# THE CRIMINAL CODE

AND THE

# LAW OF CRIMINAL EVIDENCE IN CANADA.

BEING AN ANNOTATION OF THE CRIMINAL CODE OF CANADA, AND OF THE CANADA EVIDENCE ACT, 1893, AS AMENDED TO 1902 INCLUSIVE, WITH SPECIAL REFERENCE TO THE LAW OF EVIDENCE AND THE PROCEDURE IN CRIMINAL COURTS, INCLUDING THE PRACTICE BEFORE JUSTICES AND ON CERTIORARI AND HABEAS CORPUS.

BY

W. J. TREMEEAR,

OF THE TORONTO BAR.

TORONTO:
CANADA LAW BOOK COMPANY,
LAW BOOK PUBLISHERS,
32 TORONTO ST.
1902.

# TABLE OF CONTENTS.

## THE CANADIAN CRIMINAL CODE.

### TITLE I.

INTRODUCTORY PROVISIONS.



### TITLE II.

OFFENCES AGAINST PUBLIC ORDER, INTERNAL AND EXTERNAL.



### TITLE III.

OFFENCES AGAINST THE ADMINISTRATION OF LAW AND JUSTICE.

## TITLE IV.

OFFENCES AGAINST RELIGION, MORALS, AND PUBLIC CONVENIENCE.



## TITLE V.

OFFENCES AGAINST THE PERSON AND REPUTATION.



## TITLE VI

OFFENCES AGAINST RIGHTS OF PROPERTY AND RIGHTS ARISING OUT OF CONTRACTS, AND OFFENCES CONNECTED WITH TRADE.

## TITLE VII.

### PROCEDURE.

## TITLE VIII.

PROCEEDINGS AFTER CONVICTION.



## TITLE IX.



## TITLE X.



## THE CANADA EVIDENCE ACT.

# TABLE OF ABBREVIATIONS OF CANADIAN REPORTS.

| | |
|---|---|
| A.R.<br>App. R. | Reports of Court of Appeal of Ontario, 1846-1900. |
| All. | Allen's New Brunswick, (6-11 N.B.R.) 1848-1866. |
| B.C.R. | British Columbia Reports, 1882- |
| Bert. | Berton's New Brunswick, (2 N.B.R.) 1835-1839. |
| C.C.C. | Canadian Criminal Cases, 1893- |
| C.L.J. | Canada Law Journal, (new series) 1865- |
| C.L.T. | Canadian Law Times, 1881- |
| C.P. | Upper Canada Common Pleas, 1850-1882. |
| Cameron MSS. | Cameron's Reports, Upper Canada, 1840-1844. |
| Camp. MSS. | Campbell's Reports, Upper Canada, 1823-1827. |
| Can. Cr. Cas. | Canadian Criminal Cases, 1893- |
| Can. S.C.R. | Reports of Supreme Court of Canada, 1877- |
| Cartw. | Cartwright's Constitutional Cases, 1874- |
| Cham. R. | Reports of Decisions in Common Law, Chambers, (Ont.) 1848-1853. |
| Ch. Cham. | Chancery Chambers Reports, (Ont.) 1858-1872. |
| Chip. | Chipman's New Brunswick, (1 N.B.R.) 1825-1828. |
| Cochrane | Cochrane's Reports, Nova Scotia, 1859. |
| Dor. Q.B. | Dorion's Queen's Bench, (Quebec) 1880- |
| Dra. | Draper's King's Bench Reports, Upper Canada, 1829-1831. |
| Duval R. | Duval's Supreme Court (Canada) Reports, 1876- |
| E. & A. | Error and Appeal Reports, Upper Canada, 1846-1866. |
| G. & O. | Geldert & Oxley's Nova Scotia, 1866-1875. |
| Gr. | Grant's Chancery, (Ontario) 1849-1882. |
| H. & W. | Haszard & Warburton's Prince Edward Island, 1850-1874. |
| Han. | Hannay's New Brunswick, (12-13 N.B.R.) 1867-1871. |
| Hodg. El. Cas. | Hodgins' Election Cases, (Ont.) 1871-1878. |
| James | James' Reports, Nova Scotia, 1851-1855. |
| Kerr | Kerr's New Brunswick, (3-5 N.B.R.) 1840-1848. |
| L.C. Jur. | Lower Canada Jurist, 1856- |
| L.C.L.J. | Lower Canada Law Journal, 1866-1868. |
| L.C.R. | Lower Canada (Quebec) Reports, 1850-1867. |
| L.N. | Legal News, (Montreal) 1878- |
| Man. R. | Manitoba Law Reports, 1884- |
| Mathieu R. | Mathieu's Quebec Revised Reports. |
| Mont. L.R. | Montreal Law Reports, 1884- |
| N.B. Eq. | New Brunswick Equity Reports, 1876- |
| N.B.R. | New Brunswick Reports, 1825- |
| N.S.D. | Nova Scotia Decisions, 1867-1874. |
| N.S.R. | Nova Scotia Reports, 1834- |

