviction takes place, for the public uses of such corporation.

2. If the conviction takes place where there is no municipality, the pistol shall be handed over to the Lieutenant-Governor of the province in which the conviction takes place, for the public uses thereof in connection with the administration of justice therein.

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## R.S.C., CHAPTER 149.

### An Act respecting the seizure of Arms kept for dangerous purposes.

5. All Justices of the Peace in and for any district, county, city, town or place, in Canada, shall have concurrent jurisdiction as Justices of the Peace, with the Justices of any other district, county, city, town or place, in all cases with respect to the carrying into execution the provisions of this Act, and with respect to all matters and things relating to the preservation of the public peace under this Act, as fully and effectually as if each of such Justices was in the commission of the peace, or was *ex officio* a Justice of the Peace for each of such districts, counties, cities, towns or places.

7. The Governor in Council may, from time to time, by proclamation, suspend the operation of this Act in any province of Canada or in any particular district, county or locality specified in the proclamation; and from and after the period specified in any such proclamation, the powers given by this Act shall be suspended in such province, district, county or locality; but nothing herein contained shall prevent the Governor in Council from again declaring, by proclamation, that any such province, district, county or locality shall be again subject to this Act and the powers hereby given and upon such proclamation this Act shall be revived and in force accordingly.

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## R.S.C., CHAPTER 151.

### An Act respecting the Preservation of Peace in the vicinity of Public Works.

INTERPRETATION.

1. In this Act, unless the context otherwise requires,—

(*a*) The expression "this Act" means such section or sections thereof as are in force, by virtue of any proclamation, in the place or places with reference to which the Act is to be construed and applied;

(*b*) The expression "commissioner" means a commissioner under this Act;

(*c*) The expression "weapon" includes any gun or other firearm, or air-gun or any part thereof, or any sword, swordblade, bayonet, pike-head, spear, spear-head, dirk, dagger, or other instrument intended for cutting or stabbing, or any steel or metal knuckles, or other deadly or dangerous weapon, and any instrument or thing intended to be used as a weapon, and all ammunition which may be used with or for any weapon;

(*d*) The expression "intoxicating liquor" means and includes any alcoholic, spirituous, vinous, fermented or other intoxicating liquor, or any mixed liquor, a part of which is spirituous or vinous, fermented or otherwise intoxicating;

(*e*) The expression "district, county or place," includes any division of any province for the purposes of the administration of justice in the matter to which the context relates;

(*f*) The expression "public work" means and includes any railway, canal, road, bridge or other work of any kind, and any mining operation constructed or carried on by the Government of Canada, or of any province of Canada, or by any municipal corporation, or by any incorporated company, or by private enterprise.

PROCLAMATION.

1. The Governor in Council may, as often as occasion requires, declare, by proclamation, that upon and after a day therein named, this Act, or any section or sections thereof, shall be in force in any place or places in Canada in such proclamation designated, within the limits or in the vicinity whereof any public work is in course of construction, or in such places as are in the vicinity of any public work, within which he deems it necessary that this Act, or any section or sections thereof, should be in force, and this Act, or any such section or sections thereof, shall, upon and after the day named in such proclamation, take effect within the places designated therein.

2. The Governor in Council may, in like manner, from time to time, declare this Act, or any section or sections thereof, to be no longer in force in any such place or places, — and may, again, from time to time, declare this Act, or any section or sections thereof, to be in force therein.

3. No such proclamation shall have effect within the limits of any city.

4. All Courts, Magistrates and Justices of the Peace shall take judicial notice of every such proclamation.

WEAPONS.

3. On or before the day named in such proclamation, every person employed on or about any public work, to which the same relates, shall bring and deliver up, to some Commissioner or Officer appointed for the purposes of this Act, every weapon in his possession, and shall obtain from such Commissioner or Officer a receipt for the same.

4. Every weapon found in the possession of any person employed, as aforesaid, after the day named in any proclamation and within the limits designated in such proclamation, may be seized by any Justice of the Peace, Commissioner, Constable or other Peace Officer, — and shall be forfeited to the use of Her Majesty.

5. Every one employed upon or about any public work, within the place or places in which this Act is then in force, who, upon or after the day named in such proclamation, keeps or has in his possession or under his care or con-

trol, within any such place, any weapon, shall incur a penalty not exceeding four dollars and not less than two dollars for every such weapon found in his possession.

6. Every one who, for the purpose of defeating this Act, receives or conceals or aids in receiving or concealing, or procures to be received or concealed, within any place in which this Act is at the time in force, any weapon belonging to or in the custody of any person employed on or about any public work, shall incur a penalty not exceeding one hundred dollars and not less than forty dollars, and a moiety of such penalty shall belong to the informer and the other moiety to Her Majesty, for the public uses of Canada.

7. Any Commissioner or Justice of the Peace, Constable or Peace Officer, or any person acting under a warrant, in aid of any Constable or Peace Officer, may arrest and detain any person employed on any public work, found carrying any weapon, within any place in which this Act is, at the time, in force, at such time and in such manner as, in the judgment of such Commissioner, Justice of the Peace, Constable or Peace Officer, or person acting under a warrant, affords just cause of suspicion that it is carried for purposes dangerous to the public peace; and every one so employed, who so carries any such weapon, is guilty of a misdemeanor,—and the Justice of the Peace or Commissioner arresting such person, or before whom he is brought under such a warrant, may commit him for trial for a misdemeanour, unless he gives sufficient bail for his appearance at the next term or sitting of the Court before which the offence can be tried, to answer to any indictment to be then preferred against him.

8. Any Commissioner appointed under this Act, or any Justice of the Peace having authority within the place in which this Act is at the time in force, upon the oath of a credible witness that he believes that any weapon is in the possession of any person or in any house or place contrary to the provisions of this Act, may issue his warrant to any Constable or Peace Officer to search for and seize the same,—and he, or any person in his aid, may search for and seize the same in the possession of any person, or in any such house or place.

9. If admission to any such house or place is refused after demand, such Constable or Peace Officer, and any person in his aid, may enter the same by force by day or by night, and seize any such weapon and deliver it to such Commissioner; and unless the person in whose possession or in whose house or premises the same is found, within four days next after the seizure, proves to the satisfaction of such Commissioner or Justice of the Peace that the weapon so seized was not in his possession or in his house or place contrary to the meaning of this Act, such weapon shall be forfeited to the use of Her Majesty.

10. All weapons declared forfeited under this Act shall be sold or destroyed under the direction of the Commissioner by whom or by whose authority the same are seized, and the proceeds of such sale, after deducting necessary expenses, shall be received by such Commissioner and paid over by him to the Minister of Finance and Receiver-General, for the public uses of Canada.

11. Whenever this Act ceases to be in force within the place where any weapon has been delivered and detained in pursuance thereof, or whenever the owner or person lawfully entitled to any such weapon satisfies the Commissioner that he is about to remove immediately from the limits within which this Act is at the time in force, the Commissioner may deliver up to the owner or person authorized to receive the same, any such weapon, on production of the receipt given for it.

12. Every Commissioner under this Act shall make a monthly return to the Secretary of State of all weapons delivered to him, and by him detained under this Act.

INTOXICATING LIQUOR.

13. Upon and after the day named in such proclamation and during such period as such proclamation remains in force, no person shall, at any place within the limits specified in such proclamation, sell, barter or directly or indirectly, for any matter, thing, profit or reward, exchange, supply or dispose of, any intoxicating liquor; nor expose, keep or have in possession any intoxicating liquor intended to be dealt with in any such way.

2. The provisions of this section shall not extend to any person selling intoxicating liquor by wholesale, and not retailing the same, if such person is a licensed distiller or brewer.

14. Every one who, by himself, his clerk, servant, agent or other person, violates any of the provisions of the next preceding section, is guilty of an offence against this Act, and, on a first conviction, shall be liable to a penalty of forty dollars and costs, and, in default of payment, to imprisonment for a term not exceeding three months,—and on every subsequent conviction, to the said penalty and the said imprisonment in default of payment, and also to further imprisonment for a term not exceeding six months.

15. Every clerk, servant, agent or other person who, being in the employment of, or on the premises of another person, violates or assists in violating any of the provisions of the thirteenth section of this Act, for the person in whose employment or on whose premises he is, shall be equally guilty with the principal offender, and shall be liable to the penalties mentioned in the next preceding section.

16. If any person makes oath or affirmation before any Commissioner or Justice of the Peace, that he has reason to believe, and does believe that any intoxicating liquor with respect to which a violation of the provisions of the thirteenth section of this Act has been committed or is intended to be committed is, within the limits specified in any proclamation by which this Act has been proclaimed to be in force, on board of any steam-boat, vessel, boat, canoe, raft or other craft, or in or about any building or premises, or in any carriage, vehicle or other conveyance, or at any place, the Commissioner or Justice of the Peace shall issue a search warrant to any Sheriff, Police Officer, Constable or Bailiff who shall forthwith proceed to search the steam-boat, vessel, boat, canoe, raft, other craft, building, premises, carriage, vehicle, conveyance or place described in such search warrant: and if any intoxicating liquor is found therein or thereon the person executing such search warrant shall seize the intoxicating liquor and the barrels, casks, jars, bottles or other packages in which it is contained and shall keep it and them secure until final action is had thereon.

2. No dwelling-house in which, or in part of which or on the premises whereof, a shop or a bar is not kept, shall be searched, unless the said informant also makes oath or affirmation that some offence in violation of the provisions of the thirteenth section of this Act has been committed therein or therefrom within one month next preceding the time of making his said information for a search warrant.

3. The owner, keeper or person in possession of the intoxicating liquor so seized if he is known to the officer seizing the same, shall be summond forthwith by the Commissioner or Justice of the Peace who issued the search warrant to appear before such Commissioner or Justice of the Peace; and if he fails so to appear, or if it appears to the satisfaction of such Commissioner or Justice of the Peace that a violation of the provisions of the thirteenth

section of this Act has been committed or is intended to be committed, with respect to such intoxicating liquor, it shall be declared forfeited, with any package in which it is contained, and shall be destroyed by authority of the written order to that effect of such Commissioner or Justice, and in his presence or in the presence of some person appointed by him to witness the destruction thereof; and the Commissioner or Justice or the person so appointed by him, and the officer by whom the said intoxicating liquor has been destroyed, shall jointly attest, in writing upon the back of the said order, the fact that it has been destroyed.

4. The owner, keeper or person in possession of any intoxicating liquor seized and forfeited under the provisions of this section may be convicted of an offence against the thirteenth section of this Act without any further information laid or trial had, and shall be liable to the penalties mentioned in the fourteenth section of this Act.

17. If the owner, keeper or possessor of intoxicating liquor seized under the next preceding section is unknown to the officer seizing the same, it shall not be condemned and destroyed until the fact of such seizure, with the number and description of the packages, as near as may be, has been advertised for two weeks, by posting up a written or a printed notice and description thereof, in at least three public places of the place where it was seized.

2. If it is proved within such two weeks, to the satisfaction of the Commissioner or Justice by whose authority such intoxicating liquor was seized, that with respect to such intoxicating liquor no violation of the provisions of the thirteenth section of this Act has been committed or is intended to be committed it shall not be destroyed, but shall be delivered to the owner, who shall give his receipt therefor in writing upon the back of the search warrant, which shall be returned to the Commissioner or Justice who issued the same; but if, after such advertisement as aforesaid, it appears to such Commissioner or Justice that a violation of the provisions of the thirteenth section of this Act has been committed or is intended to be committed, then such intoxicating liquor, with any package in which it is contained, shall be forfeited and destroyed, according to the provisions of the next preceding section.

18. Any payment or compensation, whether in money or securities for money, labour or property of any kind, for intoxicating liquor sold, bartered, exchanged, supplied or disposed of, contrary to the provisions of the thirteenth section of this Act, shall be held to have been criminally received without consideration, and against law, equity and good conscience, and the amount or value thereof may be recovered from the receiver by the person making, paying or furnishing such payment or compensation; and all sales, transfers, conveyances, liens and securities of every kind, which either in whole or in part have been made or given for or on account of intoxicating liquor sold, bartered, exchanged, supplied or disposed of contrary to the provisions of the thirteenth section of this Act, shall be void against all persons, and no right shall be acquired thereby; and no action of any kind shall be maintained, either in whole or in part ,for or on account of intoxicating liquor sold, bartered, exchanged, supplied or disposed of, contrary to the provisions of the said section.

19. In any prosecution under this Act for any offence with respect to intoxicating liquor, it shall not be necessary that any witness should depose directly to the precise description of the liquor with respect to which the offence has been committed, or to the precise consideration therefor, or to the fact of the offence having been committed with his participation or to his own personal and certain knowledge; but the Commissioner or Justice of the Peace trying the case, so soon as it appears to him that the circumstances in evidence sufficiently establish the offence complained of, shall put

the defendant on his defence, and in default of such evidence being rebutted, shall convict the defendant accordingly.

GENERAL PROVISIONS.

20. Any Commissioner or Justice of the Peace may hear and determine, in a summary manner, any case arising within his jurisdiction under this Act; and every person making complaint against any other person for violating this Act, or any provision thereof, before such Commissioner or Justice, may be admitted as a witness; and the Commissioner or Justice of the Peace before whom the examination or trial is had, may, if he thinks there was probable cause for the prosecution, order that the defendant shall not recover costs although the prosecution fails.

21. All the provisions of every law respecting the duties of Justices of the Peace in relation to summary convictions, and orders and to appeals from such convictions, and for the protection of Justices of the Peace when acting as such or to facilitate proceedings by or before them in matters relating to summary convictions and orders, shall, in so far as they are not inconsistent with this Act, apply to every Commissioner or Justice of the Peace mentioned in this Act or empowered to try offenders against this Act; and every such Commissioner shall be deemed a Justice of the Peace within the meaning of any such law, whether he is or is not a Justice of the Peace for other purposes.

22. On the trial of any proceeding, matter or question under this Act, the person opposing or defending, and the wife or husband of such person, shall be competent to give evidence.

23. No action or other proceeding, warrant, judgment, order or other instrument or writing, authorized by this Act or necessary to carry out its provisions, shall be held void or be allowed to fail for defect of form.

24. Every action brought against any Commissioner or Justice of the Peace, Constable, Peace Officer or other person, for anything done in pursuance of this Act, shall be commenced within six months next after the alleged cause of action arises; and the venue shall be laid or the action instituted in the district or county or place where the cause of action arose; and the defendant may plead the general issue and give this Act and the special matter in evidence; and if such action is brought after the time limited, or the venue is laid or the action brought in any other district, county or place than as above prescribed, the judgment or verdict shall be given for the defendant; and in such case, or if the judgment or verdict is given for the defendant on the merits, or if the plaintiff becomes nonsuited or discontinues after appearance is entered, or has judgment rendered against him on demurrer, the defendant shall be entitled to recover double costs.

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## R.S.C., CHAPTER 152.

### An Act respecting the Preservation of Peace at Public Meetings.

1. Any Justice of the Peace within whose jurisdiction any public meeting is appointed to be held, may demand, have and take of and from any person attending such meeting, or on his way to attend the same, any offensive weapon, such as firearms, swords, staves, bludgeons, or the like, with which any such person is so armed, or which any such person has in his possession; and every such person who, upon such demand, declines or refuses to

deliver up, peaceably and quietly, to such Justice of the Peace, any such offensive weapon as aforesaid, is guilty of a misdemeanour, and such Justice may thereupon record the refusal of such person to deliver up such weapon, and adjudge him to pay a penalty not exceeding eight dollars,—which penalty shall be levied in like manner as penalties are levied under the *Act respecting summary proceedings before Justices of the Peace*, or such person may be proceeded against by indictment or information, as in other cases of misdemeanour; but such conviction shall not interfere with the power of such Justice, or any other Justice of the Peace, to take such weapon, or cause the same to be taken from such person, without his consent and against his will, by such force as is necessary for that purpose.

2. Upon reasonable request to any Justice of the Peace, to whom any such weapon has been peaceably and quietly delivered as aforesaid, made on the day next after the meeting has finally dispersed, and not before, such weapon shall, if of the value of one dollar or upwards, be returned by such Justice of the Peace to the person from whom the same was received.

3. No such Justice of the Peace shall be held liable to return any such weapon, or make good the value thereof, if the same, by unavoidable accident, has been actually destroyed or lost out of the possession of such Justice without his wilful default.

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## R.S.C., CHAPTER 153.

### An Act respecting Prize-fighting.

6. If, at any time, the Sheriff of any county, place or district in Canada, any Chief of Police, any Police Officer, or any Constable, or other Peace Officer, has reason to believe that any person within his bailiwick or jurisdiction is about to engage as principal in any prize-fight within Canada, he shall forthwith arrest such person and take him before some person having authority to try offences against this Act, and shall forthwith make complaint in that behalf, upon oath, before such person; and thereupon such person shall inquire into the charge and if he is satisfied that the person so brought before him was, at the time of his arrest, about to engage as a principal in a prize-fight, he shall require the accused to enter into a recognizance, with sufficient sureties, in a sum not exceeding five thousand dollars and not less than one thousand dollars, conditioned that the accused will not engage in any such fight within one year from and after the date of such arrest: and in default of such recognizance, the person before whom the accused has been brought shall commit the accused to the gaol of the county, district or city within which such inquiry takes place, or if there is no common gaol there, then to the common gaol which is nearest to the place where such inquiry is had, there to remain until he gives such recognizance with such sureties.

7. If any Sheriff has reason to believe that a prize-fight is taking place or is about to take place within his jurisdiction as such Sheriff, or that any persons are about to come into Canada at a point within his jurisdiction, from any place outside of Canada, with intent to engage in, or to be concerned in, or to attend any prize-fight within Canada, he shall forthwith summon a force of the inhabitants of his district or county sufficient for the purpose of suppressing and preventing such fight,—and he shall with their aid, suppress and prevent the same, and arrest all persons present thereat, or who come into Canada as aforesaid, and shall take them before some person having authority to try offences against this Act, to be dealt with according to law, and fined or imprisoned, or both, or compelled to enter into recogni-

zances with sureties, as hereinbefore provided, according to the nature of the case.

10. Every Judge of a Superior Court or of a County Court, Judge of the Sessions of the Peace, Stipendiary Magistrate, Police Magistrate, and Commissioner of Police of Canada, shall, within the limits of his jurisdiction as such Judge, Magistrate or Commissioner, have all the powers of a Justice of the Peace with respect to offences against this Act.

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## R.S.C., CHAPTER 154.

### An Act respecting Perjury.

(The unrepealed section, 4, of this Act is set out at p. 140, *ante*.)

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## R.S.C., CHAPTER 157.

### An Act respecting Offences against Public Morals and Public Convenience.

8. * * * *

(4). If provision is made therefor by the laws of the province in which the conviction takes place, any such loose, idle or disorderly person may, instead of being committed to the common gaol or other public prison, be committed to any house of industry or correction, alms-house, work house or reformatory prison.

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## R.S.C., CHAPTER 167.

### An Act respecting Offences relating to the Coin.

(The unrepealed sections, 26, 29, 30, 31, 32, 33 and 34, of this Act are set out at pp. 527-529, *ante*.)

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## R.S.C., CHAPTER 169.

### An Act respecting offences relating to the Army and Navy.

9. One moiety of the amount of any penalty recovered under any of the preceding sections shall be paid over to the prosecutor or person by whose means the offender has been convicted, and the other moiety shall belong to the Crown.

## R.S.C., CHAPTER 172.

### An Act respecting Cruelty to Animals.

7. Every pecuniary penalty recovered with respect to any such offence shall be applied in the following manner, that is to say: one moiety thereof to the Corporation of the City, town, village, township, parish or place in which the offence was committed, and the other moiety, with full costs, to the person who informed and prosecuted for the same, or to such other person as to the Justices of the Peace seems proper.

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## 51 VICT., CHAPTER 41.

### An Act to amend the law relating to fraudulent marks on Merchandise.

(The unrepealed sections, 15, 16, 18, 22, and 23, of this Act are set out at pp. 515 and 516, *ante*.)

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## 52 VICT., CHAPTER 41.

### An Act for the Prevention and Suppression of Combinations formed in restraint of Trade.

4. Where an indictment is found against any person for offences provided against in this Act, the defendant or person accused shall have the option to be tried before the Judge presiding at the Court at which such indictment is found, or the Judge presiding at any subsequent sitting of such Court, or at any Court where the indictment comes on for trial, without the intervention of a Jury; and in the event of such option being exercised the proceedings subsequent thereto shall be regulated, in so far as may be applicable, by *The Speedy Trials Act*.

5. An Appeal shall lie from any conviction under this Act by the Judge without the intervention of a Jury to the highest Court of Appeal in criminal matters in the province where such conviction shall have been made, upon all issues of law and fact; and the evidence taken in the trial shall form part of the record in appeal, and for that purpose the Court before which the case is tried shall take note of the evidence and of all legal objections thereto.

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## 53 VICT., CHAPTER 37.

### An Act further to amend the Criminal Law.

ESCAPES AND RESCUES.

(Section 1 of this Act is set out at p. 153, *ante*.)

Section 2 and sections 32 to 41 of the Act are as follows: —

2. Every one who, being sentenced to imprisonment or detention in, or being ordered to be detained in any industrial refuge, industrial home or in-

dustrial school, by reason of incorrigible or vicious conduct, or with reference to the general discipline of the institution, is beyond the control of the Officer in charge of such institution, is guilty of a misdemeanour, and may be dealt with as follows: —

(*a*) The offender may, at any time before the expiration of his term of imprisonment or detention, be brought without warrant before any Magistrate, if the Officer in charge of such refuge, home or school certifies in writing that the removal of such offender to a place of stricter imprisonment is desirable, and if the governing body of such refuge, home or school applies for such removal, and if sufficient cause therefor is shown to the satisfaction of such Magistrate, he may order the offender to be removed to and to be kept imprisoned, for the remainder of his original term of imprisonment or detention, in any reformatory prison or reformatory school in which by law such offender may be imprisoned for a misdemeanour; and when there is no such reformatory prison or school the Magistrate may order the offender to be removed to and to be so kept imprisoned in any other place of imprisonment to which the offender may be lawfully committed;

(*b*) The magistrate may, after conviction, sentence the offender to such additional term of imprisonment, not exceeding one year, as to such Magistrate seems a proper punishment for the incorrigible conduct of the offender.