| | |
|---|---|
| N.W.T. Rep. | North-West Territories Reports (old series). |
| O.R. / Ont. R. | Ontario Reports, 1882-1900. |
| Old. | Oldright's Reports, Nova Scotia, 1860-1867. |
| Ont. A.R. | Reports of Court of Appeal of Ontario, 1846- |
| Ont. Elec. R. | Ontario Election Reports, 1891-1900. |
| P. & B. | Pugsley & Burbidge, New Brunswick, (17-20 N.B.R.) 1877-1881. |
| P. & T. | Pugsley & Trueman, New Brunswick, (22 N.B.R.) 1882-1883. |
| Perrault | Perrault's Lower Canada Reports, 1726-1759. |
| Pugs. | Pugsley's New Brunswick, (14-16 N.B.R.) 1872-1876. |
| Peters | Peters' Reports, Prince Edward Island, 1850-1872. |
| P.E.I. | Prince Edward Island Reports, 1850- |
| P.R. | Practice Reports, (Ont.) 1850-1900. |
| Pyke | Pyke's Reports, Quebec, 1810-1811. |
| Que. K.B. | Quebec Reports, King's Bench, 1901- |
| Que. L.R. | Quebec Law Reports, 1874- |
| Que. P.R. | Quebec Practice Reports, 1899- |
| Que. Q.B. | Quebec Reports, Queen's Bench, 1892-1900. |
| Que. S.C. | Quebec Reports, Superior Court, 1892- |
| R. & C. | Russell & Chesley's Nova Scotia, 1875-1879. |
| R. & G. | Russell & Geldert's Nova Scotia, 1879-1882. |
| R.J.Q., Q.B. | Quebec Judicial Reports, Queen's Bench, 1892-1900. |
| R.J.Q., S.C. | Quebec Judicial Reports, Superior Court, 1892- |
| Ramsay & M. | Ramsay & Morin's Montreal Condensed Reports, 1854. |
| Rev. Crit. | Revue Critique, (Quebec) 1871-1875. |
| Rev. de Leg. | Revue de Legislation, (Quebec) 1845-1848. |
| Rev. Leg. | Revue Legale, (Que.) 1869- |
| Russ. & Ch. | Russell & Chesley, Nova Scotia, 1875-1879. |
| Terr. L.R. | Law Reports of the North Western Territories (new series). |
| Thom. Dec. | Thomson's Decisions, Nova Scotia, 1834-1851. |
| Thom. R. | Thomson's Reports, Nova Scotia, 1856-1859. |
| U.C.C.P. | Upper Canada Common Pleas, 1850-1882. |
| U.C.L.J. | Upper Canada Law Journal, (old series) 1855-1864. |
| U.C.O.S. | Upper Canada, Queen's Bench Reports, (old series) 1831-1844. |
| U.C.Q.B. | Upper Canada, Queen's Bench, 1844-1882. |

# CASES CITED.

## CORRIGENDA.

page 512—for "Copy of depositions" (side heading to section 595) read "Recognizance to prosecute"

page 625—Insert "Amendment of 1900" above sec. 702

page 711—In line 1 of sec. 832, for "Court by which any judge" read "Court by which *and* any judge."

page 743—strike out the seventh line from foot of page "Crim. Code one hundred and twenty-three."

page 789—for "R. v. Henell" read "R. v. Herrell"

# THE CANADIAN CRIMINAL CODE,

AND THE

# LAW OF CRIMINAL EVIDENCE

APPLICABLE THERETO.

---

## THE CRIMINAL CODE, 1892

(Statutes of Canada, 55-56 Vict., Chap. 29) and amending Acts 1893 to 1901, inclusive.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

[N.B.—Where in the original Act passed in the reign of Her late Majesty, Queen Victoria, reference was made to "Her Majesty," the text is now printed "His Majesty," and the word "King's" substituted for "Queen's," etc.]

## TITLE I.

### INTRODUCTORY PROVISIONS.

PART I.

### PRELIMINARY.

SECT.



---

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

*Sub-divisions of Code.*]—The arrangement of titles in this Code is as follows:—

TITLE I. Introductory provisions; II. Offences against public order, internal and external; III. Offences affecting the administration of law and

justice; IV. Offences against religion, morals and public convenience; V. Offences against the person and reputation; VI. Offences against the rights of property and rights arising out of contracts, and offences connected with trade; VII. Procedure; VIII. Proceedings after conviction; IX. Actions against persons administering the criminal law; X. Repeal, etc. There are two schedules to the Code, the first containing the Forms, and the second a Table of Acts repealed by the Code (see under sec. 981). The Code Forms are in this treatise set forth under the respective sections to which they refer. There is also an appendix of Acts and parts of Acts which are not affected by the Code. See under sec. 983 (3).