PUBLIC AND REFORMATORY PRISONS.

*Certified Industrial School, Ontario.*

32. The Governor General, by warrant under his hand, may at any time in his discretion (the consent of the Provincial Secretary of Ontario having been first obtained), cause any boy who is imprisoned in a reformatory or gaol in that province, under sentence for an offence against a law of Canada, and who is certified by the Court, Judge or Magistrate by whom he was tried to have been, in the opinion of such Court, Judge or Magistrate, at the time of his trial, of or under the age of thirteen years, to be transferred for the remainder of his term of imprisonment to a certified industrial school in the province.

33. Where, under any law of Canada, any boy is convicted in Ontario, whether summarily or otherwise, of any offence punishable by imprisonment, and the Court, Judge, Stipendiary or Police Magistrate may sentence such boy to imprisonment in a certified industrial school for any term not exceeding five years and not less than two years provided that no boy shall be sentenced to any such school unless public notice has been given in the *Ontario Gazette* and has not been countermanded, that such school is ready to receive and maintain boys sentenced under laws of the Dominion: Provided also, that no such boy shall be detained in any certified industrial school beyond the age of seventeen years.

*Halifax Industrial School.*

34. Section sixty-one of chapter one hundred and eighty-three of the Revised Statutes, intituled: *An Act respecting Public and Reformatory Prisons*, is hereby repealed and the following substituted therefor: —

"61. Whenever any boy, who is a Protestant and a minor apparently under the age of sixteen years, is convicted in Nova Scotia of any offence for which by law he is liable to imprisonment, the Judge, Stipendiary Magistrate, Justice or Justices by whom he is so convicted may sentence such boy to be detained in the Halifax Industrial School for any term not exceeding five years, and not less than two years."

35. Section sixty-two of the said Act is hereby repealed and the following substituted therefor: —

"62. No such sentence shall be pronounced unless or until provision has been made by the municipality within which such conviction is had, out of its funds, for the support of boys so sentenced, at the rate of not less than sixty dollars per annum for each boy."

*St. Patrick's Home Halifax.*

36. Section sixty-five of the said Act is hereby repealed and the following substituted therefor: —

"65. Whenever any boy, who is a Roman Catholic and apparently under the age of sixteen years, is convicted in Nova Scotia of any offence for which by law he is liable to imprisonment, the Judge, Stipendiary Magistrate, Justice or Justices by whom he is so convicted may sentence such boy to be detained in Saint Patrick's Home at Halifax for any term not exceeding five years, and not less than two years; but no such sentence shall be pronounced unless or until provision has been made by the municipality within which such conviction is had, out of its funds, for the support of boys so sentenced, at the rate of not less than sixty dollars per annum for each boy."

37. Section sixty-six of the said Act is hereby repealed and the following substituted therefor: —

"66. The superintendent, or head of the said home, may at any time notify the Mayor, Warden or other Chief Magistrate of any municipality, that no prisoners, beyond those already under sentence in such home, will be received therein; and after such notification no such sentence shall be pronounced in such municipality until notice has been received by such Mayor, Warden or Chief Magistrate, from the said superintendent or head, that prisoners will again be received in the said home."

38. The six preceding sections shall not, nor shall any of them, come into force until the same shall have been proclaimed by the Governor in Council.

39. The said Act is hereby further amended by adding at the end thereof the following sections.

PART VI.

"MANITOBA.

"*Manitoba Reformatory for Boys.*

"78. If any boy, who, at the time of his trial, appears to the Court to be under the age of sixteen years, is convicted of any offence for which a sentence of imprisonment for a period of three months or longer, but less than five years, may be imposed upon an adult convicted of the like offence, and the Court before which such boy is convicted is satisfied that a due regard for the material and moral welfare of the boy manifestly requires that he should be committed to the Manitoba reformatory for boys, then such Court may sentence the boy to be imprisoned in such reformatory for such term as the Court thinks fit, not being greater than the term of imprisonment which could be imposed upon an adult for the like offence, and may further sentence such boy to be kept in such reformatory for an indefinite time after the expiration of such fixed term: Provided, that the whole period of confinement in such reformatory shall not exceed five years from the commencement of his imprisonment.

"79. If any boy, apparently under the age of sixteen years, is convicted of any offence, punishable by law on summary conviction, and thereupon is sentenced and committed to prison in any common gaol for a period of fourteen days at the least, any Judge of any one of the Superior Courts, or any Judge of a County Court, in any case occurring within his county, may examine and inquire into the circumstances of such case and conviction and when he considers the material and moral welfare of the boy requires such sentence, he may, as an additional sentence for such offence, sentence such boy to be sent either forthwith or at the expiration of his imprisonment in such gaol, to such reformatory, to be there detained for the purpose of his industrial and moral education for an indefinite period, not exceeding in the whole five years, from the commencement of his imprisonment in the common gaol.

"80. Every boy so sentenced shall be detained in such reformatory until the expiration of the fixed term, if any, of his sentence, unless sooner discharged by a lawful authority, and thereafter shall, subject to the provisions hereof and to any regulations made as hereinafter provided, be detained in such reformatory for a period not to exceed five years from the commencement of his imprisonment, for the purpose of his industrial and moral education.

"81. A copy of the sentence of the Court, duly certified by the proper Officer, or the warrant or order of the Judge or other Magistrate by whom any boy is sentenced to confinement in such reformatory, shall be a sufficient authority to the Sheriff, Constable or other Officer who is directed, verbally or otherwise, so to do, to convey such boy to the common gaol of the county where such sentence is pronounced, and for the gaoler of such gaol to receive and detain such boy, until some person, lawfully authorized, requires the delivery of such boy for removal to the reformatory.

"82. If any boy sentenced to be confined in such reformatory is in such a weak state of health that he cannot safely or conveniently be removed to the reformatory, he may be detained in the common gaol or other place of confinement in which he is, until he is sufficiently recovered to be safely and conveniently removed to the reformatory.

"83. No boy shall be discharged from such reformatory at the termination of his term of confinement, if then labouring under any contagious or infectious disease, or under any acute or dangerous illness, but he shall be permitted to remain in such reformatory until he recovers from such disease or illness: Provided that any boy remaining in such reformatory for any such cause shall be under the same discipline and control as if his term was still unexpired.

"84. Any Sheriff or other person having the custody of any offender sentenced to imprisonment in the said reformatory, may detain the offender in the common gaol of the county or district in which such offender is sentenced, or other place of confinement in which such offender is, until some person lawfully authorized in that behalf requires such offender's delivery for the purpose of being conveyed to such reformatory.

"85. Whenever the time of any offender's sentence in such reformatory, under any law within the legislative authority of the Parliament of Canada, expires on a Sunday, such offender shall be discharged on the previous Saturday, unless such offender desires to remain until the Monday following."

40. The provisions of this Act in respect to the Manitoba reformatory for boys shall not come into force until the same shall have been proclaimed by the Governor in Council.

# THE CANADA EVIDENCE ACT 1893

[56 VICT. c. 31].

(Amended by 61 Vic., c. 53 and by 1 Edw. VII., c. 36).

**1. Short title.** — This Act may be cited as *The Canada Evidence Act*, 1893.

**2. Application.** — This Act shall apply to all criminal proceeding and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in this behalf.

## WITNESSES.

**3. Interest or crime, no bar.** — A person shall not be incompetent to give evidence by reason of interest or crime.

**4. Accused and husband and wife competent.** — Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness, whether the person so charged is charged solely or jointly with any other person. Provided, however, that no husband shall be competent to disclose any communication made to him by his wife during their marriage, and no wife shall be competent to disclose any communication made to her by her husband during their marriage.

2. The failure of the person charged, or of the wife or husband of such person, to testify, shall not be made the subject of comment by the Judge or by Counsel for the prosecution in addressing the Jury.

A co-defendant in a criminal case, in which the defendants are being tried joint'y, cannot be *compelled* by the prosecution to testify; but he may offer to give and may give his evidence, if he wishes. (1)

It has been held, in the United States, that a conversation, participated in by a husband, his wife and a third person, is not a privileged communication between husband and wife, and that it may be given in evidence by such third person. (2)

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(1) R. v. Connors et al., Que. Jud. Rep., 3 Q. B., 100.
(2) S. v. Gray, 17 Cr. L. Mag., 675.

Persons who have cohabited as man and wife on the strength of a marriage, *de facto*, supposed by both of them to be a good marriage, may, — after the mariage is found to be a nullity, — give, in evidence, in a Court of justice, statements made by each of them to the other during their cohabitation. (3)

Where a defendant, who was indicted for stealing a quantity of oil, pleaded not guilty and, on the trial, gave evidence on his own behalf, and the prosecuting counsel, in addressing the jury, commented unfavorably on the failure of the defendant's wife to testify, it was held that the comment was a violation of clause 2 of the above section 4, and that the defendant was entitled to a new trial. (4)

Where, on a trial for perjury, the trial judge, in his charge to the jury, commented upon the fact that the prisoner did not testify on his own behalf, — although, when his attention was called to it, he recalled the jury and withdrew his comment, — it was held, in appeal, that the prisoner had a right to have his case submitted to the jury without the comment, and that, being deprived of that right, there was a substantial wrong done to him and it could not be undone by calling the jury back and withdrawing the comment: and a new trial was ordered. (5)

Where, during the address to the jury by the prisoner's counsel, the Crown counsel interjected a remark, in the hearing of the jury, intimating that the prisoner could have given evidence as to an alleged occurrence, then being referred to by the prisoner's counsel in his address, and it appeared that the ascertainment of whether or not such occurrence took place was not material to the issue, it was held that such interjected remark was not a ground for ordering a new trial. (5*a*)

There is some difference of opinion as to whether the above section, 4, renders a defendant competent as a witness on his own behalf when charged with an offence against a provincial statute or a municipal by-law, in the absence of provincial legislation rendering him so competent. The question seems to depend upon the construction to be placed upon the sections of the *British North America Act* regulating the respective powers of Dominion and Provincial Legislatures in relation to criminal law and procedure. In other words, does subsection 27 of section 91 of the *British North America Act* vest in the Dominion Parliament *exclusive* legislative authority to regulate procedure, (including, of course, evidence, as a branch of procedure), in relation to ALL criminal offences, no matter by what authority punishable, — that is, whether punishable by virtue of Dominion, Provincial, Municipal or other laws? Or, is subs. 15 of sec. 92 of the B. N. A., Act, (which gives provincial legislatures authority to make laws imposing punishment by fine, penalty, or imprisonment for the enforcement of provincial laws), to be construed as conferring on the provincial legislatures the power to regulate and fix the procedure in regard to offences against provincial laws? And, if this be so, are there, therefore, as some have contended, two sets of criminal offences, —FEDERAL crimes, (subject, — as to procedure, — to Dominion legislation), and PROVINCIAL crimes subject, — as to procedure, — to provincial legislation)?

Sec. 91, subsection 27, of the B. N. A. Act, declares that the exclusive legislative authority of the Dominion Parliament extends to all matters relating to the CRIMINAL LAW, except the constitution of the Courts, but *including* the PROCEDURE in CRIMINAL MATTERS.

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(3) Wells v. Fletcher, 5 C. P., 12.
(4) R. v. Corby, 30 N. S. R., 330; 1 Can. Cr. Cas., 457.
(5) R. v. Coleman, 19 C. L. T., 26; 30 O. R., 93; 2 Can. Cr. Cas., 523.
(5*a*) R. v. Weir, (No 3), 3 Can. Cr. Cas., 262.

This language certainly seems to cover procedure in all criminal matters whatsoever; and, as subsection 15 of section 92 says nothing at all about procedure, it may be said that, in empowering provincial legislatures to impose a punishment for infraction of provincial laws, it merely confers upon the provincial legislatures a SPECIAL and LIMITED authority concurrent with and in aid of the GENERAL authority which the Dominion Parliament possesses over all criminal matters.

When, under the limited authority conferred upon them, provincial legislatures impose a fine, or a penalty or imprisonment, for disobedience of a provincial law, they do not thereby create the criminal offence involved in such disobedience. Disobedience of a statute is a crime under the common law. It is a crime under the general criminal law of the country; and the Criminal Code itself (by section 138) expressly makes it an indictable offence to unlawfully disobey any Act of any Legislature in Canada, and enacts that the offender shall be liable to one year's imprisonment, unless there is some other punishment expressly provided by law.

So, that, if the limited authority given to the provincial legislatures by the B. N. A. Act were not in existence at all, or, if, though in existence, it were not exercised, a contravention of a provincial statute would be punishable under the general criminal law controlled by the Dominion Parliament. And, surely, the mere fact that the provincial legislatures are granted a limited right, to the extent of fixing the punishment in the case of a criminal offence which contravenes a provincial statute, does not give them the further right to regulate, in regard to such offences, the criminal procedure, over which the Dominion Parliament is given exclusive control; such exclusive control being so given to the Dominion Parliament in order, no doubt, to secure in the trial of criminal offences, uniformity of procedure and evidence all over Canada.

It is not easy to reconcile the decisions in some of the cases which have arisen upon this subject, and which are briefly noticed below. But there seems a good deal of reason in the contention that, when the subject matter of a proceeding before a Justice or a Magistrate is in the nature of a criminal offence, it should have applied to it the general law of criminal procedure and evidence, whether it is based upon an infraction of a provincial law or otherwise.

In Roddy's case, the defendant who was accused, in Ontario, of an infraction of the License Act was convicted of the offence on his own evidence: the prosecution having called him as a witness (against his own protest) under the authority of 36 Vic., (*Ont.*), c. 10, sec. 4, rendering a defendant a competent and compellable witness in any matter *not being a* crime; the position taken by the prosecution being that a violation of the license laws was *not* a crime but a mere violation of a provincial law. In appeal, Harrison, C. J., in rendering the judgment of the Court, quashing the conviction, referred to section 91, subsection 27, of the B. N. A. Act, and said that, as the provincial legislatures have no direct power to legislate either as to crime or criminal procedure, the question was whether the charge against the defendant was a charge of crime or not; and, after reviewing a number of decisions as to what particular offences are crimes, he concluded that the offence of selling liquor on Sunday, (the offence charged against the defendant), being one of public interest and being punishable by fine or imprisonment with hard labor, it was of a criminal nature and the defendant ought not to have been compelled to give evidence under the authority of a provincial Act rendering him competent and compellable as a witness in any matter *not being a crime.* (6)

In a case against a physician charged with violating a law of the province of Ontario by practising without being registered, it was held that, as this

(6) R. v. Roddy, 41 U. C. Q. B., 291.

was a crime, the defendant could not be a witness under 36 Vic., c. 10, sec. 4 (Ont.). (7)

In another Ontario case, the defendant was charged with the violation of a municipal by-law, and as the act complained of was a criminal offence, he was held incompetent to give evidence. (8)

In a later Ontario case, a different decision was arrived at. A defendant was convicted of selling intoxicating liquor without a license. Upon a motion to quash the conviction, on the ground of defendant's evidence on his own behalf having been refused, it was contended that he was a competent witness under section 4 of the *Canada Evidence Act*, but, for the prosecution it was contended that the province alone has the right to regulate the procedure and evidence under a provincial Liquor License Act; and the Common Pleas Division held that, notwithstanding the reservation, — by subsection 27 of section 91 of the B. N. A. Act, — of criminal procedure to the Dominion Parliament, a provincial legislature has power to regulate and provide for the course of trial and adjudication of offences against its lawful enactments, such as a breach of the Liquor License Law,, even though such offences may be termed crimes, and that therefore they have power to regulate the giving of evidence by the defendant in such a case, as is done by R. S. O., c. 61, sec. 9, by providing that where the proceeding is a crime under the provincial law, the defendant is neither a competent nor compellable witness. (9)

In the province of Quebec, it has been held that the *Canada Evidence Act* does not apply to a charge of selling liquor without license laid under the Provincial Liquor License Act, and that on the trial of such a charge the magistrate has the right to refuse to allow the defendant to testify on his own behalf, seeing that the provincial law on the subject expressly denies a defendant the right to give evidence. (9*a*)

**5. Incriminating Answers.** — No person shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person; provided, however, that if with respect to any question the witness objects to answer upon the ground that his answer may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this section the witness would therefore have been excused from answering such question, then although the witness shall be compelled to answer yet the answer so given shall not be used or receivable in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place other than a prosecution for perjury in giving such evidence. (As amended by the 61 Vic., c. 53).

2. The proviso to subsection 1 of this section shall in like manner apply to the answer of a witness to any question which pur-

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(7) R. v. Sparham, 8 O. R., 570.

(8) R. v. McNicoll, 11 O. R., 659. See also R. v. Hart, 20 O. R., 611; R. v. Wason, 17 Ont. A. R., 221; R. v. Dunning, 14 O. R., 52.

(9) R. v. Bittle, 21 O. R., 605.

(9*a*) Cairns v. Choquet, 3 Que. P. R., 25; Can. Ann. Dig. (1900), 121.

suant to an enactment of the Legislature of a province such witness is compelled to answer after having objected so to do upon any ground mentioned in the said subsection, and which, but for that enactment, he would upon such ground have been excused from answering. (Added by 1 Edw. VII, c. 36).

The amendment made, to the first clause of this section, by the 61 Vic., c. 53 does away with a number of conflicting decisions, it having been held, in some cases, that as, under the terms of this section, it would be of no use for a witness to object to answer, it was not necessary for him to object, in order to avail himself of the benefit of the proviso rendering his evidence inadmissible against him in any subsequent criminal trial, etc.; (10) while, in other cases, it was held that, if a witness gave evidence without making any objection that his answers might incriminate him, his evidence so given was afterwards receivable against him, as having been voluntary. (11) It was held, in another case, that there was a distinction to be made between evidence given in a civil proceeding and evidence given in a criminal proceeding, and that, where the witness was examined in a civil proceeding, he must object to answer, in order to avail himself of the proviso, whereas if he were examined in a criminal proceeding, he need not object, in order to avail himself of it. (12)

It has been held that a witness who is not a party to an indictment, which is being tried cannot be excused from answering questions on the ground that he himself is indicted as a receiver of the goods stolen, and that his answers might incriminate him; but his objection should be noted, and his evidence then given should not be used against him at his own trial. (13)

**6. Evidence of mute.** — A witness who is unable to speak, may give his evidence in any other manner in which he can make it intelligible.

## DOCUMENTARY EVIDENCE.

**7. Imperial Acts &c.**—Judicial notice shall be taken of all Acts of the Imperial Parliament, of all ordinances made by the Governor in Council, or the Lieutenant-Governor in Council of any province or colony which, or some portion of which, now forms or hereafter may form part of Canada, and of all the Acts of the legislature of any such province or colony, whether enacted before or after the passing of *The British North America Act*, 1867.

**8. Proof of Proclamations &c.** — Evidence of any proclamation order, regulation or appointment, made or issued by the Governor General or by the Governor in Council, or by or under the authority of any Minister or head of any department of the Government of Canada, may be given in all or any of the modes hereinafter mentioned, that is to say: —

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(10) R. v. Hendershott & Welter, 15 C. L. T., 272; 26 O. R., 678; R. v. Thompson, 17 C. L. T., 295; R. v. Hammond, 18 C. L. T., 82; 29 O. R., 211; 1 Can. Cr. Cas., 373; R. v. Lalonde, Que. Jud. Rep., 7 Q. B., 204; R. v. Viau, Que. Jud. Rep., 7 Q. B., 362.

(11) R. v. Madden & Bowerman, 14 C. L. T., 505; R. v. Williams, 17 C. L. T., 376; 28 O. R., 583.

(12) R. v. Chisholm & al., 2 Rev. de Jur., 342.

(13) R. v. McLinehy, 2 Can. Cr. Cas., 416; Que. Jud. Rep., 8 Q. B., 166.

(*a*) By the production of a copy of the *Canada Gazette* or a volume of the Acts of the Parliament of Canada purporting to contain a copy of such proclamation, order, regulation, or appointment or a notice thereof;

(*b*) By the production of a copy of such proclamation, order, regulation or appointment, purporting to be printed by the Queen's Printer for Canada; and —

(*c*) By the production, in the case of any proclamation, order, regulation or appointment made or issued by the Governor-General or by the Governor in Council, of a copy or extract purporting to be certified to be true by the Clerk, or assistant or acting Clerk of the Queen's Privy Council for Canada, — and in the case of any order, regulation or appointment made or issued by or under the authority of any such Minister or head of a department, by the production of a copy or extract purporting to be certified to be true by the Minister, or by his deputy or acting deputy, or by the secretary or acting secretary of the department over which he presides.

**9.** Evidence of any proclamation, order, regulation or appointment made or issued by a Lieutenant-Governor or Lieutenant-Governor in Council of any province, or by or under the authority of any member of the Executive Council, being the head of any department of the Government of the province, may be given, in all or any of the modes hereinafter mentioned, that is to say: —

(*a*) By the production of a copy of the Official Gazette for the province, purporting to contain a copy of such proclamation, order, regulation or appointment or a notice thereof;

(*b*) By the production of a copy of such proclamation, order, regulation or appointment, purporting to be printed by the Government or Queen's Printer for the province;

(*c*) By the production of a copy or extract of such proclamation, order, regulation or appointment, purporting to be certified to be true by the clerk or assistant or acting clerk of the Executive Council, or by the head of any department of the Government of a province, or by his deputy or acting deputy, as the case may be.

**10. Proof of judicial proceedings.**—Evidence of any proceeding or record whatsoever of, in, or before any Court in the United Kingdom, or the Supreme or Exchequer Courts of Canada, or any Court, or before any Justice of the Peace or any coroner, in any province of Canada, or any Court in any British colony or possession, or any Court of record of the United States of America, or of any State of the United States of America, or of any other foreign country, may be made in any action or proceeding by an exemplification or certified copy thereof, purporting to be under

the seal of such Court, or under the hand or seal of such Justice or Coroner, as the case may be, without any proof of the authenticity of such seal or of the signature of such Justice or Coroner or other proof whatever; and if any such Court, Justice or Coroner, has no seal, or so certifies then by a copy purporting to be certified under the signature of a Judge or presiding Magistrate of such Court or of such Justice or Coroner, without any proof of the authenticity of such signature or other proof whatsoever.

**11. Imperial Proclamations, &c.** — Imperial Proclamations, Orders in Council, treaties, orders, warrants, licenses, certificates, rules, regulations, or other Imperial official records, acts or documents may be proved (*a*) in the same manner as the same may from time to time be provable in any Court in England, or (*b*) by the production of a copy of the *Canada Gazette*, or a volume of the Acts of the Parliament of Canada purporting to contain a copy of the same or a notice thereof, or (*c*) by the production of a copy thereof, purporting to be printed by the Queen's Printer for Canada.

Substitute the words "King's Printer" and "King's Privy Council," for "Queen's Printer" and "Queen's Privy Council," in the above sections.

**12. Official Documents.** — In every case in which the original record could be received in evidence, a copy of any official or public document of Canada or of any province, purporting to be certified under the hand of the proper officer or person in whose custody such official or public document is placed, or a copy of a document, by-law, rule, regulation or proceeding, or a copy of any entry in any register or other book of any municipal or other corporation, created by charter or statute of Canada or any province, purporting to be certified under the seal of the corporation, and the hand of the presiding officer, clerk or secretary thereof, shall be receivable in evidence without proof of the seal of the corporation, or of the signature or of the official character of the person or persons appearing to have signed the same, and without further proof thereof.

**13. Copies of Public Books.** — Where a book or other document is of so public a nature as to be admissible in evidence on its mere production from the proper custody, and no other statute exists which renders its contents provable by means of a copy, a copy thereof or extract therefrom shall be admissible in evidence in any Court of Justice, or before a person having, by law or by consent of parties, authority to hear, receive and examine evidence, provided it is proved that it is a copy or extract purporting to be certified to be true by the officer to whose custody the original has been entrusted.

**14. Proof of hand writing not required.**—No proof shall be re-

quired of the handwriting or official position of any person certifying, in pursuance of this Act, to the truth of any copy of or extract from any proclamation, order, regulation, appointment, book or other document; and any such copy or extract may be in print or in writing, or partly in print, and partly in writing.

**15. Order signed by Secretary of State.** — Any order in writing, signed by the Secretary of State of Canada, and purporting to be written by command of the Governor-General, shall be received in evidence as the order of the Governor-General.

**16. Copies of Documents in Canada Gazette.** — All copies of official and other notices, advertisements and documents printed in the *Canada Gazette* shall be *prima facie* evidence of the originals, and of the contents thereof.

**17. Copies of Entries in Government books.** — A copy of any entry in any book kept in any department of the Government of Canada, shall be received as evidence of such entry and of the matters, transactions and accounts therein recorded, if it is proved by the oath or affidavit of an officer of such department that such book was, at the time of the making of the entry, one of the ordinary books kept in such department, that the entry was made in the usual and ordinary course of business of such department, and that such copy is a true copy thereof.

**18. Notarial Acts in Quebec.** — Any document purporting to b a copy of a notarial Act or instrument made, filed or enregistered in the Province of Quebec, and to be certified by a notary or prothonotary to be a true copy of the original, in his possession as such notary or prothonotary, shall be received in evidence in the place and stead of the original, and shall have the same force and effect as the original would have if produced and proved: Provided, that it may be proved in rebuttal that there is no such original, or that the copy is not a true copy of the original in some material particular, or that the original is not an instrument of such nature as may by the law of the Province of Quebec be taken before a notary or be filed, enrolled or enregistered by a notary in the said Province.

**19. Notice to adverse party.** — No copy of any book or other document as provided in sections ten, twelve, thirteen, fourteen, seventeen and eighteen of this Act, shall be received in evidence upon any trial unless the party intending to produce the same has before the trial given to the party against whom it is intended to be produced reasonable notice of such intention. The reasonableness of the notice shall be determined by the Court or Judge, but the notice shall not in any case be less than ten days.

The rule is that the contents of a writing in any document or upon any portable article cannot be proved without its production or without shewing it to be in the possession of the prisoner or opposite party and on notice to him to produce it.

Upon the trial of an indictment against two prisoners for burglary, one of the stolen articles, — the only one directly proved to have been in the possession of either of them, — was a ring of a certain description which had upon it a certain inscription. A witness produced a ring similar to the stolen one and containing the same inscription; and it was proved that, soon after the burglary, one of the prisoners had shewn a similar ring also containing an inscription; but, as no notice had been given to the prisoner to produce it, it was held that the contents of the inscription could not be proved. (14)

Secondary evidence of the contents of letters, of which one of the witnesses for the Crown had taken cognizance, is not admissible, where it is not proved that it was impossible to produce the letters themselves, or even that such letters ever existed. (15)

**20. Construction of this Act.** — The provisions of this Act shall be deemed to be in addition to and not in derogation of any powers of proving documents given by any existing statute or existing at law.

**21. Application of Provincial Laws.** — In all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the province in which such proceedings are taken, including the laws of proof of service of any warrant, summons, subpœna or other document, shall, subject to the provisions of this and other Acts of the Parliament of Canada, apply to such proceedings.

As we have already seen, (16) one of the rules of evidence in England is that the cross-examination of a witness is not limited to the matters upon which such witness has been examined in chief, but extends to the whole case; so, that, under this rule, if a witness is called, for instance, for the prosecution and gives any evidence of the simplest fact connected with the case, the defendant's counsel is at liberty to cross-examine him on every issue, and, by putting leading questions, to establish, if he can, his entire defence.

But it will be seen that the above section, 21, expressly provides that in criminal cases the laws of evidence in force in the province in which the proceedings are taken "shall, subject to the provisions of this and other Acts of the Parliament of Canada, apply to such proceedings." So, that the English rule above referred to will not apply to criminal proceedings in a province, whose laws of evidence, — as is the case in the province of Quebec, — restrict a witness' cross-examination to the facts referred to in his examination in chief. (17)

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(14) R. v. Farr, 4 F. & F., 336.
(15) R. v. Viau, Que. Jud. Rep., 7 Q. B., 362.
(16) See p. 819, *ante*.
(17) See Code of Civil Procedure, (Que), Art. 340.

## OATHS AND AFFIRMATIONS.

**22. Who may administer Oaths.** — Every Court and Judge, and every person, having by law or consent of parties authority to hear and receive evidence, shall have power to administer an oath to every witness who is legally called to give evidence before that Court, Judge or person.

**23. Affirmations instead of Oaths.** — If a person called or desiring to give evidence, objects, on grounds of conscientious scruples, to take an oath or is objected to as incompetent to take an oath, such person may make the following affirmation: —

"I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth, and nothing but the truth."

And, upon the person making such solemn affirmation, his evidence shall be taken and have the same effect as if taken under oath.

**24.** If a person required or desiring to make an affidavit or deposition in a proceeding, or on an occasion whereon or touching a matter respecting which an oath is required or is lawful, whether on taking office or otherwise, refuses or is unwilling to be sworn, on grounds of conscientious scruples the Court or Judge, or other officer or person qualified to take affidavits or depositions, shall permit such person instead of being sworn, to make his solemn affirmation in the words following, viz: "I. A. B., do solemnly affirm," &c.; which solemn affirmation shall be of the same force and effect as if such person had taken an oath in the usual form.

2. Any witness whose evidence is admitted or who makes an affirmation under this or the next preceding section shall be liable to indictment and punishment for perjury in all respects as if he had been sworn.

In England, it has been held to be the duty of the judge before permitting a witness to affirm, (in accordance with the Imperial *Oaths Act*, 1888), to enquire into the ground of his objection to be sworn and to ascertain whether it is because he has no religious belief, or because the taking of an oath is contrary to his religious belief, that he objects to be sworn, and, further, that an objection to the admissibility of the evidence of a witness permitted to affirm without being so questioned is not taken too late, when taken after verdict. (18)

See comments, on the subject of affirming instead of swearing, at pp. 701, 702, *ante*.

(18) R. v. Moore, 61 L. J., M. C., 80; 17 Cox C. C., 458. See, also, R. v. Gibson, 18 Q. B. D., 537.

**25. Evidence of Child.** — In any legal proceeding where a child of tender years is tendered as a witness, and such child does not, in the opinion of the Judge, Justice or other presiding Officer, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the Judge, Justice or other presiding Officer, as the case may be, such child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

2. But no case shall be decided upon such evidence alone, and such evidence must be corroborated by some other material evidence.

See section 685 and the cases cited thereunder at pp. 817, 818, *ante*.

STATUTORY DECLARATIONS.

**26. Solemn declaration.** — Any Judge, Notary public, Justice the Peace, Police or Stipendiary Magistrate, Recorder, Mayor, Commissioner authorized to take affidavits to be used either in the Provincial or Dominion Courts, or any other functionary authorized by law to administer an oath in any matter, may receive the solemn declaration of any person voluntarily making the same before him, in the form in the schedule A to this Act, in attestation of the execution of any writing, deed or instrument, or of the truth of any fact or of any account rendered in writing.

**27. Affidavits for Insurance Claims.** — Any affidavit, affirmation or declaration required by any insurance company authorized by law to do business in Canada, in regard to any loss of, or injury to, person, property or life insured or assured therein, may be taken before any Commissioner authorized to take affidavits, or before any Justice of the Peace, or before any Notary public for any province of Canada; and such Officer is hereby required to take such affidavit, affirmation or declaration.

**28. Repeal.** —T he Acts mentioned in schedule B to this Act are hereby repealed.

**29. Commencement of Act.** — This Act shall come into force on the first day of July, one thousand eight hundred and ninety-three.

## SCHEDULE A.

I, A. B., do solemnly declare that (*state the fact or facts declared to*), and I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath, and by virtue of *The Canada Evidence Act*, 1893.

Declared before me
at this day of

A. D. 18

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## SCHEDULE B.

| Acts repealed. | Title. | Extent of Repeal. |
|---|---|---|
| R. S. C., c. 139..... | An Act respecting evidence..... ..... | The whole Act. |
| R. S. C., c. 141..... | An Act respecting Extra-judicial Oaths. ..... ..... ..... | The whole Act. |

# EXTRA APPENDICES.

## IMPERIAL ACTS.


EXTRA APPENDIX A.—THE IMPERIAL CRIMINAL EVIDENCE ACT, 1898.

" " B.—THE FOREIGN ENLISTMENT ACT.


## CANADIAN ACTS.


EXTRA APPENDIX C.—INTERPRETATION ACT AMENDMENT ACT.

VICTORIA DAY ACT.

DEMISE OF THE CROWN ACTS.

" " D.—ALIEN LABOR ACT.

" " E.—YUKON TERRITORY ACTS.

" " F.—FUGITIVE OFFENDERS' ACT.

" " G.—THE EXTRADITION ACTS.

THE EXTRADITION CONVENTION WITH THE UNITED STATES.

FINAL APPENDIX—LIST OF EXTRADITION TREATIES, ETC.

# EXTRA APPENDIX A.

## THE IMPERIAL CRIMINAL EVIDENCE ACT, 1898.

This Act is the 61-62 Vict., c. 36; and it contains 7 sections, which are as follows: —

**1. Competency of witnesses.** — Every person charged with an offence and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Provided as follows: —

(*a*) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application;

(*b*) The failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution:

(*c*) The wife or husband of the person charged shall not, save as in this Act mentioned be called as a witness in pursuance of this Act except upon the application of the person so charged:

(*d*) Nothing in this Act shall make a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during the marriage:

(*e*) A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged:

(*f*) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless —

(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

(iii) he has given evidence against any other person charged with the same offence.

(*g*) Every person called as a witness in pursuance of this Act shall, unless otherwise ordered by the court, give his evidence from the witness box or other place from which the other witnesses give their evidence:

(*h*) Nothing in this Act shall affect the provisions of section eighteen of the Indictable Offences Act, 1848, or any right of the person charged to make a statement without being sworn.

It will be noticed that clause (*h*) of this section does not prevent the judge from commenting on the failure of the accused, or of the wife or husband of the accused, to give evidence. It merely declares that such failure shall not be the subject of any comment by the prosecution. In this respect it differs from subsection 2 of section 4 of the *Canada Evidence Act, ante*, which expressly provides that neither the judge nor the counsel for the prosecution shall make such comment in addressing the jury.

**2. When accused to be examined.** — Where the only witness to the facts of the case called by the defence is the person charged, he shall be called as a witness immediately after the close of the evidence for the prosecution.

**3. Right of Reply.** — In cases where the right of reply depends upon the question whether evidence has been called for the defence the fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right of reply.

**4. Special Cases.** — 1. The wife or husband of a person charged with an offence under any enactment mentioned in the schedule to this Act may be called as a witness either for the prosecution or defence and without the consent of the person charged.

2. Nothing in this Act shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person.

At common law, in cases in which personal injuries have been effected by violence or coercion by the husband upon the wife or by the wife upon the husband, such wife or such husband is a competent and compellable witness. (1)

**5. Scotland.** — In Scotland, in a case where a list of witnesses is required, the husband or wife of a person charged shall not be called as a witness for the defence, unless notice be given in the terms prescribed by section thirty-six of the Criminal Procedure (Scotland) Act, 1887.

**6. Application of Act.** — 1. This Act shall apply to all crimi-

(1) See R. v. The Mayor of London, 16 Q. B. D., 772, per A. L. Smith, J., at p. 775; Reeve v. Wood, 34 L. J., M. C., 13; Steph. Dig. Law of Ev., Art. 108.

nal proceedings, notwithstanding any enactment in force at the commencement of this Act, except that nothing in this Act shall affect the Evidence Act, 1877.

2. But this Act shall not apply to proceedings in courts martial unless so applied —

(*a*) as to courts martial under the Naval Discipline Act, by general orders made in pursuance of section sixty-five of that Act; and

(*b*) as to courts martial under the Army Act, by rules made in pursuance of section seventy of that Act.

**7. Extent, etc., of Act.** — (1) This Act shall not extend to Ireland.

2. This Act shall come into operation on the expiration of two months from the passing thereof.

3. This Act may be cited as the Criminal Evidence Act, 1898.

The Acts mentioned in the Schedule and referred to in the above section, 4, are the *Vagrancy Act*, 1824, the *Poor Law (Scotland) Act*, 1845, the *Offences against the Person Act*, 1861, the *Married Women's Property Act*, 1882, the *Criminal Law Amendment Act*, 1885, and the *Prevention of Cruelty to Children Act*, 1894.

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# EXTRA APPENDIX B.

## THE FOREIGN ENLISTMENT ACT 1870

This Act, which, in the main, is a reproduction of the 59 Geo. 3, c. 69, was passed, hurriedly, in August 1870, in consequence of the Franco-German War, following on the "Alabama" crisis with the United States, and the "Fenian Raid" from the United States across the Canadian border.

It is the 33-34 Vict., c. 90, (as amended by the 46-47 Vict., c. 39 and the 56-57 Vict., c. 54), and contains 33 sections, which are as follows: —

**1.** This Act may be cited for all purposes as "The Foreign Enlistment Act, 1870."

**2.** This Act shall extend to all the dominions of Her Majesty, including the adjacent territorial waters.

**3.** This Act shall be proclaimed in every British possession by the Governor thereof as soon as may be after he receives notice of this Act, and shall come into operation in that British possession on the day of such proclamation, and the time at which this Act comes into operation in any place is, as respects such place, in this Act referred to as the commencement of this Act. (*As amended by 56-57 Vic., c. 54*).

*Illegal Enlistment.*

**4.** If any person, without the license of Her Majesty, being a British subject, within or without Her Majesty's dominions, accepts or agrees to accept any commission or engagement in the military or naval service of any foreign state *at war with any foreign state at peace with Her Majesty*, and in this Act referred to as a friendly state, or whether a British subject or not within Her Majesty's dominions, induces any other person to accept or agree to accept any commission or engagement in the military or naval service of any such foreign state as aforesaid, —

He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

**5.** If any person, without the license of Her Majesty, being a British subject, quits or goes on board any ship with a view of quitting Her Majesty's dominions, with intent to accept any commission or engagement in the military or naval service of any foreign state *at war with a friendly state*, or, whether a British subject or not, within Her Majesty's dominions, induces any other person to quit or to go on borad any ship with a view of quitting Her Majesty's dominions with the like intent, —

He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

**6.** If any person induces any other person to quit Her Majesty's dominions or to embark on any ship within Her Majesty's dominions under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign State *at war with a friendly State*, —

He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

**7.** If the master or owner of any ship, without the licence of Her Majesty, knowingly either takes on board, or engages to take on board, or has on board such ship within Her Majesty's domi-

nions, any of the following persons, in this Act referred to as illegally enlisted persons; that is to say,

(1) Any person who, being a British subject within or without the dominions of Her Majesty, has, without the licence of Her Majesty, accepted or agreed to accept any commission or engagement in the military or naval service of any foreign state *at war with any friendly state*;

(2) Any person, being a British subject, who, without the licence of Her Majesty, is about to quit Her Majesty's dominions with intent to accept any commission or engagement in the military or naval service of any foreign State *at war with a friendly state*;

(3) Any person who has been induced to embark under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign State *at war with a friendly state*;

Such master or owner shall be guilty of an offence against this Act, and the following consequences shall ensue; that is to say,

(1) The offender shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour; and

(2) Such ship shall be detained until the trial and conviction or acquittal of the master or owner, and until all penalties inflicted on the master or owner have been paid, or the master or owner has given security for the payment of such penalties to the satisfaction of two justices of the peace, or other magistrate or magistrates having the authority of two justices of the peace; and

(3) All illegally enlisted persons shall immediately on the discovery of the offence be taken on shore, and shall not be allowed to return to the ship.

*Illegal Shipbuilding and Illegal Expeditions*

**8.** If any person within Her Majesty's dominions, without the licence of Her Majesty, does any of the following acts; that is to say,

(1) Builds or agrees to build, or causes to be built any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State *at war with any friendly state*; or

(2) Issues or delivers any commission for any ship with intent or knowledge, or having reasonable cause to believe that the same

shall or will be employed in the military or naval service of any foreign state at war with any friendly state; or

(3) Equips any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state; or

(4) Despatches, or causes or allows to be despatched, any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state;

Such person shall be deemed to have committed an offence against this Act, and the following consequences shall ensue:

(1) The offender shall be punishable by fine and imprisonment or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour;

(2) The ship in respect of which any such offence is committed, and her equipment, shall be forfeited to Her Majesty:

Provided that a person building, causing to be built, or equipping a ship in any of the cases aforesaid, in pursuance of a contract made *before the commencement of such war* as aforesaid, shall not be liable to any of the penalties imposed by this section in respect of such building or equipping if he satisfies the conditions following; that is to say,

(1) If forthwith upon a proclamation of neutrality being issued by Her Majesty, he gives notice to the Secretary of State that he is so building, causing to be built, or equipping such ship, and furnishes such particulars of the contract and of any matters relating to, or done, or to be done under the contract as may be required by the Secretary of State:

(2) If he gives such security, and takes and permits to be taken such other measures, if any, as the Secretary of State may prescribe for ensuring that such ship shall not be despatched, delivered, or removed without the license of Her Majesty until the termination of such war as aforesaid.

**9.** Where any ship is built by order of or on behalf of any foreign state *when at war with a friendly state*, or is delivered to or to the order of such foreign state, or any person who to the knowledge of the person building is an agent of such foreign state, or is paid for by such foreign state or such agent, and is employed in the military or naval service of such foreign state, such ship shall, until the contrary is proved, be deemed to have been built with a view to being so employed, and the burden shall lie on the builder of such ship of proving that he did not know that the ship was intended to be so employed in the military or naval service of such foreign state.

**10.** If any person within the dominions of Her Majesty, and without the licence of Her Majesty, —

By adding to the number of the guns, or by changing those on board for other guns, or by the addition of any equipment for war, increases or augments, or procures to be increased or augmented, or is knowingly concerned in increasing or augmenting the warlike force of any ship which at the time of her being within the dominions of Her Majesty was a ship in the military or naval service of any foreign state *at war with any friendly state*, —

Such person shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

**11.** If any person within the limits of Her Majesty's dominions and without the licence of Her Majesty, —

Prepares or fits out any naval or military expedition to proceed against the dominions of any friendly state, the following consequences shall ensue:

(1) Every person engaged in such preparation or fitting out, or assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

(2) All ships, and their equipments, and all arms and munitions of war, used in or forming part of such expedition, shall be forfeited to Her Majesty.

**12.** Any person who aids, abets, counsels, or procures the commission of any offence against this Act shall be liable to be tried and punished as a principal offender.