*Legislative power.*]—Section 91 of the British North America Act, 1867, embodying the Canadian Constitution, provides that it shall be lawful for the Dominion Parliament to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects thereby assigned exclusively to the Legislatures of the provinces; and "for greater certainty, but not so as to restrict the generality of the foregoing terms," it is thereby declared that (notwithstanding anything in that Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within certain classes of subjects enumerated, amongst which is: (27) The Criminal Law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters.

Section 92 of the same statute provides that in each province the Legislature may exclusively make laws in relation to matters coming within certain other classes of subjects therein enumerated, amongst which is included the following: (14) The administration of justice in the province, including the constitution, maintenance, and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts.

This latter power has been held to include the power of giving jurisdiction to the provincial courts and to impliedly include the power of enlarging, altering, amending and diminishing the jurisdiction of such courts. R. v. Levinger (1892), 22 O.R. 690 (Q.B.D.). But in R. v. Boucher (1879), Cassels S.C. Dig. 181, Henry, J. of the Supreme Court of Canada, held that to merely add to the existing duties or functions of a police magistrate does not interfere with the constitution, maintenance or organization of the court, even if such office can be called a "Court" within the meaning of sec. 92 of the B.N.A. Act, which he doubted. And in R. v. Toland (1892), 22 O.R. 505, it was held that an Ontario Statute (sec. 2 of 53 Vict., ch. 18), which authorized police magistrates to try and convict persons charged with forgery was ultra vires of the Provincial Legislature; per MacMahon, J. Enforcing the law against a person charged with the commission of a crime is by the "trial" of the offender and his punishment for the offence. The trial is not connected with the constitution, maintenance or organization of a court but is a criminal procedure. Ibid.

The whole domain of crime and criminal procedure is the exclusive property of the Dominion Parliament, and to allow the parliament of a province to declare that an Act which, by the general law, is a crime, triable and punishable as a crime with the ordinary safeguards of the constitution affecting procedure as to crime, shall be something other than or less than a crime, and so triable before and punishable by magistrates as if not a crime, would be destructive of the checks provided by the general law for the constitutional liberty of the subject. R. v. Lawrence (1878), 43 U.C.Q.B. 164, 175, per Harrison, C. J.

But there are many acts not being crimes which are triable before and punishable by magistrates, which, although called offences, are not crimes, and which by the proper legislative authority may be made the subject of summary magisterial jurisdiction, either with or without appeal; but these are not to be mistaken for acts in themselves crimes, and the subject of

indictment, and of conviction under indictment, either at the common law or by statute. Such acts as these may by the Provincial Legislature be made the subject of punishment by fine, penalty or imprisonment, when this is done for the purpose of enforcing any law of the province made in relation to any matter coming within any of the classes of subjects exclusively assigned to the Provincial Legislatures. One of the subjects exclusively assigned to the Provincial Legislatures is the right to make laws as to "shop, saloon, tavern, auctioneer and other licenses, in order to the raising of a revenue for provincial, local, or municipal purposes." Ibid.

The passing of a provincial statute, within the powers of the Legislature, cannot in any wise take away from Parliament the right to legislate respecting the same matters, and to prohibit them and to enforce the prohibition by such punishment by way of fine or imprisonment as may be deemed best; or to draw into the domain of criminal law an act which has hitherto been punishable only under a provincial statute. Per Rose, J., in R. v. Stone (1892), 23 O.R. 46, following R. v. Wason, 17 A.R. 221, and R. Hart, 20 O.R. 611.

A provincial statute relating to criminal law passed before Confederation becomes as to that province a part of the criminal law of Canada, and is subject to repeal or amendment by a Dominion Statute only. R. v. Halifax Electric Tramway Co. (1898), 1 Can. Cr. Cas. 424 (N.S.).

If it appears that provincial legislation deals with public wrongs and imposes penalties in respect thereof for the enforcement of which all citizens should have an equal interest as distinguished from enactments passed for the protection of a particular class or the regulation of the dealings or business of a certain class, as for example between master and servant, such legislation as to public wrongs is within the exclusive jurisdiction of the Dominion Parliament, although similar legislation as applied to various classes only and not to the public generally would be within Provincial jurisdiction as dealing with "civil rights." Ibid.

The Parliament of Canada has not the power to give to a provincial court a jurisdiction which is not within the scope of such court's powers as established by the Provincial Legislature. Ex p. Flanagan (1899), 5 Can. Cr. Cas. 82 (N.B.). Nor can it take away from the provincial courts the powers to try criminal cases given to them by Provincial Legislation. R. v. Wright, 5 Can. Cr. Cas. 85 (N.B.).