**13.** The term of imprisonment to be awarded in respect of any offence against this Act shall not exceed two years.

*Illegal Prize.*

**14.** If, during the continuance of any war in which Her Majesty may be neutral, any ship, goods, or merchandise captured as prize of war within the territorial jurisdiction of Her Majesty, in violation of the neutrality of this realm, or captured by any ship which may have been built, equipped, commissioned, or despatched, or the force of which may have been augmented, contrary to the provisions of this Act, are brought within the limits

of Her Majesty's dominions by the captor, or any agent of the captor, or by any person having come into possession thereof with knowledge that the same was prize of war so captured as aforesaid, it shall be lawful for the original owner of such prize, or his agent or for any person authorized in that behalf by the Government of the foreign state to which such owner belongs, to make application to the Court of Admiralty for seizure and detention of such prize, and the court shall, on due proof of the facts, order such prize to be restored.

Every such order shall be executed and carried into effect in the same manner, and subject to the same right of appeal, as in case of any order made in exercise of the ordinary jurisdiction of such court; and in the meantime and until a final order has been made on such application the court shall have power to make all such provisional and other orders as to the care or custody of such captured ship, goods, or merchandise, and (if the same be of perishable nature, or incurring risk of deterioration) for the sale thereof, and with respect to the deposit or investment of the proceeds of any such sale, as may be made by such court in the exercise of its ordinary jurisdiction.

*General Provision.*

**15.** For the purposes of this Act, a licence by Her Majesty shall be under the sign manual of Her Majesty, or be signified by Order in Council or by proclamation of Her Majesty.

*Legal Procedure.*

**16.** Any offence against this Act shall, for all purposes of and incidental to the trial and punishment of any person guilty of any such offence, be deemd to have been committed either in the place in which the offence was wholly or partly committed, or in any place within Her Majesty's dominions in which the person who committed such offence may be.

**17.** Any offence against this Act may be described in any indictment or other document relating to such offence, in cases where the mode of trial requires such a description, as having been committed at the place where it was wholly or partly committed, or it may be averred generally to have been committed within Her Majesty's dominions, and the venue or local description in the margin may be that of the county, city, or place in which the trial is held.

**18.** The following authorities, that is to say, in the United Kingdom any judge of a superior court, in any other place within the jurisdiction of any British court of justice, such court, or, if there are more courts than one, the court having the highest cri-

minal jurisdiction in that place may, by warrant or instrument in the nature of a warrant in this section included in the term "warrant," direct that any offender charged with an offence against this Act shall be removed to some other place in Her Majesty's dominions for trial in cases where it appears to the authority granting the warrant that the removal of such offender would be conducive to the interests of justice, and any prisoner so removed shall be triable at the place to which he is removed, in the same manner as if his offence had been committed at such place.

Any warrant for the purposes of this section may be addressed to the master of any ship or to any other person or persons, and the person or persons to whom such warrant is addressed shall have power to convey the prisoner therein named to any place or places named in such warrant, and to deliver him, when arrived at such place or places, into the custody of any authority designated by such warrant.

Every prisoner shall, during the time of his removal under any such warrant as aforesaid, be deemed to be in the legal custody of the person or persons empowered to remove him.

**19.** All proceedings for the condemnation and forfeiture of a ship, or ship and equipment, or arms and munitions of war, in pursuance of this Act shall require the sanction of the Secretary of State or such chief executive authority as is in this Act mentioned, and shall be had in the Court of Admiralty, and not in any other court: and the Court of Admiralty shall, in addition to any power given to the court by this Act, have in respect of any ship or other matter brought before it in pursuance of this Act all powers which it has in the case of a ship or matter brought before it in the exercise of its ordinary jurisdiction.

**20.** Where any offence against this Act has been committed by any person by reason whereof a ship, or ship and equipment, or arms and munitions of war, has or have become liable to forfeiture, proceedings may be instituted contemporaneously or not, as may be thought fit, against the offender in any court having jurisdiction of the offence, and against the ship, or ship and equipment, or arms and munitions of war, for the forfeiture in the Court of Admiralty; but it shall not be necessary to take proceedings against the offender, because proceedings are instituted for the forfeiture, or to take proceedings for the forfeiture because proceedings are taken against the offender.

**21.** The following officers, that is to say,

(1) Any officer of customs in the United Kingdom, subject nevertheless to any special or general instructions from the Commissioners of Customs, or any officer of the Board of Trade, subject nevertheless to any special or general instructions from the Board of Trade;

(2) Any officer of customs or public officer in any British possession, subject nevertheless to any special or general instructions from the Governor of such possession;

(3) Any commissioned officer on full pay in the military service of the Crown, subject nevertheless to any special or general instructions from his commanding officer;

(4) Any commissioned officer on full pay in the naval service of the Crown, subject nevertheless to any special or general instructions from the Admiralty or his superior officer, may seize or detain any ship liable to be seized or detained in pursuance of this Act, and such officers are in this Act referred to as the "local authority"; but nothing in this Act contained shall derogate from the power of the Court of Admiralty to direct any ship to be seized or detained by any officer by whom such court may have power under its ordinary jurisdiction to direct a ship to be seized or detained.

**22.** Any officer authorized to seize or detain any ship in respect of any offence against this Act may, for the purpose of enforcing such seizure or detention, call to his aid any constable or officers of police, or any officers of Her Majesty's army or navy or marines, or any excise officers or officers of customs, or any harbour-master or dock-master, or any officers having authority by law to make seizures of ships, and may put on board any ship so seized or detained any one or more of such officers to take charge of the same and to enforce the provisions of this Act, and any officer seizing or detaining any ship under this Act may use force, if necessary, for the purpose of enforcing seizure or detention, and if any person is killed or maimed by reason of his resisting such officer in the execution of his duties, or any person acting under his orders, such officer so seizing or detaining the ship, or other person, shall be freely and fully indemnified as well against the Queen's Majesty, her heirs and successors, as against all persons so killed, maimed, or hurt.

**23.** If the Secretary of State or the chief executive authority is satisfied that there is a reasonable and probable cause for believing that a ship within Her Majesty's dominions has been or is being built, commissioned, or equipped contrary to this Act, and is about to be taken beyond the limits of such dominions, or that a ship is about to be despatched contrary to this Act, such Secretary of State or chief executive authority shall have power to issue a warrant stating that there is reasonable and probable cause for believing as aforesaid, and upon such warrant the local authority shall have power to seize and search such ship, and to detain the same until it has been either condemned or released by process of law, or in manner herein-after mentioned.

The owner of the ship so detained, or his agent, may apply to

the Court of Admiralty for its release, and the court shall as soon as possible put the matter of such seizure and detention in course of trial between the applicant and the Crown.

If the applicant establish to the satisfaction of the court that the ship was not and is not being built, commissioned, or equipped, or intended to be despatched contrary to this Act, the ship shall be released and restored.

If the applicant fail to establish to the satisfaction of the court that the ship was not and is not being built, commissioned, or equipped, or intended to be despatched contrary to this Act, then the ship shall be detained till released by order of the Secretary of State or chief executive authority.

The court may in cases where no proceedings are pending for its condemnation release any ship detained under this section on the owner giving security to the satisfaction of the court that the ship shall not be employed contrary to this Act, notwithstanding that the applicant may have failed to establish to the satisfaction of the court that the ship was not and is not being built, commissioned, or intended to be despatched contrary to this Act. The Secretary of State or the chief executive authority may likewise release any ship detained under this section on the owner giving security to the satisfaction of such Secretary of State or chief executive authority that the ship shall not be employed contrary to this Act, or may release the ship without such security if the Secretary of State or chief executive authority think fit so to release the same.

If the court be of opinion that there was not reasonable and probable cause for the detention, and if no such cause appear in the course of the proceedings, the court shall have power to declare that the owner is to be indemnified by the payment of costs and damages in respect of the detention, the amount thereof to be assessed by the court, and any amount so assessed shall be payable by the Treasury out of any moneys legally applicable for that purpose. The Court of Admiralty shall also have power to make a like order for the indemnity of the owner, on the application of such owner to the court, in a summary way, in cases where the ship is released by the order of the Secretary of State or the chief executive authority, before any application is made by the owner or his agent to the court for such release.

Nothing in this section contained shall affect any proceedings instituted or to be instituted for the condemnation of any ship detained under this section where such ship is liable to forfeiture, subject to this provision, that if such ship is restored in pursuance of this section all proceedings for such condemnation shall be stayed; and where the court declares that the owner is to be indemnified by the payment of costs and damages for the detainer, all costs, charges, and expenses incurred by such owner in or

about any proceedings for the condemnation of such ship shall be added to the costs and damages payable to him in respect of the detention of the ship.

Nothing in this section contained shall apply to any foreign non-commissioned ship despatched from any part of Her Majesty's dominions after having come within them under stress of weather or in the course of a peaceful voyage, and upon which ship no fitting out or equipping of a warlike character has taken place in this country. (*As amended by the 56-57 Vict., c. 54*).

**24.** Where it is represented to any local authority, as defined by this Act, and such local authority believes the representation, that there is a reasonable and probable cause for believing that a ship within Her Majesty's dominions has been or is being built, commissioned, or equipped contrary to this Act, and is about to be taken beyond the limits of such dominions, or that a ship is about to be despatched contrary to this Act, it shall be the duty of such local authority to detain such ship, and forthwith to communicate the fact of such detention to the Secretary of State or chief executive authority.

Upon the receipt of such communication the Secretary of State or chief executive authority may order the ship to be released if he thinks there is no cause for detaining her, but if satisfied that there is reasonable and probable cause for believing that such ship was built, commissioned, or equipped or intended to be despatched in contravention of this Act, he shall issue his warrant stating that there is reasonable and probable cause for believing as aforesaid, and upon such warrant being issued further proceedings shall be had as in cases where the seizure or detention has taken place on a warrant issued by the Secretary of State without any communication from the local authority.

Where the Secretary of State or chief executive authority orders the ship to be released on the receipt of a communication from the local authority without issuing his warrant, the owner of the ship shall be indemnified by the payment of costs and damages in respect of the detention upon application to the Court of Admiralty in a summary way in like manner as he is entitled to be indemnified where the Secretary of State having issued his warrant under this Act releases the ship before any application is made by the owner or his agent to the court for such release.

**25.** The Secretary of State or the chief executive authority may, by warrant, empower any person to enter any dockyard or other place within Her Majesty's dominions and inquire as to the destination of any ship which may appear to him to be intended to be employed in the naval or military service of any foreign State at war with a friendly State and to search such ship.

**26.** Any powers or jurisdiction by this Act given to the Secretary of State may be exercised by him throughout the dominions of Her Majesty, and such powers and jurisdiction may also be exercised by any of the following officers, in this Act referred to as the chief executive authority, within their respective jurisdictions; that is to say;

(1) In *Ireland* by the Lord Lieutenant or the Chief Secretary:

(2) In *Jersey* by the Lieutenant Governor:

(3) In *Guernsey*, *Alderney*, and *Sark*, and the dependent islands by the Lieutenant Governor:

(4) In the *Isle of Man* by the Lieutenant Governor:

(5) In any British possession by the Governor.

A copy of any warrant issued by a Secretary of State or by any officer authorized in pursuance of this Act to issue such warrant in *Ireland*, the *Channel Islands*, or the *Isle of Man* shall be laid before parliament. (*As amended by the 56-57 Vict., c. 54*).

**27.** An appeal may be had from any decision of a Court of Admiralty under this Act to the same tribunal, and in the same manner to and in which an appeal may be had in cases within the ordinary jurisdiction of the court as a Court of Admiralty.

**28.** Subject to the provisions of this Act, providing for the award of damages in certain cases, in respect of the seizure or detention of a ship by the Court of Admiralty no damages shall be payable, and no officer or local authority shall be responsible, either civilly or criminally, in respect of the seizure or detention of any ship in pursuance of this Act.

**29.** The Secretary of State shall not, nor shall the chief executive authority be responsible in any action or other legal proceedings whatsoever for any warrant issued by him in pursuance of this Act, or be examinable as a witness, except at his own request, in any court of justice in respect of the circumstances which led to the issue of the warrant.

*Interpretation Clause.*

**30.** In this Act, if not inconsistent with the context, the following terms have the meanings herein-after respectively assigned to them; that is to say,

"Foreign state" includes any foreign prince, colony, province, or part of any province or people, or any person or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province or people:

"Military service" shall include military telegraphy, and any other employment whatever, in or in connexion with any military operation:

"Naval service" shall, as respects a person, include service as a marine, employment as a pilot in piloting or directing the course of a ship of war or other ship, when such ship of war or other ship is being used in any military or naval operation, and any employment whatever on board a ship of war, transport, store ship, privateer or ship under letters of marque; and as respects a ship, include any user of a ship as a transport, store ship, privateer or ship under letters of marque:

"United Kingdom" includes the *Isle of Man*, the *Channel Islands*, and other adjacent islands:

"British possession" means any territory, colony, or place being part of Her Majesty's dominions, and not part of the United Kingdom as defined by this Act:

"The Governor" shall as respects *India* mean the Governor General or the Governor of any presidency, and where a British possession consists of several constituent colonies, mean the Governor General of the whole possession, or the Governor of any of the constituent colonies, and as respects any other British possession, it shall mean the officer for the time being administering the government of such possession; also any person acting for or in the capacity of a Governor shall be included under the term "Governor":

"Court ofAdmiralty" shall mean the High Court of Admiralty of *England* or *Ireland*, the Court of Session of *Scotland*, or any Vice-Admiralty Court within Her Majesty's dominions:

"Ship" shall include any description of boat, vessel, floating battery, or floating craft; also any description of boat, vessel, or other craft or battery, made to move either on the surface of or under water, or sometimes on the surface of and sometimes under water:

"Building" in relation to a ship shall include the doing any act towards or incidental to the construction of a ship, and all words having relation to building shall be construed accordingly:

"Equipping" in relation to a ship shall include the furnishing a ship with any tackle, apparel, furniture, provisions, arms, munitions, or stores, or any other thing which is used in or about a ship for the purpose of fitting or adapting her for the sea or for naval service, and all words relating to equipping shall be construed accordingly:

"Ship and equipment" shall include a ship and everything in or belonging to a ship:

"Master" shall include any person having the charge or command of a ship. (*As amended by 56-57 Vic., c. 54*).

*Repeal of Acts, and Saving Clauses.*

**31.** [This section, 31, was repealed by the 46-47 Vict., 39].

**32.** Nothing in this Act contained shall subject to forfeiture any commissioned ship of any foreign state, or give to any British court over or in respect of any ship entitled to recognition as a commissioned ship of any foreign state, any jurisdiction which it would not have had if this Act had not passed.

**33.** Nothing in this Act contained shall extend or be construed to extend to subject to any penalty any person who enters into the military service of any prince, state, or potentate in Asia, with such leave or license as is for the time being required by law in the case of subjects of Her Majesty entering into the military service of princes, states, or potentates in Asia.

**Remarks.**—The *Foreign Enlistment Act*, though somewhat lengthy, contains only a few short points.

Each section when dealing with a time of war mentions it.

The second and third sections extend the Act to all the dominions of the British empire, including the adjacent territorial waters.

The 59 Geo. 3, c. 69, (which was the basis of the present Act), was, previously to 1870, held to be in force in Canada in a case in which the defendants were indicted in London, Ontario, on a charge of having, without the license of the Crown, engaged and procured a person to enlist as a soldier in the land service of the United States. (1)

Sections 4 to 7 deal with the enlistment of British subjects in the military or naval service of any foreign State *at war* with a *friendly State*. They also deal with any person who, by misrepresentation, induces any other person, in the like circumstances of war, to quit the British dominions; and the master and owner of any ship is made liable for knowingly taking such persons on board.

Upon the trial of an indictment alleging that at Liverpool, the defendants engaged and procured men to enlist as sailors, etc., in the service of a belligerent State, the evidence shewed that the men were engaged by the defendants at Liverpool to enter themselves as the crew of a vessel lying there for a voyage to China and that afterwards when the vessel was off the coast of France the men were, in the presence of one of the defendants enlisted in the belligerent service; and the jury were directed that, if the defendants engaged the men in Liverpool with the intention that they should afterwards be enlisted abroad in the belligerent service, the indictment was sustained. (2)

Sections 8 and 9 prohibit the building, commissioning, equipping or despatching ships to be employed in the service of any foreign State *at war* with a friendly State.

But the trade of the United Kingdom and her colonies in ship building is not to be stopped if there is no war; and contracts can be accepted from all before the commencement of hostilities. (3)

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(1) R. v. Schram & Anderson, 10 U. C. L. J., 267.
(2) R. v. Jones & Highat, 4 F. & F., 25. See Atty. Gen. v. Sillem, The "*Alexandra*," 3 F. & F., 646.
(3) See R. v. Sandoval, Baird & Call, 16 Cox, C. C., 206.

In a case under the 59 Geo. 3, c. 69, it was held that, — although it could not be stated who were the persons exercising or assuming to exercise powers of government, yet if there were a body of insurgents who were part of a province or people and who were acting together, undertaking and conducting hostilities, and the ship was in the service of this body, that was enough for the forfeiture of a ship acting without leave or license. (4)

Section 10 of the Act deals with the augmentation of the warlike force of a ship in the military or naval service of any foreign State *at war* with a *friendly* State.

Section 11 deals with an offence not included in the 59 Geo. 3, c. 69. It prohibits the preparing or fitting out, in any part of the British dominions, of any naval or military expedition to proceed from thence against the territory or dominions of any friendly State, that is, any people with whom the United Kingdom is not at war. So, that, there need be no war at all to make the preparing or fitting out of any naval or military expedition against the dominions of a friendly state an offence under this section. This is the section under which Dr Jameson and his troopers were prosecuted on a charge of having prepared and fitted out a military expedition against the South African Republic.

It seems that where there is an unlawful preparation of an expedition by any persons within the British dominions, any British subject who assists in such preparation will be guilty of an offence against the Act, even though he renders his assistance from a place outside of the British dominions. (5)

Section 14 of the Act deals with unlawful prize; and sections 16 to 29 deal with "Legal Procedure."

With regard to punishment, it will be seen, — by sections 4, 5, 6, 7, 8, 10 and 11, — that the punishment by way of fine is unlimited, but, by section 13, the punishment by imprisonment is limited to two years. And the punishment may be by fine, imprisonment or either, at the discretion of the Court, and the imprisonment may be with or without hard labor.

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# EXTRA APPENDIX C.

## INTERPRETATION ACT AMENDMENT ACT.

[1 Edw. VII, c. 11].

**1.** Section 7 of *The Interpretation Act*, chapter 1 of the Revised Statutes of Canada, is hereby amended by inserting immediately after paragraph (31) thereof the following paragraph: —

(31A) The expression "county court," in its application to the Province of Ontario, includes "district court."

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(4) R. v. Carlin, The "*Salvador*", 3 L. R., P. C., 218.
(5) R. v. Jameson and others, 18 Cox, C. C., 392; [1896] 2 Q. B., 425.

## VICTORIA DAY ACT.

[1 Edw. VII, c. 12].

**1.** Throughout Canada, in each and every year, the twenty-fourth day of May, being the birthday of Her late Majesty Queen Victoria, shall, when not a Sunday, be a legal holiday and shall be kept and observed as such under the name of "Victoria Day."

**2.** When the twenty-fourth day of May is a Sunday, the twenty-fifth day of May shall be, in lieu thereof, a legal holiday throughout Canada, and shall be kept and observed as such under the same name.

**3.** Paragraph 26 of section 7 of *The Interpretation Act* is amended by inserting after the word "sovereign," in the seventh line, the words "Victoria Day,"

**4.** Subsection 2 of section 14 of *The Bills of Exchange Act*, 1890, is amended by adding to the days to be observed in the several provinces as legal holidays or non-juridical days, "Victoria Day."

## DEMISE OF THE CROWN ACTS.

[1 Edw. VII, c. 37].

An Act to make certain provisions necessitated by the Demise of the Crown.

**1.** No writ, cause, action, suit, plea, judgment or process or any other proceeding whatsoever whether civil or criminal in or issuing out of any court shall be determined, abated or discontinued by the demise of the Crown upon the death of Her late Majesty Queen Victoria or by any demise of the Crown that may hereafter take place, but every such writ, cause, action, suit, plea, judgment, process or other proceeding shall remain in full force and virtue to be proceeded upon or with, notwithstanding any such demise of the Crown.

[1 Edw. VII, c. 38].

An Act to remove doubts concerning the continuance in office of Judges upon the Demise of the Crown.

**1.** The commissions of all Judges of Dominion and Provincial Courts who held office at the time of the demise of the Crown upon the death of Her late Majesty Queen Victoria continued and remained and continue and remain in full force notwithstanding such demise, and the commissions of all Judges of such Courts shall hereafter continue and remain in full force notwithstanding any demise of the Crown.

# EXTRA APPENDIX D.

## THE ALIEN LABOR ACT.

[60-61 Vict., c. 11].

(As amended by the 61 Vict., c. 2, and by the 1 Edw. VII, c. 13).

1. **Importation of foreign labor prohibited.** — From and after the passing of this Act it shall be unlawful for any person company, partnership or corporation, in any manner to prepay the transportation, or in any way to assist or encourage the importation, or immigration of any alien or foreigner into Canada, under contract or agreement, parole or special, express or implied, made previous to the importation or immigration of such alien or foreigner, to perform labour or service of any kind in Canada.

2. All contracts or agreements, express or implied, parole or special, hereafter made by and between any person, company, partnership or corporation, and any alien or foreigner, to perform labour or service, or having reference to the performance of labour or service by any person in Canada, previous to the immigration or importation of the person whose labour or service is contracted for into Canada, shall be void and of no effect.

3. **Penalty. — Mode of Recovery.** — For every violation of any of the provisions of section 1 of this Act, the person, partnership, company or corporation violating it by knowingly assisting, encouraging or soliciting the immigration or importation of any alien or foreigner into Canada to perform labour or service of any kind under contract or agreement, express or implied, parole or special, with such alien or foreigner, previous to his becoming a resident in or a citizen of Canada, shall forfeit and pay a sum not exceeding one thousand dollars, nor less than fifty dollars.

2. The sum so forfeited may, with the written consent of any judge of the court in which the action is intended to be brought, be sued for and recovered as a debt by any person who first brings his action therefor in any court of competent jurisdiction in which debts of like amount are now recovered.

3. Such sum may also, with the written consent, to be obtained *ex parte*, of the Attorney General of the province in which the prosecution is had, or of a judge of a superior or county court, be recovered upon summary conviction before any judge of a county court (being a justice of the peace), or any judge of the sessions of

the peace, recorder, police magistrate, or stipendiary magistrate, or any functionary, tribunal, or person invested, by the proper legislative authority, with power to do alone such acts as are usually required to be done by two or more justices of the peace, and acting within the local limits of his or its jurisdiction.

4. The sum recovered shall be paid the Minister of Finance and Receiver General.

5. Separate proceedings may be instituted for each alien or foreigner who is a party to such contract or agreement. (*As amended by the 1 Edw. VII, c. 13, sec. 1*).

**4. Penalty on master of ship knowingly bringing such aliens.** — The master of any vessel who knowingly brings into Canada on such vessel and lands or permits to be landed from any foreign port or place any alien, labourer, mechanic or artisan who, previous to embarkation on such vessel, had entered into contract or agreement, parole or special, express or implied, to perform labour or service in Canada, shall be deemed guilty of an indictable offence and on conviction thereof shall be punished by a fine of not more than five hundred dollars for each alien, labourer, mechanic or artisan so brought or landed, and may also be imprisoned for a term not exceeding six months.

**5. Exemptions.** — Nothing in this Act shall be so construed as to prevent any citizen or subject of any foreign country temporarily residing in Canada, either in private or official capacity, from engaging, under contract or otherwise, persons not residents or citizens of Canada, to act as private secretaries, servants or domestics for such foreigner temporarily residing in Canada; nor shall this Act be so construed as to prevent any person, partnership or corporation from engaging, under contract or agreement, skilled workmen in foreign countries to perform labor in Canada, in or upon any new industry not at present established in Canada, provided that skilled labor for that purpose cannot be otherwise obtained; nor shall the provisions of this Act apply to professional actors, artists, lecturers or singers, or to persons employed strictly as personal or domestic servants: Provided, that nothing in this Act shall be construed as prohibiting any person from assisting any member of his family or any relative, to migrate from any foreign country to Canada for the purpose of settlement here. (*As amended by the 1 Edward VII, c. 13, sec. 2*).

**6. Immigrants unlawfully landed to be returned.** — The Attorney General of Canada, in case he shall be satisfied that an immigrant has been allowed to land in Canada contrary to the prohibition of this Act, may cause such immigrant, within the period of one year after landing or entry, to be taken into custody and returned to the country whence he came, at the expense

of the owner of the importing vessel, or, if he entered from an adjoining country at the expense of the person, partnership, company or corporation violating section 1 of this Act (*As amended by the 1 Edw. VII, c. 13, sec. 3*).

**7.** The Receiver General may pay to any informer who furnishes original information that the law has been violated such a share of the penalties recovered as he deems reasonable and just, not exceeding fifty per cent, where it appears that the recovery was had in consequence of the information thus furnished.

**8. Advertizing for foreign labor.** — It shall be deemed a violation of this Act for any person, partnership, company or corporation to assist or encourage the importation or immigration of any person who resides in, or is a citizen of, any foreign country to which this Act applies, by promise of employment through advertisements printed or published in such foreign country; and any such person coming to this country in consequence of such an advertisement shall be treated as coming under a contract as contemplated by this Act, and the penalties by this Act imposed shall be applicable in such case: Provided, that this section shall not apply to skilled labour not obtainable in Canada, as provided by section 5 of this Act. (*As amended by the 1 Edw. VII, c. 13, sec. 4*).

**9. Application of Act.** — This Act shall apply only to the importation or immigration of such persons as reside in or are citizens of such foreign countries as have enacted and retained in force, or as enact and retain in force, laws or ordinances applying to Canada, of a character similar to this Act. (*As amended by the 1 Edw. VII, c. 13, sec. 5.*).

2. Evidence of any such law or ordinance of a foreign country may be given, —

(*a*) by the production of a copy thereof purporting to be printed by the Government Printer or at the Government Printing Office of such foreign country or contained in a volume of laws or ordinances of such country purporting to be so printed; or

(*b*) by the production of a copy thereof purporting to be certified to be true by some officer of state of such foreign country who also certifies that he is the custodian of the original of such law or ordinance, in which case no proof shall be required of the handwriting or official position of the person so certifying. (*Added by the 61 Vict., c. 2, sec. 1*).

Section 6 of the *Amending Act*. — 1 Edw. VII, c. 13, — is as follows: —

**6. Powers of Government not affected.** — Nothing in the said Act shall affect the exercise of the powers of the Government of Canada or of any province in connection with the promotion of immigration.

# EXTRA APPENDIX E.

## THE YUKON TERRITORY ACTS.

[61 Vic., c. 6, 62-63 Vic., c. 11, and 1 Edw. VII, c. 41].

The Yukon Territory was constituted and defined, in the first instance, by section 2 of the 61 Vict., c. 6, and by the Governor General's proclamation contained in the schedule to that Act; but that section and schedule have been repealed and replaced by sections 13 and 14 of and the schedule to the 1 Edw. VII, c. 41.

By sections 3 and 4 of the 61 Vict., c. 6, it is provided that a Commissioner, appointed by the Governor General in Council, shall, — under instructions from the latter or from the Minister of the Interior, — administer the Government of the Yukon territory; and section 1 of the 62-63 V., c. 11, (replacing section 5 of the 61 Vict., c. 6) provides for the appointment of a Council to assist the Commissioner in administering the government.

Section 10 of the 61 Vict., c. 6 relates to the constitution of a Superior Court called the Territorial Court and the qualifications of the judges thereof.

Sections 1 to 4 of the 1 Edw. VII, c. 41, provide for the appointment, remuneration and qualification of police magistrates for Dawson and White Horse in the Yukon Territory; while section 5 of that Act relates to their powers, and is as follows: —

"**5.** Each of the police magistrates so appointed shall *ex officio*, within the territorial limits of his jurisdiction, be a justice of the peace and have and exercise the authority and jurisdiction of two or more justices of the peace sitting or acting together.

"2. Each such police magistrate shall also within such limits be a magistrate for the purposes of Part LV. of *The Criminal Code*, 1892, and amendments thereto, and shall have and exercise all the jurisdiction of such a magistrate, including that vested in police magistrates of cities and incorporated towns by section 785 of *The Criminal Code*, 1892, as that section is enacted by section 3 of chapter 46 of the statutes of 1900, and his jurisdiction under the said Part shall be absolute without the consent of the person charged, except where such jurisdiction is dependent upon the provisions of said section 785 or of sections 789 and 790 of *The Criminal Code*, 1892, as amended."

Section 11 of the 1 Edw. VII, c. 41, relates to criminal appeals, and is as follows: —

**11.** For the purposes of Part LII of *The Criminal Code* 1892, and amendments, the Court of Appeal from the verdict or judgment of the Territorial Court or a judge thereof shall be the Supreme Court of Canada.

"2. For the purposes of the said Part LII., the court of appeal from the judgment of a police magistrate proceeding under section 785 of *Criminal Code*, 1892, as amended, shall be the Territorial Court *en banc*.

"3. The judgment of the Territorial Court upon any such appeal from a police magistrate shall be final and conclusive if the judges of the court are unanimous therein, otherwise there shall be an appeal therefrom to the Supreme Court of Canada.

"4. In the said territory the appeal from a summary conviction or order under Part LVIII., of *The Criminal Code*, 1892, shall be to a judge of the Territorial Court sitting without a jury at the place where the cause of the information or complaint arose, or the nearest place thereto where a court is appointed to be held."

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# EXTRA APPENDIX F.

## THE FUGITIVE OFFENDERS' ACT OF CANADA.

[R.S.C., CHAP. 143].

An Act respecting fugitive offenders in Canada from other parts of Her Majesty's Dominions.

HER MAJESTY, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows: —

**1. Short Title.** — This Act may be cited as "*The Fugitive Offenders' Act.*" 45 V., c. 21, s. 1.

**2. Interpretation.** — In this Act, unless the context otherwise requires, —

(*a*) The expression "Magistrate" means any Justice of the Peace or any person having authority to issue a warrant for the apprehension of persons accused of offences, and to commit such persons for trial;

(*b*) The expression "Deposition" includes every affidavit, affirmation, or statement made upon oath;

(*c*) The expression "Court" means — in the province of Ontario, the High Court of Justice for Ontario; in the province of Quebec, the Superior Court; in the province of Nova Scotia, the Supreme Court; in the province of New Brunswick, the Supreme Court; in the province of Prince Edward Island, the Supreme Court of Judicature; in the province of British Columbia, the Supreme Court; in the province of Manitoba, Her Majesty's Court of Queen's Bench for Manitoba, in the North-West Territories, a Judge of the Supreme Court for the North-West Territories; in the District of Keewatin, a stipendiary Magistrate; and also in the said Territories and District such Court or Magistrate or other judicial authority as is designated, from time to time, by proclamation of the Governor in Council published in the *Canada Gazette*. 45 V., c. 21, s. 16, *part*, — 49 V., c. 25, s. 30.

The words "His Majesty's Court of King's Bench" should be substituted for "Her Majesty's Court of Queen's Bench" in this section.

**3. Application of Act.** — This Act shall apply to the following offences, that is to say: to treason and to piracy, and to every offence, whether called felony, misdemeanor, crime or by any other name, which is for the time being punishable in the part of Her Majesty's dominions in which it was committed, either on indictment or information, by imprisonment with hard labor for a term of twelve months or more, or by any greater punishment, and, for the purposes of this section, rigourous imprisonment, and any confinement in a prison combined with labor, by whatever name it is called, shall be deemed to be imprisonment with hard labor.

2. This Act shall apply to an offence, notwithstanding that, by the law of Canada, it is not an offence or not an offence to which this Act applies; and all the provisions of this Act, including those relating to a provisional warrant and to a committal to prison, shall be construed as if the offence were in Canada an offence to which this Act applies:

3. This Act shall apply, so far as is consistent with the tenor thereof, to every person convicted by a Court in any part of Her Majesty's dominions, of an offence committed either in Her Majesty's dominions or elsewhere, who is unlawfully at large before the expiration of his sentence, in like manner as it applies to a person accused of the like offence committed in the part of Her Majesty's dominions in which such person was convicted:

4. This Act shall apply in respect to offences committed before the commencement of this Act, in like manner as if such offences were committed after such commencement. 45 V., c. 21, ss. 8, 14 and 15.

Substitute "His Majesty's dominions" for "Her Majesty's dominions" in this and the following sections of this Act.

By section 2 of the Imperial *Fugitive Offenders' Act, 1881*, (44-45 Vict., c. 69), it is provided that a person, — who is accused of having committed, in one part of the British dominions, an offence to which the Act applies, and who is a fugitive from such part, — shall, if found in another part of the British dominions, be liable to be apprehended and returned to the part from which he is a fugitive.

The Imperial Act is, by section 9 thereof, made applicable to the same class of offences as those to which our own Act is made applicable by the above section 3 thereof.

It will be seen that, both the Imperial Act and our own Act apply only to offences punishable by imprisonment with *hard labor* for a term of twelve months or more and that they do not apply to an offence punishable by imprisonment for one year *without* hard labor. So, that, where an alleged offender was arrested in England upon a charge of having committed, in Canada, an offence subject to the lesser punishment, it was held that, he could not be returned for trial but must be discharged. In that case, the charge against the prisoner was that of having, at Montreal, fraudulently forged an invoice and of having wilfully made a false declaration in passing a Customs' entry, the punishment for such offences being, under the *Customs' Act*, (R. S. C., c. 32, section 192), a fine, or imprisonment for a term not exceeding one year, or both fine and imprisonment, — there being nothing said about hard labor. (1)

RETURN OF FUGITIVES.

**4. Apprehension and return of fugitive offenders.** — Whenever a person accused of having committed an offence to which this Act applies in any part of Her Majesty's dominions, except Canada, has left that part, such person, in this Act referred to as a fugitive from that part, if found in Canada, shall be liable to be apprehended and returned, in the manner provided by this Act, to the part from which he is a fugitive:

2. A fugitive may be so apprehended under an indorsed warrant or a provisional warrant. 45 V., c. 21, s. 2.

**5. Proceedings in Canada on warrant issued elsewhere.**—Whenever a warrant has been issued in a part of Her Majesty's dominions for the apprehension of a fugitive from that part who is, or is suspected to be in or on the way to Canada, the Governor General or a Judge of a Court, if satisfied that the warrant was issued by some person having lawful authority to issue the same, may indorse such warrant in manner provided by this Act, and the warrant so indorsed shall be a sufficient authority to apprehend the fugitive in Canada and bring him before a Magistrate. 45 V., c. 21, s. 3.

**6. Provisional warrant.** — A Magistrate in Canada may issue a provisional warrant for the apprehension of a fugitive who is or is suspected of being in or on his way to Canada, on such information and under such circumstances as would, in his opinion,

(1) R. v. Boyd, 21 C. L. T. — (Editorial Review), — 80.

justify the issue of a warrant, if the offence of which the fugitive is accused had been committed within his jurisdiction; and such warrant may be backed and executed accordingly:

2. A Magistrate issuing a provisional warrant shall forthwith send a report of the issue together with the information or a certified copy thereof to the Governor General; and the Governor General may if he thinks fit discharge the person apprehended under such warrant. 45 V., c. 21, s. 4.

**7. Proceedings on fugitive's apprehension.** — A fugitive, when apprehended, shall be brought before a Magistrate, who, subject to the provisions of this Act, shall hear the case in the same manner, and have the same jurisdiction and powers, as nearly as may be, including the power to remand and admit to bail, as if the fugitive was charged with an offence committed within his jurisdiction;

2. If the endorsed warrant for the apprehension of the fugitive is duly authenticated, and such evidence is produced as, subject to the provisions of this Act, according to the law ordinarily administered by the Magistrate raises a strong or probable presumption that the fugitive committed the offence mentioned in the warrant, and that the offence is one to which this Act applies, the Magistrate shall commit the fugitive to prison to await his return, and shall forthwith send a certificate of the committal and such report of the case, as he thinks fit, to the Governor General.

3. Whenever the Magistrate commits the fugitive to prison he shall inform the fugitive that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus* or other like process;

4. A fugitive apprehended on a provisional warrant may, from time to time, be remanded for such reasonable time not exceeding seven days at any one time as under the circumstances seems requisite for the production of an endorsed warrant. 45 V., c. 21, s. 5.

It has been held that, the Imperial *Fugitive Offenders' Act, 1881*, does not take away, from the High Court of Justice, its inherent power to grant bail to a fugitive offender apprehended in England and committed to prison by a magistrate to await his surrender for trial at a Consular Court. (1)

But, there are circumstances under which the Court will, in such a case, refuse to grant bail. (2)

**8. Order for fugitive's return.** — Upon the expiration of fifteen days after the fugitive has been committed to prison to await his

(1) R. v. Spilsbury, 67 L. J., Q. B., 838; [1898] 2 Q. B., 615; 19 Cox C. C., 160.

(2) See, for such circumstances, R. v. Hole, 62 J. P., 616.

return, — or if a writ of *habeas corpus* or other like process is issued by a Court with reference to such fugitive, after the final decision of the Court in the case, — the Governor General, by warrant under his hand, if he thinks it just, may order the fugitive to be returned to the part of Her Majesty's dominions from which he is a fugitive, and for that purpose to be delivered into the custody of the persons to whom the warrant is addressed, or some one or more of them, and to be held in custody and conveyed to the said part of Her Majesty's dominions, to be dealt with there, in due course of law, as if he had been there apprehended; and such warrant shall be forthwith executed according to the tenor thereof. 45 V., c. 21, s. 6.

**9. Discharge of fugitive in certain cases.**—If a fugitive who, in pursuance of this Act, has been committed to prison in Canada to await his return, is not conveyed out of Canada within two months after such committal, the Court, upon application, by or on behalf of the fugitive, and upon proof that reasonable notice of the intention to make such application has been given to the Governor General, may, unless sufficient cause is shown to the contrary, order the fugitive to be discharged out of custody. 45 V., c. 21, s. 7.

**10.** Whenever it is made to appear to the Court that by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities for communication, and to all the circumstances of the case, be unjust or oppressive or too severe a punishment to return the fugitive either at all or until the expiration of a certain period, such Court may discharge the fugitive, either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises, as to the Court seems just. 45 V., c. 21, s. 9.

**11. A fugitive undergoing sentence for another offence.** — A fugitive who has been accused of an offence within Canadian jurisdiction, not being the offence for which his surrender is asked, or who is undergoing sentence under a conviction in Canada, shall not be surrendered until after he has been discharged, whether by acquittal or by expiration of his sentence, or otherwise.

**12. Search warrant.** — Whenever a warrant, for the apprehension of a person accused of an offence, has been endorsed in pursuance of this Act, in Canada, any magistrate in Canada shall have the same power of issuing a warrant to search for any property alleged to have been stolen or to be otherwise unlawfully taken or obtained by such person, or otherwise to be the subject of such

offence, as that magistrate would have if the property had been stolen or otherwise unlawfully taken or obtained, or the offence had been committed wholly within the jurisdiction of such magistrate. 45 V., c. 21, s. 10.

**13. Exercise of judicial powers.** — Any judge of the court may either in term time or vacation, exercise in chambers, all the powers conferred by this Act upon the court. 45 V., c. 21, s. 16, *part*.

**14. Endorsement on a warrant.** — An indorsement of a warrant in pursuance of this Act shall be signed by the authority indorsing the same, and shall authorize all or any of the persons named in the indorsement, and of the persons to whom the warrant was originally directed, and also every constable, to execute the warrant within Canada by apprehending the person named in it, and bringing him before a magistrate in Canada, whether he is the magistrate named in the indorsement or some other:

2. Every warrant, summons, subpœna and process, and every indorsement made in pursuance of this Act thereon, shall, for the purpose of this Act, remain in force, notwithstanding that the person signing the warrant or such indorsement dies or ceases to hold office. 45 V., c. 21, s. 11.

**15. Manner of return of fugitive.** — Whenever a fugitive or prisoner is authorized to be returned to any part of Her Majesty's dominions in pursuance of this Act, such fugitive or prisoner may be sent thither in any ship registered in Canada or belonging to the Government of Canada:

2. The Governor General, for the purpose aforesaid, may, by the warrant for the return of the fugitive, order the master of any ship registered in Canada, bound to the said part of Her Majesty's dominions, to receive such fugitive or prisoner, and afford a passage and subsistence during the voyage to him and to the person having him in custody, and to the witnesses; but such master shall not be required to receive more than one fugitive or prisoner for every hundred tons of his ship's registered tonnage, or more than one witness for every fifty tons of such tonnage:

3. The Governor General shall cause to be endorsed upon the agreement of the ship such particulars with respect to any fugitive prisoner or witness sent in her, as the Minister of Marine and Fisheries, from time to time, requires:

4. Every such master shall, on his ship's arrival in the said part of Her Majesty's dominions, cause such fugitive or prisoner, if he is not in the custody of any person, to be given into the custody of some constable there, to be dealt with according to law:

5. Every master who fails, on payment or tender of a reasonable amount for expenses, to comply with an order made in pursuance of this section, or to cause a fugitive or prisoner committed to his charge to be given into custody as required by this section, shall be liable, on summary conviction, to a penalty not exceeding two hundred dollars. 45 V., c. 21, s. 12.

EVIDENCE.

**16. Depositions.** — A Magistrate may take depositions for the purposes of this Act, in the absence of a person accused of an offence, in like manner as he might take the same if such person was present and accused of the offence before him. 45 V., c. 21, s. 13, *part.*

**17.** Depositions whether taken in the absence of the fugitive or otherwise and copies thereof, and official certificates of, or judicial documents stating facts, may, if duly authenticated, be received in evidence in proceedings under this Act. 45 V., c. 21, s. 13, *part.*

**18. Authentication of Warrants, etc.** — Warrants and depositions and copies thereof, and official certificates of, or judicial documents stating facts, shall be deemed duly authenticated for the purposes of this Act, if they are authenticated in manner provided, for the time being, by law, or if they purport to be signed by or authenticated by the signature of a Judge, Magistrate or Officer of the part of Her Majesty's dominions in which the same are issued, taken or made, and are authenticated either by the oath of some witness or by being sealed with the official seal of a Secretary of State, or with the public seal of a British possession, or with the official seal of a Governor of a British possession or of a Colonial Secretary, or of some Secretary or Minister administering a department of the government of a British possession; and all Courts and Magistrates shall take judicial notice of every such seal as is in the section mentioned, and shall admit in evidence without further proof the documents authenticated by it. 45 V., c. 21, s. 13, *part.*

# EXTRA APPENDIX G.

## THE EXTRADITION ACTS.

### THE EXTRADITION ACT OF 1886.

[R.S.C., chap. 142].

An Act respecting the Extradition of Fugitive Criminals.