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

The royal assent was given to this Act on the 9th day of July, 1892.

The several Acts set out in sched. II. (under sec. 981) were from and after the 1st day of July, 1893, when the Code came into operation, repealed to the extent stated in such schedule.

By an amendment of 1893 (56 Vict., ch. 32) it was declared that the provisions of this Act, i. e. the Code, 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. Although the Code was in force at the date of the prosecution and the execution of an impeached agreement, if it was not in force

when the alleged criminal acts were committed it does not apply. Major v. McCraney (1898), 2 Can. Cr. Cas. 547, 558 (S.C. Can.).

Section 754 declares that the practice and procedure in all criminal cases and matters in the High Court of Justice of Ontario, which are not provided for in the Code, shall remain as heretofore.

**3. Interpretation.**—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*).

By the Interpretation Act R.S.C. 1886, ch. 1, sec. 2, that Act and every provision thereof is to extend and apply to every Act of the Parliament of Canada "now or hereafter passed" except in so far as the provision is inconsistent with the intent and object of such Act, or the interpretation which such provisions would give to any word, expression or clause is inconsistent with the context, and except in so far as any provision thereof is in any such Act declared not applicable thereto.

The interpretation of all statutes (especially penal ones) should be highly favourable to personal liberty: Henderson v. Sherborne, 2 M. & W. 239; and where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning, which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject, and against the Legislature which has failed to explain itself. Nicholson v. Fields, 31 L.J. Exch. 235; Foley v. Fletcher, 28 L.J. Exch. 106; Scott v. Morley, 57 L.J.Q.B. 45 (C.A.); R. v. Wirth, 1 Can. Cr. Cas. 231 (B.C.).

(*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 North-West 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.

(*Amendments of 1895 and 1900*).

(*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;

(ii.) In the province of Quebec, the Court of King'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 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*).

The expression "district" or "county" as used in Part LVIII. relating to summary convictions is by sec. 839 declared to include 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.

(*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*).

(*j.*) Finding the indictment includes also exhibiting an information and making a presentment. R.S.C. c. 174, s. 2 (*d*).

(*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 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 Vict., c. 45, s. 2 (*e*).

(*Amendment of 1893*).

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.

(*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*).

(*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*).

The local Government of the Province of New Brunswick has under 32 Vict., ch. 92, power to appoint Justices of the Peace, that Act having received the assent of the Governor-General on 20th August, 1869, under the 90th sec. of the British North America Act. Ex parte Williamson (1884), 24 N.B.R. 65 (following Ganong v. Bayley, 1 P. & B. 324).

(*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 King's Regulations and Orders for the Army; any Act of the United Kingdom or other law applying to His Majesty's troops in Canada, and all other orders, rules and regulations of whatever nature or kind soever to which His 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 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. 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 His 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.

A corporation is not subject to indictment upon a charge of any crime the essence of which is either personal criminal intent or such a degree of negligence as amounts to a wilful incurring of the risk of causing injury to others. R. v. Great West Laundry Co. (1900), 3 Can. Cr. Cas. 514 (Man.).

(*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.

The phrase in Code sec. 205 (b) as to lotteries, is "disposing of any property," and the clause of interpretation as to "property" simply states that it includes "every kind of real and personal property." The property need not be "specific property," for it would be an easy evasion if the statute could be got rid of by designating no particular thing, although the winner would be able to exercise his choice among the available prizes offered. Taylor v. Smetten, 11 Q.B.D. at p. 212; R. v. Lorrain (1896), 2 Can. Cr. Cas. 144.

(*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.

The acts of a de facto officer, assuming to exercise the functions of an office to which he has no legal title, are, as regards all persons but the holder of the legal title, legal and binding. O'Neil v. Attorney-General (1896), 1 Can. Cr. Cas. 303 (S.C. Can.).

An officer de facto is "one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." R. v. Bedford Level, 6 East 356, per Lord Ellenborough; Parker v. Kett, 1 Ld. Raym. 658; 12 Mod. 467.

The distinction between an officer de jure and an officer de facto is, that an officer de jure is one who has the lawful right or title without the possession of the office, while an officer de facto has the possession and performs

the duties under the colour of right without being actually qualified in law so to act. 19 Am. & Eng. Encyc. of Law, 394.

The acts of a justice of the peace, duly commissioned, but who has not qualified by taking the prescribed oath, or who has not the property qualification without which he is prohibited by statute from acting and is declared to be incapable of "being a justice," are sustained as valid if done in a judicial character, and sufficient effect is given to the statute by considering it as penal upon the party acting; and therefore persons seizing goods under a warrant of distress, signed by a justice who had not taken the oaths required, are not trespassers because of the defect. Margate Pier v. Hannam (1819), 3 B. & Ald. 266.