HER MAJESTY, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

**1. Short title.** — This Act may be cited as "*The Extradition Act.*" 40 V., c. 25, s. 24.

**2. Interpretation.** — In this Act, unless the context otherwise requires, —

(*a*) The expression "extradition arrangement," or "arrangement," means a treaty, convention or arrangement made by Her Majesty with a foreign state for the surrender of fugitive criminals, and which extends to Canada;

(*b*) The expression "extradition crime" may mean any crime which, if committed in Canada, or within Canadian jurisdiction, would be one of the crimes described in the first schedule to this Act, — and, in the application of this Act to the case of any extradition arrangement, means any crime described in such arrangement whether comprised in the said schedule or not;

(*c*) The expressions "conviction" and "convicted" do not include the case of a condemnation under foreign law by reason of contumacy; but the expression "accused person" includes a person so condemned;

(*d*) The expressions "fugitive" and "fugitive criminal" mean a person being or suspected of being in Canada, who is accused or convicted of an extradition crime committed within the jurisdiction of any foreign state;

(*e*) The expression "foreign state" includes every colony, dependency and constituent part of the foreign state; and every vessel of any such state shall be deemed to be within the jurisdiction of and to be part of the state;

(*f*) The expression "warrant," in the case of a foreign state, includes any judicial document authorizing the arrest of a person accused or convicted of crime;

(*g*) The expression "judge" includes any person authorized to act judically in extradition matters. 40 V., c. 25, s. 1.

Under the authority of the Imperial *Extradition Acts*, 1870 and 1873, an Imperial Order in Council was made on the 17th day of November 1888, (see page XV of the Statutes of Canada, 1889), ordering that the operation of the Imperial Extradition Acts should be suspended within the Dominion of Canada so long as the provisions of the Canadian Extradition Act continue in force.

**3. Application of Act.** — In the case of any foreign state with which there is, at or after the time when this Act comes into force an extradition arrangement, this Act shall apply during the continuance of such arrangement; but no provision of this Act, which is inconsistent with any of the terms of the arrangement, shall have effect to contravene the arrangement; and this Act shall be so read and construed as to provide for the execution of the arrangement:

2. In the case of any foreign state with respect to which the application to the United Kingdom of the Act of the Parliament of the United Kingdom, passed in the year one thousand eight hundred and seventy, and intituled "*An Act for amending the Law relating to the Extradition of Criminals*," is made subject to any limitation, condition, qualification or exception, the Governor in Council shall make the application of this Act, by virtue of this section, subject to such limitation, condition, qualification or exception:

3. The Governor in Council may, at any time, revoke or alter, subject to the restrictions of this Act, any order made by him in council under this Act, and all the provisions of this Act with respect to the original order shall, so far as applicable, apply *mutatis mutandis* to the new order. 40 V., c. 25, s. 4.

**4.** This Act, so far as its application in the case of any foreign state, depends on or is affected by any Order in Council made under this Act or referred to therein, shall apply, or its application shall be affected from and after the time specified in the order, or, if no time is specified, after the date of the publication of the order in the *Canada Gazette*:

2. Any order of Her Majesty in Council, referred to in this Act, and any Order of the Governor in Council made under this Act, and any extradition arrangement not already published in the *Canada Gazette*, shall be, as soon as possible, published in the *Canada Gazette* and laid before both Houses of Parliament:

3. The publication in the *Canada Gazette* of an extradition arrangement, or an Order in Council, shall be evidence of such arrangement or order, and of the terms thereof, and of the application of this Act, pursuant and subject thereto; and the Court or Judge shall take judicial notice, without proof, of such arran-

gement or order, and the validity of the order and the application of this Act, pursuant and subject thereto, shall not be questioned. 40 V., c. 25, s. 5.

For a list of Extradition Treaties, see p. 1099, *post*.

On the question of whether, in an international point of view, the extradition of criminals is a matter of right or of comity, there is a difference of opinion; some contending that the surrender of fugitive criminals is a duty; (1) while others assert that, in the absence of a treaty so providing, there is no obligation resting upon one sovereign State to surrender to another, upon its demand, persons who have committed offences within the jurisdiction of the latter State and have sought an asylum within the jurisdiction of the State upon which the demand for surrender is made. (2)

But, whether the demand for surrender be made under and by virtue of an extradition treaty, or as a matter of right and independently of any treaty, it is necessary that there should be laws directing the mode of procedure to be used in obtaining the delivery of the offender whose surrender is demanded.

The present Act is intended for the carrying out of any extradition treaty, (made applicable to Canada) existing between Great Britain and any foreign country; and, as will be seen by clause (*b*) of section 2, *ante*, the expression "extradition crime" means any of the crimes described in the first schedule (*post*) of the present Act; and, in the application of this Act to any extradition treaty, "extradition crime" means any crime described in such treaty, whether comprised in the said first schedule or not.

It is, moreover, provided by the *Extradition Act* of 1889, — set out at pp. 1092-94, *post*, — that even in regard to a foreign State with which there is no extradition treaty or in case of there being a treaty (extending to Canada) which does not include the crimes mentioned in the schedule to the *Extradition Act* of 1889, the Minister of Justice may issue his warrant for the surrender to such foreign State of any fugitive offender, therefrom, charged with or convicted of any of the crimes mentioned in such schedule.

It has been held that, the crime charged against a person sought to be extradited from England to a foreign State must be construed by the definition of the law of England, and that if, therefore, the fugitive is charged with having committed in the foreign State an act which, by its law, amounts to one of the crimes specified by the treaty and by the statute giving effect to it, but which, under the law of England, does not amount to such a crime, it is not within the treaty. For instance, under the treaty of 1842, between England and the United States, it was mutually agreed to deliver up persons charged with (*inter alia*) forgery committed within the jurisdiction of either; and, under a statute of New-York State, every person fraudulently making any false entry in any account book of any moneyed corporation was made guilty of forgery in the third degree; and an accused who had brought himself within the terms of this enactment by making such a false entry was a fugitive in England. *Held*, that as such an act was wanting in an essential element to constitute the offence of forgery according to English law, the charge against the accused was not within the treaty and the statute giving effect to it, and that he was not liable to be apprehended and extradited thereunder; one of the learned judges (Cockburn, C. J.), remarking that the only true construction to be put

(1) Clarke on Extrad., 3rd Ed., 1, 14, 15.

(2) *Re* Anderson, 11 U. C., C. P., 61, (*Per* Richards, J.); U. S. v. Rauscher, 119 U. S., 370; *Ex parte* McCabe, 46 Fed. Rep., 363; 12 Am. & Eng. Ency. of L., 2nd Ed., 591, 592.

upon the statute relating to the extradition treaty was that the terms used therein in specifying the offences in respect of which criminals are to be surrendered by the respective States, must be taken to imply offences that have common elements in the legislation of the two countries, and that where one or the other country or where a component part of one or the other country thinks proper to make that an offence which does not fall within the definition of an offence as known to the general law of either, it will not be sufficient to bring the case within the statute. (3)

An order of committal for extradition made, in England, against a prisoner, who had been a director of a public company in France, specified, as one of the offences, "faux, (falsification of accounts and using falsified accounts)." The committing magistrate had come to the conclusion that, there was no evidence of forgery or of such falsification of accounts as would amount to forgery according to English law, but, that there was sufficient evidence of falsification of accounts by the prisoner in his character of a public officer of a company as would constitute an extraditable crime both according to English and French law. *Held*, that the falsification of accounts charged was a crime within the Extradition Treaty with France as coming within the 18th clause of Article 3, in the English version,—("Fraud by a bailee, banker, agent, factor, trustee, or *director* or *member* or *public officer* of any Company," etc.), and within the second clause of the same Article, in the French version, as *faux*, that it was also a crime, according to English law, within section 83 of the *Larceny Act*, 1861, and within section 1 of the *Falsification of Accounts Act*, 1875, and that it was an extradition crime within the first schedule of the Imperial *Extradition Act*, 1870, and was, therefore, a crime in respect of which extradition could be granted, but, that the order should be amended by adding words to shew that the falsification was one committed by the accused in his character of director, officer or member of a public Company. (4)

In an Ontario case, it was held (by Hagarty, C. J., and by Maclennan, J. A.), that, if such a *prima facie* case is made out in extradition proceedings as would warrant a committal for trial upon a preliminary enquiry before a magistrate, under the law of Canada, had the charge been that the accused had committed in Canada an offence known by the same name as the extradition crime charged, the prisoner must be extradited, although it is not proved by the prosecution that the alleged offence is a crime under the law of the demanding country; but, in the same case, it was held (by Burton, and Osler, J. J. A.), that, it is necessary for the prosecution to make out a *prima facie* case that the alleged offence is a crime according to the law of the demanding country as well as under Canadian law, and that where, in extradition proceedings for forgery, the facts proved disclose a *prima facie* case in respect of an offence which is forgery only by virtue of the extended meaning given to that term by Canadian statutes, it is necessary for the prosecution to prove that the same is also forgery under the law of the foreign country in which the alleged offence was committed. (5)

Where there is evidence of the commission of an act which is recognized as a crime by the law of Canada and by the law of the country demanding the extradition of the accused person, extradition will lie, although, in the proceedings therefor, the offence is referred to by a wrong name. The abandonment, by the Criminal Code of Canada, of the term "larceny," subsequent to the extradition treaties between Great Britain and the United States in which treaties the offence of larceny is included, does not alter the

(3) *Ex parte* Windsor, 10 Cox C. C., 118.
(4) *Re* Arton, (No 2), 18 Cox C. C., 277.
(5) *Re* Cornelius F. Murphy, 2 Can. Cr. Cas. 578. See *In re* Bellencontre, [1891] 2 Q. B., 122; 17 Cox C. C., 253.

liability to extradition of a person charged with an act which was larceny at common law and is, by the Criminal Code, still an offence in Canada under the name of theft or stealing. (6)

If in the examination into a charge of a certain offence, a more serious offence is established by the proof, the accused may be detained for the more serious offence. (7)

**5. Judges and Commissioners.** — All Judges of the Superior Courts and of the County Courts of any Province, and all commissioners who are, from time to time, appointed for the purpose, in any Province by the Governor in Council, under the Great Seal of Canada, by virtue of this Act are authorized to act judicially in extradition matters under this Act, within the Province: and every such person shall, for the purposes of this Act, have all the powers and jurisdiction of any Judge or Magistrate of the Province:

2. Nothing in this section shall be construed to confer on any Judge any jurisdiction in *habeas corpus* matters. 40 V., c. 25, s. 8.

Before the passing of the present Act, it was held that, a police magistrate, and (in the province of Quebec) a judge of sessions had, under the Imperial Extradition Acts, 1870 and 1873, power to arrest an accused whose extradition was demanded and to hold the preliminary examination into the charge against him; (8) but, the above section, 5, of the present Act restricts this power to judges of Superior Courts and of County Courts and to Extradition Commissioners specially appointed by the Governor General in Council.

The junior judge of a County Court is included in the expression "all judges, etc., of the County Courts of any province," contained in the above section, 5; and he has the functions of an extradition judge. (9)

An extradition judge or commissioner can only act judicially within the province for which he has been appointed and he has power to issue a warrant for the arrest of a fugitive only in case the latter is or is suspected to be in the province in which the judge or commissioner issuing it has jurisdiction. So, that, a warrant issued by an extradition commissioner for the apprehension of a fugitive criminal on a complaint which stated and shewed that at the time of the laying of the complaint, the accused was in another province, was, therefore, null and of no effect. (10)

## EXTRADITION FROM CANADA.

**6. Issuing warrant for apprehension of fugitive.** — Whenever this Act applies, a Judge may issue his warrant for the apprehension of a fugitive on a foreign warrant of arrest, or an information or complaint laid before him, and on such evidence or after such proceedings as in his opinion would, subject to the provisions of

(6) *In re* Gross, 18 C. L. T., 197; 25 Ont. A. R., 83; 2 Can. Cr. Cas., 67.
(7) U. S. v. Debaun, 16 R. L., 612.
(8) *Re* Kolligs, 6 R. L., 213.
(9) *Re* Parker, 19 O. R., 612; *Re* Garbutt, 21 O. R., 179.
(10) *Ex parte* Seitz, Que. Jud. Rep., 8 Q. B., 345; 3 Can. Cr. Cas., 54.

this Act, justify the issue of his warrant if the crime of which the fugitive is accused or alleged to have been convicted had been committed in Canada:

2. The Judge shall forthwith send a report of the fact of the issue of the warrant with certified copies of the evidence and foreign warrant, information or complaint, to the Minister of Justice. 40 V., c. 25, s. 11.

It has been held that clause 2 of this section is directory only, and that the neglect of an extradition judge to forward to the Minister of Justice a report of the issue of his warrant is not a ground for the discharge of the prisoner. (11)

It is not necessary that an original warrant should have been granted in the foreign country for the apprehension in this country of the person accused in order to enable proceedings to be effectually taken against him here for an extraditable offence. (12)

Alleged irregularity in the proceedings for a prisoner's arrest cannot on an application for *habeas corpus* avail him when committed for extradition. It is sufficient that, being under arrest before proper authority, a case has been made out against him to justify his commitment for extradition. (13)

In the United States it has been held that, proceedings for the extradition of a fugitive from justice cannot be instituted by private persons who may have been affected by the crime and who have not been authorized by the executive of the foreign government to represent it in such proceedings. So, that, where a prisoner was, with a view to his extradition to Canada, arrested in New York, and charged there with having forged in Montreal, the endorsements of certain bank drafts it was, after his commitment for extradition, contended, upon *habeas corpus* before the United States Circuit Court that, as the proceedings before the Commissioner were not instituted by the public authorities of Canada or by any person authorized to represent the executive of the Canadian government, but merely by a private individual alleged to have been affected by the forgery charged, the commitment was illegal; and Brown, J., — who rendered judgment quashing the proceedings and discharging the prisoner, — held, that it was the foreign government only that was entitled to obtain the extradition of the accused that the initiatory steps for extradition must be by authority of the foreign government and in its behalf, that the complaint in this case, having been made by a private individual, it was necessary that he should have shewn, *before the closing of the proceedings before the Commissioner* and before the commitment, that he was a person authorized to represent and act in the matter on behalf of the executive of the foreign power, or that his proceedings had been adopted by such executive, and that, not having shewn any such authority or any such adoption by the Canadian authorities, the proceedings were illegal and must be set aside. (14)

The practice uniformly adopted in Canada is based upon a different and more liberal interpretation of the provisions of our Extradition Acts; and the jurisdiction of the extradition judge is held not to depend upon the information or complaint being laid or made by or at the instance or under the authority of the foreign government, but the Acts are treated as author-

(11) *Re* Garbutt, 21 O. R., 179.
(12) *In re* Caldwell, 5 Ont. P. R., 217; *In re* Charles Worms, 7 R. L., 319.
(13) *Ex parte* Phelan, 6 L. N., 261.
(14) *In re* Ferrelle, 28 Fed. Rep., 878; 9 Cr. L. Mag., 85. And see, *In re* Kelly, 26 Fed. Rep., 852-856; and *ex parte* Henrich, 10 Cox C. C., 626.

izing the extradition judge to receive the complaint of any one who if the alleged offence had been committed in Canada might have made it. (15)

**7. Execution of warrant.** — A warrant issued under this Act may be executed in any part of Canada, in the same manner as if it had been originally issued, or subsequently endorsed, by a Justice of the Peace having jurisdiction in the place where it is executed. 40 V., c. 25, s. 10.

**8. Surrender not dependent on time when offence commited.** — Every fugitive criminal of a foreign state in the case of which state this Act applies, shall be liable to be apprehended, committed and surrendered in the manner provided in this Act, whether the crime or conviction in respect of which the surrender is sought was committed or took place before or after the date of the arrangement, or of the coming into force of this Act, or of the application of this Act in the case of such state, and whether there is or is not any criminal jurisdiction in any Court of Her Majesty's dominions over the fugitive in respect of the crime. 40 V., c. 25, s. 7.

**9. Proceedings before the Judge.** — The fugitive shall be brought before a Judge, who shall, subject to the provisions of this Act, hear the case, in the same manner, as nearly as may be, as if the fugitive was brought before a Justice of the Peace, charged with an indictable offence committed in Canada.

2. The Judge shall receive upon oath, or affirmation if affirmation is allowed by law, the evidence of any witness tendered to shew the truth of the charge or the fact of the conviction:

3. The Judge shall receive, in like manner, any evidence tendered to shew that the crime of which the fugitive is accused or alleged to have been convicted, is an offence of political character, or is, for any other reason, not an extradition crime; or that the proceedings are being taken with a view to prosecute or punish him for an offence of a political character. 40 V., c. 25, s. 12.

Depositions taken in a foreign country are, under this section, receivable in evidence here, although taken in the absence of the accused; and such depositions purporting to have been received and sworn before a judge of a Country Court of a foreign State and certified by him to be original depositions are sufficiently authenticated and make legal proof; more particularly so when the signature of such County Court judge is certified by the clerk of the Court and by the testimony of witnesses. (16)

When an accused is arrested and brought before an extradition judge or commissioner upon proceedings for extraditon, the evidence of the wit-

(15) Per Meredith, C. J., in *Re* Lazier, 30 O. R., 419-426. See also *Re* Lazier, 19 C. L. T., 72.

(16) *Ex parte* Hoke, 15 R. L., 705; *Ex parte* Debaun, 16 R. L., 612; *In re* Weir, 14 O. R., 389.

nesses called is taken, in the same manner as at a preliminary enquiry into an indictable offence before a magistrate, but in addition to this, the extradition judge or commissioner can, under the provisions of the above section 9 and of section 10, *post*, receive in evidence depositions and statements taken in the foreign State, when the same are duly authenticated, and he may also receive in evidence duly certified copies thereof; and in order to justify the prisoner's commitment for extradition, the evidence thus laid before the extradition judge or commissioner must be such in its sufficiency as would justify the prisoner's committal for trial if the crime had been committed in Canada. (17)

The extradition Judge or Commissioner must hear any evidence produced by the accused against the charge; but he is not to try the case. He is only called upon to decide whether or not a *prima facie* case has been made out against the accused; and, if he finds that such a case is made out, he must commit the accused for extradition. (17*a*)

**10. Evidence.** — Depositions or statements taken in a foreign State on oath, or on affirmation, where affirmation is allowed by the law of the State, and copies of such depositions or statements, and foreign certificates of, or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence in proceedings under this Act:

2. Such papers shall be deemed duly authenticated if authenticated in manner provided, for the time being, by law, or if authenticated as follows: —

(*a*) If the warrant purports to be signed by, or the certificate purports to be certified by, or the depositions or statements, or the copies thereof, purport to be certified to be the originals or true copies, by a judge, magistrate or officer of the foreign state;

(*b*) And if the papers are authenticated by the oath or affirmation of some witness, or by being sealed with the official seal of the Minister of Justice, or some other minister of the foreign state, or of a colony, dependency or constituent part of the foreign state; of which seal the judge shall take judicial notice without proof. 40 V., c. 25, s. 9.

A copy of a bill of indictment found against the accused in the United States is merely hearsay evidence; and cannot be received as legal evidence to warrant a commitment for extradition from Canada. (18)

An affidavit sworn to before a commissioner of the United States, proved to be a magistrate having authority in the matter according to the law where taken, may, if properly proved, be received as evidence against the accused in proceedings for extradition. (19)

Depositions taken at Washington before a justice of the peace and cer-

(17) R. v. Levi, 1 Can. Cr. Cas., 74; *Ex parte* Feinberg, 4 Can. Cr. Cas., 270.

(17*a*) *Ex parte* Lanctot, Que. Jud. Rep., 5 Q. B., 422.

(18) *In re* Rosenbaum, 18 L. C. J., 200; *Ex parte* Feinberg, 4 Can. Cr. Cas., 270.

(19) *Ex parte* Phelan, 6 L. N., 261.

tified and transmitted by another justice of the peace, who issued the first warrant in the United States, make proof against the accused. (20)

On a charge of forgery of a promissory note alleged to have been committed in the State of Kansas, the justice before whom the depositions were taken was certified to be a justice of the peace with power to administer oaths. *Held*, that he was a magistrate or officer of a foreign State within the above section, 10, and that it was not necessary that he should be a Federal officer and not a State officer, and further that the depositions need not have been taken in the presence of the accused; but, as the depositions failed to show that the promissory note alleged to be forged was produced to and identified by the deponents or any of them, it was held that this constituted a valid ground for refusing extradition, and that there was no power to remand the accused to have further evidence taken before the Extradition judge as to such identification. (21)

The evidence of accomplices is sufficient to establish a charge for the purposes of extradition. (22)

Where the evidence of an accomplice is uncorroborated in any material particular, the magistrate must use his discretion in regard to the commitment; and the fact of there being no corroboration is not conclusive against the commitment. (23)

The provisions of section 684, *ante*, of the Criminal Code, — requiring, in regard to certain offences, that the evidence of a single witness shall be corroborated, — refer to the trial and not to the preliminary examination, it being enacted thereby that an accused shall not be *convicted* in such cases upon the uncorroborated testimony of one witness. (23*a*)

To justify the admission in evidence, in extradition proceedings, of an alleged confession of the accused, it must be affirmatively proved that such confession was free and voluntary and was not preceded by any inducement held out by a person in authority, or was not made until after such inducement had been clearly removed. (24)

**11. Evidence necessary for committal.** — If, in the case of a fugitive alleged to have been *convicted* of an extradition crime such evidence is produced as would, according to the law of Canada, subject to the provisions of this Act, prove that he was so convicted, — and if in the case of a fugitive *accused* of an extradition crime such evidence is produced as would, according to the law of Canada, subject to the provisions of this Act, justify his committal for trial, if the crime had been committed in Canada, the judge shall issue his warrant for the committal of the fugitive to the nearest convenient prison, there to remain until surrendered to the foreign state, or discharged according to law; but otherwise the judge shall order him to be discharged. 40 V, c. 35, s. 13.

In order to obtain the extradition of a fugitive on the ground that he has been *convicted* in the foreign country of the crime for which he is

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(20) *In re* Charles Worms, 7 R. L., 319.
(21) *In re* Parker, 19 O. R., 612.
(22) *In re* Caldwell, 5 Ont. P. R., 217.
(23) *In re* Meunier, [1894] 2 Q. B., 415; 18 Cox C. C., 15.
(23*a*) *In re* Lazier, 19 C. L. T., 72.
(24) *Re* Ockerman, 2 Can. Cr. Cas., 262; 6 B. C. R., 143. See U. S. v. Debaun, 16 R. L., 612.

sought to be extradicted, it is necessary to establish (by the production of a duly authenticated copy of the record of the foreign court where the prisoner was tried and convicted), that the conviction took place after a regular trial, and to shew, also, that the crime of which he was convicted is an extradition crime and that the prisoner is identified. (25)

To justify the committal for extradition of a person accused of having committed an extradition crime, it is only necessary that the evidence should be such as gives rise to probable cause to believe him guilty, and it is not necessary that it should be sufficiently conclusive to authorize his conviction, if unanswered. (25*a*)

There may be one commitment for two or more charges. (26)

The commitment should shew on its face that the case of the accused is within the terms of the extradition treaty and of the *Extradition Act*. (26*a*)

Where an accused, using an assumed name, represented himself, to a shopkeeper in the United States, to be a traveller for a certain wholesale firm, and, after going through the form of taking an order for goods, obtained the endorsement of the shopkeeper to a draft drawn by the accused, in his assumed name, on the wholesale firm, and the accused then cashed the draft at a Bank and fled to Canada, it was held that this was forgery and that the prisoner should be extradited. (26*b*)

**12. Proceedings on committal.** — If the Judge commits a fugitive to prison he shall, on such committal, —

(*a*) Inform him that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus;* and —

(*b*) Transmit to the Minister of Justice a certificate of the committal, with a copy of all the evidence taken before him, not already so transmitted, and such report upon the case as he thinks fit. 40 V., c. 25, s. 14.

Formerly, English Courts had concurrent power to issue a *habeas corpus* into any British colony or dominion (27); but, since the passing of the Imperial Act, 25-26 Vic., c. 20, no writ of habeas corpus can issue out of any court in England to any colony or foreign dominion of the Crown in which any court exists having power to issue and insure the due execution of such a writ.

Upon a writ of *habeas corpus*, in respect of an extradition commitment for surrender to the foreign State, the weight of the authority of case law in Canada is to the effect that the Court may revise the decision of the extradition judge or commissioner on the question of whether or not there was *legal* and *competent* evidence of the commission of the crime, but that it will not review his decision as to the *sufficiency* of the evidence to justify the committal. (28)

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(25) R. v. Levi, Que. Jud. Rep., 6 Q. B., 151; 1 Can. Cr. Cas., 74.
(25*a*) *Ex parte* Feinberg, 4 Can. Cr. Cas., 270.
(26) *In re* Meunier, [1894] 2 Q. B., 415.
(26*a*) *In parte* Zink, 6 Q. L. R., 260.
(26*b*) *In re* Lazier, 19 C. L. T., 206; (*In re* Burley, 1 C. L. J., 34, and R. v. Morton, 19 U. C. C. P., 9, followed.)
(27) *In re* Anderson, 30 L. J., Q. B., 129; 9 W. R., 225.
(28) *Ex parte* Hoke, 15 R. L., 705; *Ex parte* Isaac Feinberg, 4 Can. Cr. Cas., 270; *In re* Weir, 14 O. R., 389.

Where there is *legal* evidence before the extradition judge or commissioner to establish the charge and that legal evidence is deemed by him to be *sufficient* and he grants a warrant of commitment that commitment must stand and no Court has a right to disregard it or to render it ineffectual, at least not until the expiration of two months after it has issued.

This rule is subjec, however, to an exception in cases where, in the decision of the Extradition Judge or Commissioner, the question of whether the alleged offence is one of a political character or not is involved. In such a case, the Court may upon *habeas corpus* consider the whole matter and even receive fresh evidence on the question of whether the offence charged is one of a political character. (28*a*)

In the United States the authorities on the subject are not uniform. In some cases, it has been held that the Court, on a return before it of a writ of *habeas corpus*, has no further power than to ascertain and determine whether the prisoner stands charged with a criminal offence subjecting him to imprisonment and whether the extradition commissioner possessed competent authority to enquire into and adjudge upon the charge but that the Court has no jurisdiction upon *habeas corpus* to review the justness of the Commissioner's decision. (29)

On the other hand, it has been held in the United States Circuit Court that it is the law of that Court and its duty to look into the evidence upon which the judgment of the Commissioner rests and which has been certified to that Court in compliance with a writ of *habeas corpus* directed to him, and to pass upon the weight of the evidence as well as upon its competency; but, with this reservation, that in the exercise of the power of revising, on *habeas corpus*, the judgment of the commissioner, the Court will not revise his action upon trifling grounds nor for mere errors in form, and that where the Commissioner has legal evidence before him the Court will not reverse his judgment, except for substantial error in law or for such manifest error in fact as would warrant a Court in granting a new trial for a verdict against evidence. (30)

A prisoner who has been discharged upon *habeas corpus* by reason of a defect in the commitment or on the ground that the extradition commissioner had no jurisdiction to act judicially on the complaint laid before him, may be again arrested and proceeded against before a commissioner having jurisdiction over the complaint; but a prisoner who has been liberated upon the merits of the charge laid against him, when the order of detention or cimmitment founded on the charge is set aside as unfounded in law, cannot be lawfully arrested and imprisoned again for the same offence upon the same state of facts. (31)

**13. By whom requisition for surrender may be made.** — A requisition for the surrender of a fugitive criminal *of a foreign state* who is, or is suspected to be in Canada may be made to the Minister of Justice by any person recognized by him as a consular officer of that state resident at Ottawa, — or by any minister of that state communicating with the Minister of Justice through the diplomatic representative of Her Majesty in that state, — or

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(28*a*) *In re* Castioni, *cit.* p. 1085, *post.*

(29) *In re* Von Aernam, 3 Blach. Rep., 64; *In re* Heilbronn, 12 N. Y., Leg. Obs., 65; *Re* Veremaitre & others, 9 N. Y., Leg. Obs., 137; *Re* Kaine, 10 N. Y., Leg. Obs., 257.

(30) *Ex parte* Henrich, 10 Cox C. C., 626.

(31) R. v. Seitz, (No. 2), Que. Jud. Rep., 8 Q. B., 392; 3 Can. Cr. Cas., 127.

if neither of these modes is convenient, then in such other mode as is settled by arrangement. 40 V., c. 25, s. 15.

**14. When fugitive not liable to surrender.** — No fugitive shall be liable to surrender under this Act if it appears. —

(*a*) That the offence in respect of which proceedings are taken under this Act is one of a political character; or —

(*b*) That such proceedings are being taken with a view to prosecute or punish him for an offence of a political character. 40 V., c. 25, s. 6.

The true meaning of the expression "an offence of a political character" is that it must be an offence incidental to and forming part of political disturbances. (32)

Where, during a political rising in Switzerland the insurgents, of whom the accused was one, beset the Government House, and, entrance to it having been refused by R., (a member of the Government), the gates were broken open, and immediately afterwards, the accused fired a revolver at and killed R.; and there was some evidence to shew that the killing of R. was not necessary for the success of the movement. *Held* that, inasmuch as the evidence shewed that the act of shooting took place in a scene of great confusion and excitement and in the course of and as part of and incidental to a political insurrection, the alleged offence was one of a political character which privileged him from surrender from England. (33)

It has been held, in England, that where in committing a prisoner for extradition, the magistrate has decided that the offence charged is not of a political character, such decision is subject to review by the Court on an application for *habeas corpus* and that the Court, in such a case is not bound by the decision of the magistrate on the facts before him but has power to consider the whole matter, and even to receive fresh evidence on the question of whether the offence charged is one of a political character. (34)

One M., an anarchist and a fugitive criminal from France had been committed, in England, for extradition to France on two charges of murder and attempt to murder, by means of explosions, in Paris, one at a government building and the other in a cafe. On an application for the prisoner's release upon *habeas corpus*, on the ground (*inter alia*), that the offence charged, with respect to the explosion at the government building, was a political offence, it was held that, the prisoner being an anarchist, he did not belong to a party having a form of government of its own nor which sought to impose a form of government upon another party, and that the offences charged, being directed in the main against citizens generally rather than against the government as a government, were not offences of a political character, and that consequently the writ of *habeas corpus* ought not to go. (35)

**15. Cases where surrender may be refused.** — If the Minister of Justice at any time determines: —

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(32) 2 Step. Hist. Cr. L., 71.

(33) *In re* Castioni, 60 L. J., M. C., 22; [1891] 1 Q. B., 149; 17 Cox C. C., 225.

(34) *Ib.*

(35) *Re* Meunier, 18 Cox C. C., 15; 63 L. J., M. C., 198; [1894] 2 Q. B., 415.

(*a*) That the offence in respect of which proceedings are being taken under this Act is one of a political character;

(*b*) That the proceedings are, in fact, being taken with a view to try or punish the fugitive for an offence of a political character; or —

(*c*) That the foreign state does not intend to make a requisition for surrender, —

He may refuse to make an order for surrender, and may, by order under his hand and seal, cancel any order made by him, or any warrant issued by a Judge under this Act, and order the fugitive to be discharged out of custody on any committal made under this Act; and the fugitive shall be discharged accordingly. 40 V., c. 25, s. 16; — 45 V., c. 20, s. 1.

In most extradition treaties there is a clause providing that, "in no case nor on any consideration whatever shall the High Contracting parties be bound to surrender their own subjects." Such a clause is contained in the extradition treaty between Great Britain and Belgium; but, it has been held, in a case under that treaty, that, while the executive government of Great Britain are not *bound* to surrender a fugitive criminal who is a British subject, they have a discretion to surrender, and may surrender such a person, although he is a British subject, upon a *prima facie* case being made out, and upon the requirements of the Extradition Acts being complied with. (36)

**16. Delay before surrender.** — A fugitive shall not be surrendered until after the expiration of fifteen days from the date of his committal for surrender; or if a writ of *habeas corpus* is issued, until after the decision of the Court remanding him:

2. A fugitive who has been accused of an offence within Canadian jurisdiction, not being the offence for which his surrender is asked or who is undergoing sentence under a conviction in Canada, shall not be surrendered until after he has been discharged, whether by acquittal or by expiration of his sentence, or otherwise. 40 V., c. 25, s. 17.

**17. Surrender to officer of foreign state.** — Subject to the provisions of this Act, the Minister of Justice upon the requisition of the foreign state, may, under his hand and seal, order a fugitive who has been committed for surrender to be surrendered to the person or persons who are, in his opinion, duly authorized to receive him in the name and on behalf of the foreign state, and he shall be so surrendered accordingly:

2. Any person to whom such order is directed may deliver, and the person so authorized may receive, hold in custody and convey the fugitive within the jurisdiction of the foreign state; and if he escapes out of any custody to which he is delivered, on or in pur-

(36) R. v. Galwey, 18 Cox C. C., 213.

suance of such order, he may be retaken in the same manner as any person accused or convicted of any crime against the laws of Canada may be re-taken on an escape. 40 V., c. 25, s. 19.

**18. Property found on Fugitive.** — Every thing found in the possession of the fugitive at the the time of his arrest, which may be material as evidence in making proof of the crime may be delivered up with the fugitive on his surrender, *subject to all rights of third persons with regard thereto.* 40 V., c. 25, s. 19.

Upon an application, in England, for the extradition of one Emile Ebstein, a fugitive criminal upon a charge of stealing certain articles in France, a purchaser of the articles in England, produced, under a subpœna *duces tecum*, before the magistrate, the articles alleged to have been stolen in France. The magistrate, after committing the accused to await extradition, verbally told a police officer in Court to take charge of the articles, so that they might be produced on the trial of the accused in France, — the magistrate adding that the right of property in the articles was entirely unaffected by his direction and was fully reserved to all parties. The person, who had produced the articles under the subpœna, afterwards applied, under section 5 of the 11-12 Vict., c. 44,— (which authorizes the High Court of Justice to order a justice or justices of the peace to do any act relating to the duties of his or their office, when they refuse), — for an order directing the magistrate to order the articles in question to be delivered to him. *Held*, that the High Court had no jurisdiction to make the order asked for, the section of the Act above mentioned only enabling the Court to order the magistrate to do his duty, and, that, as he was *functus officio* as soon as he had committed the accused, his duty was ended. *Held*, also, that, even if there were jurisdiction to make the order, the purchaser's possessory title (if any) to the articles had passed under the subpœna *duces tecum*, and that, therefore, he was not entitled to the relief asked for, but that the proper remedy of the applicant, if he had a grievance at all, was to bring an action against the persons in whose custody the articles were, and claim an injunction against their parting with them until after the trial of his action. (37)

**19. Time within which fugitive must be conveyed out of Canada.** — If a fugitive is not surrendered and conveyed out of Canada within two months after his committal for surrender, or if a writ of *habeas corpus* is issued, within two months after the decision of the Court on such writ, over and above, in either case, the time required to convey him from the prison to which he has been committed, by the readiest way out of Canada, any one or more of the Judges of the Superior Courts of the Province in which such person is confined, having power to grant a writ of *habeas corpus*, may, upon application made to him or them by or on behalf of the fugitive, and on proof that reasonable notice of the intention to make such application has been given to the Minister of Justice, order the fugitive to be discharged out of custody, unless sufficient cause is shewn against such discharge. 40 V., c. 25, s. 21.

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(37) R. v. Lushington. — *Ex parte* Otto. — *Re* Ebstein. — 17 Cox C. C., 754.

**20. Forms.** — The forms set forth in the second schedule to this Act, or forms as near thereto as circumstances admit of, may be used in the matters to which such forms refer, and when used, shall be deemed valid. 40 V., c. 25, s. 21.

## EXTRADITION FROM FOREIGN STATE.

**21. Requisition for a fugitive from Canada.** — A requisition for the surrender of a fugitive criminal from Canada, who is or is suspected to be in any foreign state with which there is an extradition arrangement, may be made by the Minister of Justice to a consular officer of that state resident at Ottawa, or to the Minister of Justice or any other Minister of that state, through the diplomatic representative of Her Majesty in that state, or if neither of these modes is convenient, then in such other mode as is settled by an arrangement. 40 V., c. 25, s. 22.

**22. Conveyance of fugitive surrendered.** — Any person accused or convicted of an extradition crime, who is surrendered by a foreign state, may, under the warrant for his surrender issued in such foreign state, be brought into Canada and delivered to the proper authorities to be dealt with according to law.

**23. Surrendered fugitive not punishable contrary to arrangement.** — Whenever any person accused or convicted of an extradition crime is surrendered by a foreign state in pursuance of any extradition arrangement, such person shall not, until after he has been restored or has had an opportunity of returning to the foreign state within the meaning of the arrangement, be subject, in contravention of any of the terms of the arrangement, to any prosecution or punishment in Canada for any other offence committed prior to his surrender, for which he should not, under the arrangement, be prosecuted. 40 V., c. 25, s. 23.

### LIST OF CRIMES.

**24. Construction of list of crimes in schedule.** — The list of crimes in the first schedule to this Act shall be construed according to the law existing in Canada at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act, and as including only such crimes, of the descriptions comprised in the list, as are, under that law, indictable offences. 40 V., c. 25, second schedule, *part*.

## FIRST SCHEDULE.

*List of Crimes.*

1. MURDER, or ATTEMPT or CONSPIRACY TO MURDER;

2. MANSLAUGHTER;

3. COUNTERFEITING or altering money, and UTTERING counterfeit or altered money;

4. FORGERY, counterfeiting or altering, or UTTERING what is forged, counterfeited or altered;

5. LARCENY; (38)

6. EMBEZZLEMENT; (38)

7. OBTAINING money or goods, or valuable securities, BY FALSE PRETENCES;

8. CRIMES AGAINST BANKRUPTCY OR INSOLVENCY LAW;

9. FRAUD by a BAILEE, BANKER, AGENT, FACTOR, TRUSTEE, or by a director or member or officer of any company, which fraud is made criminal by any Act for the time being in force; (38)

10. RAPE;

11. ABDUCTION;

12. CHILD STEALING;

13. KIDNAPPING;

14. FALSE IMPRISONMENT;

15. BURGLARY, HOUSE-BREAKING or SHOP-BREAKING;

16. ARSON;

17. ROBBERY;

18. THREATS, by letter or otherwise, WITH INTENT TO EXTORT;

19. PERJURY or SUBORNATION of perjury;

20. PIRACY by municipal law or law of nations, committed on board of or against a vessel of a foreign state;

21. CRIMINAL SCUTTLING or DESTROYING such a VESSEL AT SEA, whether on the high seas or on the great lakes of North America, or ATTEMPING or CONSPIRING to do so;

22. ASSAULT ON board such VESSEL AT SEA, whether on the high seas or on the great lakes of North America, with intent to destroy life or to do grievous bodily harm;

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(38) See Title VI of the Code, at pp. 337, *et seq.*, for offences formerly called larceny, embezzlement, fraud, etc., and now included in the general term "THEFT".

23. REVOLT OR CONSPIRACY TO REVOLT, by two or more persons on board such a vessel at sea, whether on the high seas or on the great lakes of North America, against the authority of the master;

24. Any offence under either of the following Acts, and not included in any foregoing portion of this schedule: —

(*a*) "*An Act respecting offences against the Person;*"

(*b*) "*The Larceny Act;*"(38)

(*c*) "*An Act respecting forgery:*"

(*d*) "*An Act respecting offences relating to the Coin;*"

(*e*) "*An Act respecting Malicious Injuries to property;*"

25. Any offence which is, in the case of the principal offender, included in any foregoing portion of this schedule, and for which the fugitive criminal, though not the principal, is liable to be tried or punished as if he were the principal. 40 V., c. 25, second schedule *part.*

## SECOND SCHEDULE.

FORM ONE.

*Form of Warrant of Apprehension.*

———— ;

To wit : —

To all and each of the constables of

Whereas it has been shewn to the undersigned, a Judge under "*The Extradition Act,*" that late of is accused (*or* convicted) of the crime of within the jurisdiction of

This is therefore to command you in Her Majesty's name forthwith to apprehend the said and to bring him before me, or some other Judge under the said Act, to be further dealt with according to law; for which this shall be your warrant.

Given under my hand and seal at this day of A. D.

(38) See Title VI of the Code at pp. 337, *et seq.*, for offences formerly termed *Larceny, Embezzlement, Fraud,* etc., and now included in the general term "THEFT".

FORM TWO.

*Form of Warrant of Committal.*

_____ ;

To wit:--

To one of the constables of
and to the keeper of the
at

Be it remembered that on this day of in the year at , is brought before me a Judge under "*The Extradition Act*," who has been apprehended under the said Act, to be dealt with according to law; and forasmuch as I have determined that he should be surrendered in pursuance of the said Act, on the ground of his being accused (*or* convicted) of the crime of within the jurisdiction of

This is therefore to command you, the said constable, in Her Majesty's name, forthwith to convey and deliver the said into the custody of the keeper of the at and you, the said keeper, to receive the said into your custody, and him there safely to keep until he is thence delivered pursuant to the provisions of the said Act, for which this shall be your warrant.

Given under my hand and seal at
this day of A. D.

Substitute "His Majesty" for "Her Majesty".

FORM THREE.

*Form of Order of Minister of Justice for Surrender.*

To the keeper of the at ,
and to

Whereas late of
accused (*or* convicted) of the crime of
within the jurisdiction of
was delivered into the custody of you, the keeper of the
at by warrant
dated pursuant to "*The Extradition Act.*"

Now I do hereby, in pursuance of the said Act, order you, the said keeper, to deliver the said into the custody of the said ; and I command you, the said to receive the said into your custody, and to convey him within the jurisdiction of the said and there place him in the custody of any person or persons (*or* of ) appointed by the said to receive him; for which this shall be your warrant.

Given under the hand and seal of the undersigned Minister of Justice of Canada, this day of A. D.
40 V., c. 25, third schedule.

## THE EXTRADITION ACT OF 1889.

[52 Vict., c. 36.]

An Act to extend the provisions of the Extradition Act.

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows: —

**1. Fugitive offenders may be surrendered though there is no treaty.** — In case no extradition arrangement within the meaning of "*The Extradition Act*," exists between Her Majesty and a foreign state, or in case such an extradition arrangement, extending to Canada, exists between Her Majesty and a foreign state, but does not include the crimes mentioned in the schedule to this Act, it shall nevertheless, be lawful for the Minister of Justice to issue his warrant for the surrender to such foreign state of any fugitive offender from such foreign state charged with or convicted of any of the crimes mentioned in the schedule to this Act: Provided always, that the arrest, committal, detention, surrender and conveyance out of Canada of such fugitive offender shall be governed by the provisions of "*The Extradition Act*," and that all the provisions of the said Act shall apply to all steps and proceedings in relation to such arrest, committal, detention, surrender and conveyance out of Canada in the same manner and to the same extent as they would apply if the said crimes were included and specified in an extradition arrangement between Her Majesty and the foreign state, extending to Canada.

**2. Expenses.** — Al expenses connected with the arrest, committal, detention, surrender and conveyance out of Canada of any fugitive offender under this Act shall be borne by the foreign state applying for the surrender of such fugitive offender.

**3. Law of Canada to govern.** — The list of crimes in the schedule to this Act shall be construed according to the law existing in Canada at the date of the commission of the alleged crime, whether by common law or by statute made before or after the coming into force of this Act, and as including only such crimes, of the description comprised in the list, as are, under that law, indictable offences:

2. The provisions of this Act shall apply to any crime mentioned in the said schedule, committed after the coming into force of this Act, as regards any foreign state as hereinafter provided.