It is a general presumption of law that a person acting in a public capacity is duly authorized to do so. R. v. Jones, 2 Camp. 131; Gordon's case (1789), 1 Leach's Crown Cases 581; Berryman v. Wise, 4 T.R. 366; but such presumption only stands till the contrary is proved. R. v. Verelst (1813), 3 Camp. 431.

(*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*).

*(Amendment of 1900.)*

(*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;

(ii.) In the province of Quebec, the Court of King'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 King's Bench (Crown side).

* A Provincial Legislature has no jurisdiction to confer upon a single judge, concurrently or otherwise, the power to determine matters arising under the Criminal Code, as to which the full court was formerly the proper forum. R. v. Beale (1896), 1 Can. Cr. Cas. 235 (Man.).

In Ontario the jurisdiction to quash convictions was at the time of the passing of the Ontario Judicature Act in the Courts of Queen's Bench and Common Pleas respectively, and was exercised and exerciseable by them respectively sitting in term; the courts or divisions of the High Court of Justice mentioned in sub-sec. 3 of sec. 3 of the Judicature Act can respectively exercise all the jurisdiction of the High Court of Justice in the name of the High Court of Justice; the sittings of these respective courts or divisions are analogous to and represent the sittings of the former courts of common law in term. R. v. Beemer (1888), 15 O.R. 266.

(*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 V., c. 37, s. 20.

It was formerly held that the term "valuable security" meant a valuable security to the person who parted with it on the false pretence, and that the inducing a person to execute a mortgage on his own property was therefore not obtaining a "valuable security." R. v. Brady (1866), 26 U.C.Q.B. 13; R. v. Danger, 3 Jur. N.S. 100; but the present definition expressly includes any deed, bond, etc., which evidences title.

Defendant was indicted for forging an order for the payment of money, the order being in the following words: "John McLean, tailor, please give M. A. S. (defendant) to the amount of $3.50 and by doing you will oblige me, A. McP." It was proved that the signature A. McP. was forged by the prisoner, and prisoner was convicted and sentenced. It was held that this was an order for the payment of money, and not a mere request, and the conviction was affirmed. R. v. Steel (1863), 13 U.C.C.P. 619 (following R. v. Tuke (1858), 17 U.C.Q.B. 296).

The true criterion as to whether a document is an order for payment of money or only a request, is, whether, if the instrument were genuine, and the person to whom it was directed paid it, he could recover the amount from the party by whom the order was given, or charge it to him, for if such be the case it is an order. R. v. Carter, 1 Cox 172; R. v. Ferguson, 1 Cox 241; R. v. Dawson, 3 Cox 220; R. v. Vivian, 1 Den. C.C. 35.

(*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.

*Interpretation Act.*]—By section 7 of the Interpretation Act the following rules of interpretation applicable to the Code are enacted:—

"*Shall.*"]—This word shall be construed as imperative (sub-sec. 4).

"*May.*"]—This expression is to be construed as permissive (sub-sec. 4.)

The word "may" in a statute is, however, sometimes imperative, as where the intent and object of the statute so require (sec. 2).

Where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the court will require it to be exercised. Per Lord Cairns, L.C., Julius v. Bishop of Oxford (1880), 5 App. Cas. 214, 225.

The word "may" is aptly and properly used to confer on the court an authority, and the rule is that when a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested and having the right to make the application. Jervis, C.J., in Macdougall v. Patterson (1851), 11 C.B. 755; Reid v. Gardner, 8 Exch. 651; Jones v. Harrison, 6 Ex. 328, disapproved.

Where a statute directs the doing of a thing for the sake of justice or the public good, the word "may" is the same as the word "shall." Rex v. Barlow, Salk. 609, Skin. 370, Carth. 293. The words "it shall be lawful"

used in a statute merely make that legal and possible which there would otherwise be no right or authority to do, and their natural meaning is permissive and enabling only; so when the Church Discipline Act, 3 and 4 Vict. (Imp.), ch. 86, provided that it shall be lawful for the bishop of the diocese on the application of any party complaining thereof, or if he shall think fit, of his own mere notion to issue a commission for the purpose of making enquiry as to the grounds of such charge or report, and either in the first instance or after the commissioners shall have reported that there is sufficient prima facie ground for instituting proceedings, to send the case by letters of request to the Court of Appeal, etc., it was held that the sections gave the bishop complete discretion to issue or decline to issue such commission. Julius v. Bishop of Oxford (1880), 5 App. Cas. 214.

Enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right, and if by enabling words a court is empowered to pass sentence on one convicted of a crime, it would be the duty of the court to pass that sentence. Per Lord Blackburn, in Julius v. Bishop of Oxford (1880), 5 App. Cas., at page 245.