**4. Coming into force of Act.** — The foregoing provisions of this Act shall not come into force with respect to fugitive offenders from any foreign state until this Act shall have been declared by Proclamation of the Governor General to be in force and effect as regards such foreign state, from and after a day to be named in such Proclamation; and the provisions of this Act shall cease to have any force or effect with respect to fugitive offenders from any foreign state, if by Proclamation the Governor General declares this Act to be no longer in operation as regards such foreign state:

2. The day from and after which, in such case, the provisions of this Act shall cease to have force and effect shall be a day to be named in such Proclamation.

**5. Restriction.** — This Act shall not authorize the issue of a warrant for the extradition of any person under the provisions of this statute, to any state or country in which by the law in force in such state or country, such person may be tried after such extradition for any other offence than that for which he has been extradited, unless an assurance shall first have been given by the executive authority of such state or country, that the person whose extradition has been claimed shall not be tried for any other offence than that on account of which such extradition has been claimed.

## SCHEDULE.

(1) Murder, or attempt or conspiracy to murder;

(2) Manslaughter;

(3) Counterfeiting or altering money and uttering counterfeit or altered money;

(4) Forgery, countefeiting or altering, or uttering what is forged, countefeited or altered;

(5) Larceny;

(6) Embezzlement;

(7) Obtaining money or goods or valuable securities by false pretences;

(8) Rape;

(9) Abduction; indecent assault;

(10) Child stealing;

(11) Kidnapping;

(12) Burglary, house-breaking or shop-breaking;

(13) Arson;

(14) Robbery;

(15) Fraud committed by a bailee, banker, agent, factor, trustee or member or public officer of any company or municipal corporation, made criminal by any law for the time being in force;

(16) Any malicious act done with intent to endanger persons in a railway train;

(17) Piracy by municipal law or law of nations, committed on board of or against a vessel of a foreign state;

(18) Criminal scuttling or destroying such a vessel at sea, whether on the high seas or on the great lakes of North America, or attemping or conspiring to do so;

(19) Assault on board such a vessel at sea, whether on the high seas or on the great lakes of North America, with intent to destroy life or to do grievous bodily harm;

(20) Revolt, or conspiracy to revolt, by two or more persons on board such a vessel at sea, whether on the high seas or on the great lakes of North America, against the authority of the master;

(21) Administering drugs or using instruments with intent to procure the miscarriage of a woman;

(22) Any offence which is, in the case of the principal offender, included in any foregoing portion of this schedule, and for which the fugitive criminal though not the principal, is liable to be tried or punished as if he were the principal.

## EXTRADITION BETWEEN CANADA AND THE UNITED STATES.

The first treaty between Great Britain and the United States was Jay's Treaty made in 1794. It extended only to *murder* and *felony*, and ceased its operation in 1812, at the outbreak of the American War.

The extradition of fugitive criminals between Canada and the United States is now regulated by the Ashburton Treaty or Treaty of Washington,

made between Great Britain and the United States in 1842, by statutes passed to give that Treaty effect, and by a convention between Great Britain and the United States concluded in 1889 and ratified on the 11th of March 1890.

The Imperial statutes relating to procedure in extradition are the *Extradition Acts* of 1870 and 1873, (33-34 Vic., c. 52, and 36-37 Vic., c. 60), by which it is, (among other things), enacted that if, by any law made after the passing of the Act of 1870, by the Legislature of any British possession, provision is made for carrying into effect within such possession the surrender of fugitive criminals who are in or suspected of being in such British possession, an Imperial Order in Council may be made suspending the operation of the Imperial *Extradition Acts* within any such British possession, so long as the extradition law of such British possession continues in force there; and, by an Imperial Order in Council dated the 17th of November 1888, (see page XV of the Statutes of Canada 1889), it was directed that, — in view of the passing of the Extradition Act of the Dominion Parliament passed in 1886, (39), — the operation of the Imperial *Extradition Acts* of 1870 and 1873 should be suspended within Canada so long as the said Dominion Act should continue in force; and, immediately after the ratification of the Extradition Convention made between Great Britain and the United States in 1889-1890, another Imperial Order in Council was passed ordering that, from and after the 4th of April 1890 the Imperial Extradition Acts of 1870 and 1873 should apply to the said convention, and further ordering the suspension of the operation of the said Imperial Acts within Canada, so far as relates to the United States, so long as the provisions of the Canadian *Extradition Act* continues in force.

So, that, our present law, as to procedure in the Extradition of fugitive criminals between Canada and the United States, is contained in the Canadian *Extradition Acts* of 1886 and 1889, *ante*.

The Ashburton Treaty only applied to the crimes of MURDER, PIRACY, ARSON, ROBBERY, FORGERY and the UTTERANCE OF FORGERIES; but, by the Convention of 1889-1890 it now embraces, as between Canada (as part of the British Empire), and the United States, not only MURDER, PIRACY, ARSON, ROBBERY, FORGERY, and the UTTERANCE OF FORGERIES, but also a number of other offences, which will be found enumerated in the first of the following Articles of that Convention, which is in the following terms:—

## EXTRADITION CONVENTION OF 1889-90 WITH THE UNITED STATES.

"WHEREAS by the Xth Article of the Treaty concluded between Her Britannic Majesty and the United States of America on the ninth day of August, one thousand eight hundred and forty-two provision is made for the extradition of persons charged with certain crimes;

"And whereas it is now desired by the High Contracting Parties that the provisions of the said Article should embrace certain crimes not therein specified, and should extend to fugitives convicted of the crimes specified in the said Article and in this Convention;

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(39) See the Canadian *Extradition Act* of 1886, set out at pp. 1074-1092 *et seq.*, *ante*.

"The said High Contracting Parties have appointed as their plenipotentiaries to conclude a Convention for this purpose, that is to say: —

"Her Majesty the Queen of the United Kingdom of Great Britain and Ireland; Sir Julian Pauncefote, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Knight Commander of the Most Honourable Order of the Bath, and Envoy Extraordinary and Minister Plenipotentiary of Her Britannic Majesty to the United States;

"And the President of the United States of America; James G. Blaine, Secretary of State of the United States;

"Who, after having communicated to each other their respective full powers, found in good and due form, have agreed upon and concluded the following Articles:

"ARTICLE I.

"The provisions of the said Xth Article are hereby made applicable to the following *additional* crimes: —

"1. MANSLAUGHTER when voluntary.

"2. COUNTERFEITING OR ALTERIGN money; UTTERING OR BRINGING INTO CIRCULATION COUNTERFEIT OR ALTERED MONEY.

"3. EMBEZZLEMENT; LARCENY; RECEIVING any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained. (40)

"4. FRAUD by a bailee, banker, agent, factor, trustee, or director or member or officer of any company, made criminal by the laws of both countries.

"5. PERJURY, or SUBORNATION OF PERJURY.

"6 RAPE ; ABDUCTION; CHILD-STEALING; KIDNAPPING.

"7. BURGLARY; HOUSEBREAKING or SHOPBREAKING.

"8. PIRACY by the law of nations.

"9. REVOLT, or CONSPIRACY TO REVOLT, by two or more persons on board a ship on the high seas, against the authority of the master; WRONGFULLY SINKING or DESTROYING A VESSEL AT SEA, or ATTEMPING to do so; ASSAULTS ON BOARD A SHIP on the high seas, WITH INTENT to do grievous bodily harm.

"10. CRIMES AND OFFENCES AGAINST THE LAWS of both countries for the suppression of SLAVERY and SLAVE TRADING.

(40) See Title VI of the Code, at pp. 337 *et seq.*, for offences formerly called larceny, embezzlement, etc., and now included in the general term "THEFT."

"Extradition is also to take place for PARTICIPATION in any of the crimes mentioned in this Convention or in the aforesaid Xth Article, provided such participation be punishable by the laws of both countries.

"ARTICLE II.

"A fugitive criminal shall not be surrendered, if the offence in respect of which his surrender is demanded be one of a political character, or if he proves that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character.

"No person surrendered by either of the High Contracting Parties to the other shall be triable or tried, or be punished for any political crime or offence, or for any act connected therewith, committed previously to his extradition.

"If any question shall arise as to whether a case comes within the provisions of this Article, the decision of the authorities of the Government in whose jurisdiction the fugitive shall be at the time shall be final.

"ARTICLE III.

"No person surrendered by or to either of the High Contracting Parties shall be triable or be tried for any crime or offence committed prior to his extradition, other than the offence for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered.

"ARTICLE IV.

"All articles seized which were in the possession of the person to be surrendered at the time of his apprehension, whether being the proceeds of the crime or offence charged or being material as evidence in making proof of the crime or offence, shall, so far as practicable, and if the competent authority of the State applied to for the extradition has ordered the delivery thereof, be given up when the extradition takes place. Nevertheless, the rights of third parties with regard to the articles aforesaid shall be duly respected.

"ARTICLE V.

"If the individual claimed by one of the two High Contracting Parties, in pursuance of the present Convention, should also be claimed by one or several other Powers on account of crimes or offences committed within their respective jurisdictions, his extradition shall be granted to that State whose demand is first received.

"The provisions of this Article, and also of Articles II to IV inclusive, of the present Convention, shall apply to surrender for offences specified in the aforesaid Xth Article, as well as to surrender for offences specified in this Convention.

"ARTICLE VI.

"The extradition of fugitives under the provisions of this Convention and of the said Xth Article shall be carried out in Her Majesty's dominions and in the United States, respectively, in conformity with the laws regulating extradition for the time being in force in the surrendering State.

"ARTICLE VII.

"The provisions of the said Xth Article and of this Convention shall apply to persons convicted of the crimes therein respectively named and specified, whose sentence therefor shall not have been executed.

"In case of a fugitive criminal alleged to have been convicted of the crime for which his surrender is asked, a copy of the record of the conviction and of the sentence of the Court before which such conviction took place duly authenticated shall be produced, together with the evidence proving that the prisoner is the person to whom such sentence refers.

"ARTICLE VIII.

"The present Convention shall not apply to any of the crimes herein specified which shall have been committed, or to any conviction which shall have been pronounced, prior to the date at which the Convention shall come into force."

# FINAL APPENDIX.

LIST OF GREAT BRITAIN'S EXTRADITION TREATIES (WITH FOREIGN STATES) IN FORCE IN CANADA.

| FOREIGN STATE. | DATE. | REFERENCE. |
|---|---|---|
| Argentine (Republic).... | May 22, 1899 . | Acts of Can., 1894, p. xliii. |
| Austria-Hungary ..... | Dec. 3, 1878.. | Cl. Extr., 3 Ed., App. p. xxxiii. |
| Belgium..... | May 30, 1876 . | " " xlii. |
| " ..... ..... | July 23, 1877.. | " " liv. |
| " ..... ..... | April 21, 1887. | " " lvi. |
| Bolivia (Republic) ..... | Feb. 22, 1892 . | Acts of Can., 1899, p. xiii. |
| Brazil ..... | Nov. 13, 1872. | Cl. Extr , 3 Ed.. App. p. lviii. |
| Chile (Republic)..... | Jan. 26, 1897 . | Acts. of Can., 1899, p. vi. |
| Colombia (Republic) .... | Oct. 27, 1888.. | " " xxxi. |
| Denmark..... | Mch. 31, 1873. | Cl. Extr., 3 Ed., App. p. lxvii. |
| Ecuador (Republic)..... | Sep. 20, 1880.. | " " lxxviii. |
| France..... | Aug. 14, 1876.. | " " lxxxix. |
| Germany ..... ..... | May 14, 1872 . | " " ci. |
| " ..... ..... | May 5, 1894 .. | Acts of Can., 1895, p. xiii. |
| Guatemala..... | July 4, 1885 .. | Cl. Extr., 3 Ed., App. p. cx. |
| Hayti (Republic)..... | Dec. 7, 1874 .. | " " cxx. |
| Italy ..... | Feb. 5, 1873 .. | " " cxxviii. |
| " ..... | May 7, 1873 .. | " " cxxxvii. |
| Liberia (Republic) ..... | Dec 16, 1892.. | Acts of Can., 1894, p. lviii. |
| Luxembourg ..... .... | Nov. 24, 1880. | Cl. Extr., 3 Ed., App. p. cxxxviii. |
| Mexico ..... ..... | Sep 7, 1886 ... | Acts of Can,, 1889, p. xvii. |
| Monaco ..... | Dec. 17, 1891.. | " " 1892, xvi. |
| Netherlands ..... | June 19, 1874. | Cl. Extr., 3 Ed., App. p. cxlvii. |
| " ..... | Sep. 26, 1898.. | Acts of Can., 1899, p. xx. |

| FOREIGN STATE. | DATE. | REFERENCE. |
|---|---|---|
| Orange Free State (1) . . . | June 25, 1890. | Acts of Can., 1891, p. li. |
| Portugal (2) . . . . . | Oct. 17, 1892 / Nov. 30, 1892 | " " 1894, pp. li-lvii. |
| Roumania . . . . . | Mch. 21, 1893. | " " 1894, p. lxiv. |
| Russia . . . . . | Nov. 24, 1886. | Cl. Extr., 3 Ed., App. p. cliv. |
| Salvador . . . . . | June 23, 1881. | " " clxiv. |
| San Marino . . . . . | Oct. 16, 1899. . | Acts of Can., 1900, p. xi. |
| Spain . . . . . | June 4, 1878. . | Cl. Extr., 3 Ed., App. p. clxxiv. |
| " . . . . . | Feb. 19, 1889 . | Acts of Can., 1890, p. xxvi. |
| Sweden and Norway. . . . . | June 26, 1873. | Cl. Extr., 3 Ed., App. p. clxxxvi. |
| Switzerland . . . . . | Nov. 26, 1879. | " " cxciv. |
| Tonga (3) . . . . . | Nov. 29, 1879. / July 3, 1882. . | " " ccvii. / " " ccviii. |
| Tunis (4) . . . . . | Dec. 31, 1889 . | Acts of Can., 1891, p. xlix. |
| United States (5) . . . . . | Aug. 9, 1842. . | Cl. Extr., 3 Ed., App. p. ccix. |
| United States (5) . . . . . | July 12, 1889. . | Acts of Can., 1890, p. xliii. |
| Uruguay . . . . . | Mch. 26, 1884. | Cl. Extr., 3 Ed., App. p. ccxi. |
| " . . . . . | Mch. 20, 1891. | Acts of Can., 1892, p. ix. |

## OTHER TREATIES, ETC.

**The Turkish Empire.** — By virtue of the *Foreign Jurisdiction Acts*, 1843 to 1878, an Imperial order in Council was made on the 3rd of May 1882, see pp. xix — xxiv of the Statutes of Canada of 1888), whereby, — after reciting that, by treaty, capitulation, grant, usage, sufferance and other lawful means, the En-

(1) The Orange Free State has now lost its independence and become a part of the British Empire.

(2) The provisions of this Treaty do not apply to extradition between British and Portuguese India.

(3) Tongan subjects escaping to British territory.

(4) By this Treaty, — made between the British Government, on the one part, and the Government of the French Republic, acting in the name of the Government of His Highness the Bey of Tunis, on the other part, — the provisions of the Anglo-French Treaty of the 14th of August 1876 are extended to Tunis.

(5) See, also, pp. 1094-1098, *ante*, for the provisions of these treaties with the United States of America.

glish Crown has power and jurisdiction over British subjects and others in the Ottoman dominions, — it was (among other things) ordered, (to wit, by clause 10 thereof), as follows: —

"10. The *Fugitive Offenders' Act*, 1881, except part II thereof, (6) or so much thereof, except that part, as is for the time being in force, and any enactment for the time being in force amending or substituted for the same, are hereby extended to the Ottoman dominions, with the adaptations following, namely:

"(i) Her Majesty's Ambassador is hereby substituted for the Governor of a British possession:

"(ii) The Supreme Court or the Court for Egypt, or the Court for Tunis (7) (as the case requires), is hereby substituted for a Superior Court in a British possession."

**China, Japan and Corea.** — By virtue of the *Foreign Jurisdiction Acts*, 1843 to 1878, an Imperial Order in Council was made on the 26th of June 1884, (see pp. xxiv — xxvii of the Statutes of Canada of 1888), whereby—after reciting that, by treaty and otherwise, the English Crown has power and jurisdiction within China and Japan and the dominions of the King of Corea, —it was among other things) ordered, (to wit, by clause 8 thereof) as follows: —

"8 The *Fugitive Offenders' Act*, 1881," shall apply, in relation to British subjects, to China, Japan and Corea respectively, as if such countries were British possessions, and for the purposes of part II of the said Act, and of this article, China, Japan and Corea shall be deemed to be one group of British possessions, and Her Majesty's Minister for China, Japan or Corea (as the case may be), shall have the powers of a governor or superior court of a British possession."

**Siam.**—By virtue of the *Foreign Jurisdiction Acts*, 1843 to 1878, an Imperial Order in Council was made on the 26th of June 1884, (see pp. xxviii — xxxii of the Statutes of Canada of 1888), whereby, — after reciting that the English Crown has power and jurisdiction within the dominions of the Kings of Siam and the territories of Chiengmai, Lukon and Lampoonchi belonging to Siam, — it was (among other things) ordered, (to wit, by clause 18 thereof), as follows: —

"18. The *Fugitive Offenders' Act*, 1881," shall, with respect to British subjects, apply to all places to which this order applies, as

(6) Part II of the Imperial *Fugitive Offenders Act, 1881*, applies to special groups of British possessions to which by reason of their contiguity, the Act is applied.

(7) See p. 1100, *ante*, for the Extradition Treaty since made with Tunis in 1889.

if such places were British possessions, and for the purposes of part II of the said Act and of this article, all the places to which this Order for the time being applies, and the Straits Settlements, shall, for the purposes of part II of the said Act, be deemed to be one group of British possessions, and the consul shall, as regards any place within his jurisdiction, have the powers of a Governor or Superior Court of a British possession."

## REMARKS.

By the preamble to the *Foreign Jurisdiction Act* of 1890, (*an Act to consolidate the Foreign Jurisdiction Acts*), it is recited that by treaty, capitulation, grant, usage, sufferance and other lawful means, the Crown of England has jurisdiction within divers foreign countries; by section 1 of the same Act it is enacted that it shall be lawful for the British Crown to hold, exercise and enjoy any jurisdiction it then had or may at any time thereafter have within a foreign country in the same and as ample a manner as if such jurisdiction had been acquired by the cession or conquest of territory, and, by section 2 of the Act, it is provided that where a foreign country is not subject to any Government from whom the British Crown might obtain jurisdiction in the manner above recited, the Crown of England shall have jurisdiction over Her Majesty's subjects for the time being residing in or resorting to that country, and that that jurisdiction shall be the jurisdiction of the Crown of England in a foreign country within the meaning of the provisions of the Act.

The Act contains a number of provisions, (see sections 6 to 13), relative to the power of British Courts, — within the foreign countries where British authority is exerciseable, — either to there try and (if convicted) punish persons accused of crime committed there or to send them to a British possession for trial.

By section 18 of the Act, all previous *Foreign Jurisdiction Acts* are repealed; but, by a subsection of the said section 18, it is provided that any Order in Council, commission or instructions, made or issued in pursuance of any enactment so repealed, shall continue in force as if made in pursuance of the *Foreign Jurisdiction Act* of 1890, and be deemed to have been made or issued under and in pursuance thereof. So, that, the above mentioned Orders in Council relating, respectively, to the Turkish Empire, China, Japan, Corea and Siam, are still in force: and the Imperial *Fugitive Offenders' Act* is thus still applicable so far as British subjects are concerned, to all the dominions and territories of the Turkish Empire, China, Japan, Corea and Siam, as if they were British possessions.

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Police Magistrates in.. .. .. .. 1066

# ERRATA.

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|---|---|---|
| Page | 18, Note (4) | Read "Offord" instead of "Oxford." |
| " | 33, Note (112) | Read "24 Q. B. D. 357" instead of "24 Q. B. D. 157." |
| " | 59, Note (10a) | Read "3 Can. Cr. Cas. 472" instead of "3 Com. Cr. Cas. 472." |
| " | 80, Line 25 | Read "c. 146," instead of "c. 140." |
| " | 89, Note (7) | Read "5 C. & P. 154" instead of "5 C. & R. 146." |
| " | 147, Note (30) | Read "Windhill" instead of "Windmill." |
| " | 166, Note (34) | Read "S. v. Ingle" instead of "R. v. Ingle." |
| " | 167, Line 39. | Read "provision" instead of "prevision." |
| " | 207, Line 24, | Read "199 *ante*" instead of " ante." |
| " | 212, Note (15) | Read "10 Moo. 63" instead of "10 Mod. 63." |
| " | 309, Note (12), | Read "33 L. J. C. P. 89" instead of "32 L. J. C. P. 89." |
| " | 327, Line 46, | Read "634" instead of "834." |
| " | 401, Note (22) | Read "1 Den. C. C. 559" instead of "1 Den. C. C. 539." |
| " | 401, Note (22) | Read "20 C. L. T. 185" instead of "28 C. L. T. 185." |
| " | 433, Top of, | Read "Sec. 394" instead of "Sec. 294." |
| " | 448, Note (69) | Read "14 U. C. Q. B. 569" instead of "U. C. Q. B. 569." |
| " | 525, Line 10 | Read "the Crown" instead of "the Ceown." |
| " | 709, Note (67) | Read "18 Cox C. C. 71/" instead of "18 Cox C. C." |
| " | 772, Line 11, | Read "a dismissal" instead of "admissal." |
| " | 776, Note (8) | Read "2 Can. Cr. Cas. 523" instead of "2 Can. Cr. Cas., 93." |
| " | 824, Note (128) | Read "14 Cox C. C. 326" instead of "44 Cox C. C. 326." |
| " | 910, Line 19, | Read "case" instead of "cases." |
| " | 912, Note (47) | Read "[1892] 1 Q. B. 555,600," instead of "[1892] 555,600." |
| " | 931, Line 21, | Read "issue" instead of "issued." |
| " | 943, Line 23, | Read "Findings" instead of "Finding." |