Where a statute provided that execution "may" be issued by leave of the court upon motion for a rule to shew cause, and that it shall be lawful for such court to make absolute or discharge such rule, or to make such order therein as to such court shall seem fit, it was held by the Court of Common Pleas that the statute left no discretion to the court, which had nothing more to do than to see that the execution creditor had complied with all the conditions which the Legislature had thought fit to impose upon him. Morisse v. Royal British Bank (1856), 1 C.B.N.S. 66; Hill v. London and County Assurance Co., 1 H. and N. 398.

But where a statute was in the terms that upon information and complaint laid, etc., the justices receiving the same *may*, if they shall think fit, issue a summons or warrant, they have a discretion, and if they think the charge frivolous or vexatious they are not bound to grant an application for summonses; what the justices have to consider is whether there was prima facie evidence of a criminal offence which in their judgment calls upon the alleged offender to answer. If they think there is such prima facie evidence, it is their *duty* to issue summonses, and if they refuse, not because they disbelieve the evidence or for any other reasonable ground, but from some ground which they ought not to have taken into account, a mandamus may be ordered to compel them to hear and determine the matter of the application for the summonses. R. v. Adamson (1875), 1 Q.B.D. 201. Ex parte McMahon, 48 J.P. 70.

Code sec. 880 (*e*) enacting that the court "may" order the fine and costs to be paid out of moneys deposited pursuant to sec. 880 (e) on taking an appeal, if the conviction is affirmed, 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. Fenson v. New Westminster (1897), 2 Can. Cr. Cas. 52 (B.C.).

"*Province.*"]—This expression includes the North-West Territories and the District of Keewatin (sub-sec. 13).

*Names.*]—The name commonly applied to any country, place, body, corporation, society, officer, functionary, person, party or thing, means such country, place, body, corporation, society, officer, functionary, person, party or thing, although such name is not the formal and extended designation thereof (sub-sec. 16).

"*County.*"]—The expression "county" includes two or more counties united for purposes to which the enactment relates (sub-sec. 20).

*Number and gender.*]—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, and the converse (sub-sec. 21).

"*Person.*"]—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 (sub-sec. 22).

"*Writing.*"]—The expression "writing" "written," or any term of like import, includes words printed, painted, engraved, lithographed or otherwise traced or copied. See also sub-sec. (*ee*) supra.

"*Now*" *or* "*Next.*"]—The expression "now" or "next" shall be construed as having reference to the time when the Act was presented for the Royal Assent (sub-sec. 24).

"*Month.*"]—The expression "month" means a calendar month (sub-sec. 25).

"*Holiday.*"]—The expression "holiday" includes Sundays, New Year's 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 celebration of the birthday of the reigning sovereign, Victoria Day, Dominion Day, Labour Day (first Monday of September), and any day appointed by proclamation for a general fast or thanksgiving (sub-sec. 26 as amended 56 Viet. c. 30, 57-58 Viet. c. 55, and 1 Edw. VII. c. 12, s. 3).

*Reckoning of time.*]—If the time limited by any Act for any proceeding, or the doing of any thing 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.

"*Oath.*"]—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" (sub-sec. 28).

"*Sureties.*"]—The expression "sureties" means sufficient sureties, and whenever the word is used one person shall be sufficient therefor unless otherwise expressly required (sub-sec. 30).

"*Magistrate.*"]—The expression "magistrate" means a justice of the peace (sub-sec. 34). But anything directed to be done by or before a magistrate must be done by or before a magistrate whose jurisdiction or powers extend to the place where such thing is to be done (sub-sec. 36). As to the meaning of the term "magistrate" under the Summary Trials Procedure (Part LV. of the Code), see Code sec. 782.

"*Security.*"]—This expression means sufficient security, and, whenever used, one person shall be sufficient therefor unless otherwise expressly required (sub-sec. 30).

"*County Court.*"]—This expression in its application to the Province of Ontario includes "district court" (sub-sec. 31a added by 1 Edw. VII., ch. 11, sec. 1).

"*Two justices.*"]—This expression means two or more justices of the peace assembled or acting together (sub-sec. 35). But anything directed to be done by or before them must be done by or before those whose jurisdiction or powers extend to the place where such thing is to be done (sub-sec. 36).

"*Imprisoned.*"]—If, in any Act, any person is directed to be imprisoned or committed to prison, such imprisonment or committal shall, if no other place is mentioned or provided by law, be in or to the common gaol of the locality in which the order for such imprisonment is made, or if there is no common gaol there, then in or to that common gaol which is nearest to such locality; and the keeper of any such common gaol 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 (sub-sec. 38).

*Majorities rule.*]—When any act or thing is required to be done by more than two persons, a majority of them may do it (sub-sec. 42).

*Forms.*]—Whenever forms are prescribed, slight deviations therefrom, not affecting the substance or calculated to mislead, shall not vitiate them (sub-sec. 44).

*Rules.*]—Whenever power to make by-laws, regulations, rules or orders is conferred, it shall include the power, from time to time, to alter or revoke the same and make others (sub-sec. 45).

*The Crown.*]—No provision or enactment in any Act shall affect, in any manner or way whatsoever, the rights of His Majesty, His heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby (sub-sec. 46).

*Repeal.*]—The repeal of any Act or part of an Act shall not revive any Act or provision of law repealed by such Act or part of an Act, or prevent the effect of any saving clause therein (sub-sec. 48). Whenever any Act is repealed, wholly or in part, and other provisions are substituted, and whenever any regulation is revoked and other provisions substituted, all officers, persons, bodies politic or corporate, acting under the old law or regulation, shall continue to act as if appointed under the new law or regulation until others are appointed in their stead; and all proceedings taken under the old law or regulation shall be taken up and continued under the new law or regulation, when not inconsistent therewith; and all penalties and forfeitures may be recovered and all proceedings had in relation to matters which have happened before the repeal or revocation, in the same manner as if the law or regulation was still in force, pursuing the new provisions as far as they can be adapted to the old law or regulation (sub-sec. 49). Whenever any Act is repealed, wholly or in part, and other provisions are substituted, all by-laws, orders, regulations, rules and ordinances made under the repealed Act shall continue good and valid in so far as they are not inconsistent with the substituted Act, enactment or provision, until they are annulled or others made in their stead (sub-sec 50). Whenever any Act or part of an Act is repealed, and other provisions are substituted by way of amendment, revision or consolidation, any reference in an unrepealed Act, or in any rule, order or regulation made thereunder to such repealed Act or enactment, shall, as regards any subsequent transaction, matter or thing, be held and construed to be a reference to the provisions of the substituted Act or enactment relating to the same subject matter as such repealed Act or enactment: Provided always, that where there is no provision in the substituted Act or enactment relating to the same subject matter, the repealed Act or enactment shall stand good, and be read and construed as unrepealed, in so far, but in so far only, as is necessary to support, maintain or give effect to such unrepealed Act, or such rule, order or regulation made thereunder (sub-sec. 51).

No offence committed and no penalty or forfeiture incurred, and no proceeding pending under any Act at any time repealed, or under any regulation at any time revoked, shall be affected by the repeal or revocation, except that the proceeding shall be conformable, when necessary, to the repealing Act or regulation, and that whenever any penalty, forfeiture or punishment is mitigated by any of the provisions of the repealing Act or regulation, such provisions shall be extended and applied to any judgment to be pronounced after such repeal or revocation (sub-sec. 53).

**4. 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 definitions under the Post Office Act (R.S.C. 1886 ch. 35, and 52 Vict., ch. 20), include the following:—

"*Mail.*"]—This expression includes every conveyance by which post letters are carried whether it is by land or by water (sec. 2 (*f*)).

"*Post letter.*"]—The expression "post letter" means any letter transmitted through 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 (sec. 2 (*i*)).

"*Mailable Matter.*"]—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 (sec. 2 (*j*)).

"*Post letter bag.*"]—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 (sec. 2 (*k*)).

"*Post Office.*"]—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.

"*Letter.*"]—The expression "letter" includes packets of letters (sec. 2 (*a*)).

*Expressions in other statutes.*]—The rule to be applied where there is no such statutory provision as the above is that an appeal to earlier law and decisions for the purpose of interpreting the provisions of a statutory code can only be justified on some special ground, such as the doubtful import or previously acquired technical meaning of the language used therein. Robinson v. Canadian Pacific R. W. Co., [1892] A.C. 481.

**4A. Carnal knowledge.**—Carnal knowledge is complete upon penetration to any, even the slightest degree, and even without the emission of seed. R.S.C. c. 174, s. 226. (Transferred from s. 266, sub-sec. 3 by amendment of 1893).

This section was formerly sub-sec. 3 of sec. 266 defining the crime of rape, and was transferred to Part I. of the Code by the statute 56 Viet. (1893), ch. 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 His Majesty's dominions or possessions.

As to offences within the jurisdiction of the English Admiralty, see sec. 542.

By the Imperial Act, 49 Geo. III., ch. 126, certain provisions contained in the statute of 5 & 6 Edw. VI., ch. 16, against buying and selling public offices were made applicable to His Majesty's dominions and were therefore held to be operative in Ontario. R. v. Mercer, 17 U.C.Q.B. 602.

The Imperial Foreign Enlistment Act of 1870 and amendments 46-47 Viet., ch. 39, and 56-57 Viet., ch. 54, extend to all the dominions of His Majesty, including the adjacent territorial waters (33-34 Viet. (Imp. ch. 90, s. 2); and any powers or jurisdiction thereby given to the Secretary of State may be exercised by him throughout His Majesty's dominions, and such powers and jurisdiction may also be exercised in Canada by the Governor-General (33-34 Viet. (Imp.), ch. 90, sec. 26). Jurisdiction thereby given to a Court of Admiralty will be exercised in Canada by the Exchequer Court (Ibid. sec. 30). The latter is also a Prize Court for Canada under Warrant in Admiralty of 17th August, 1899.

**6. Punishments.**—Everyone 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;

(*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.

*Locality of Crime.*]—All crime is local, and the jurisdiction over the crime belongs to the country where it is committed. Jefferys v. Boosey (1855), 4 H.L.C. 815, 24 L.J. Ex. 81, per Parke, B.; MacLeod v. New South Wales (1891), A.C., 455, 17 Cox C.C. 341.

But if a material part of any crime is committed within the jurisdiction, legislation may properly provide for the punishment there of the whole of it: Bishop on Cr. Law, sec. 116

And offences committed by a subject or citizen within the territorial limits of a foreign state may, by legislation, be made punishable in the courts of the country to which the party owes allegiance, and whose laws he is bound to obey. Wheaton's International Law, sec. 113, re Bigamy Sections, 1 Can. Cr. Cas. 172 (S.C. Can.).

In cases of obtaining goods under false pretences, the crime is complete where the goods are obtained; and, therefore, if the pretences are made within one jurisdiction and the property is obtained in another, the person making the representations must be indicted within the latter jurisdiction. 7 Am. & Eng. Ency. of Law 758; People v. Sully, 5 Parker Cr. Cas. (N.Y.) 142; Skiff v. People, 2 Parker Cr. Cas. N.Y. 139; Connor v. State, 29 Fla. 455, 30 Am. St. Rep. 126.

On an indictment for obtaining money by false pretences by sending a false return of fees to certain public commissioners, it was shewn that the return was received in Westminster with a letter dated Northampton, together with an affidavit sworn there, and that the commissioners thereupon issued an order upon the treasury to pay certain moneys to the prisoner. It was held by Coleridge, J., that the jury might infer that the documents were posted in Northamptonshire, where the affidavit was sworn, and from which county the letter purported to have been written, and that the prisoner was properly indicted in Northamptonshire for obtaining money by false pretences, the "forwarding" of the false return, etc., being alleged as the false pretence. R. v. Cooke (1858), 1 Foster & F. 64.

The last-mentioned case was followed and approved by the Court for Crown Cases Reserved in R. v. Holmes (1883), 15 Cox C.C. 343. It was there held that where a false pretence was made by the prisoner in England by letter there posted to a person in France, and received in France by the latter, in consequence of which the latter sent to the prisoner a cheque drawn in France, but payable in England, which the prisoner cashed in England, an offence was established to have taken place in England, and that the prisoner was properly indicted and convicted there. Lord Coleridge, C.J., said: "The pretence was made in the County of Nottingham, for it was held in R. v. Burdett, 4 B. & Ald. 95, and other cases, that the delivery at the post office of a sealed letter, enclosing a libel, is a publication of the libel at the place of posting, and the money, which was the result of the false pretence, was obtained in Nottingham; therefore, the two necessary ingredients of the offence both took place in the country where the prisoner was tried."

PART II.

## MATTERS OF JUSTIFICATION OR EXCUSE.

SECT.

**7. At common law.**—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.

The common law is not abrogated by the Code and will still be applicable in cases for which no provision has been made in the Code as well to their prosecution as defence. Even in cases provided for by the Code the common law jurisdiction as to crime is still operative except where there is a repugnancy in which event the Code will prevail. R. v. Cole, 12 February, 1902, per Boyd, C. and Ferguson, J., not yet reported.

Generally speaking, if an uninhabited country be discovered and occupied by English subjects, all English laws then in being, which are the birthright of every subject, are immediately there in force. But this must be understood with many and great restrictions. Such colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony. Broom & Hadley's Com. 119. At the time of its occupation by English subjects the country now known as the North-West Territories would fall within the description of an uninhabited country. R. v. Connor (1885), 2 Man. L.R. 235, 1 Terr. L.R. 4, 13, per Taylor, J.

*Intent.*]—It is a general principle of the criminal law that there must be as an essential ingredient in a criminal offence some blameworthy condition of mind—something of the mind which is designated by the expression mens rea. It is also a principle of the criminal law that the condition of the mind of the servant is not to be imputed to the master. This principle applies also to statutory offences, with this difference, that it is in the power

of the Legislature, if it so pleases, to enact that a man may be convicted and punished for an offence, although there was no blameworthy condition of mind about him; but it lies on those who assert that the Legislature has so enacted to make it out convincingly by the language of the statute. Per Cave, J., in Chisholm v. Doulton, 22 Q.B.D. 736; cited by Osler, J.A., in R. v. Potter (1893), 20 Ont. App. 516, 523.

Every person at the age of discretion is, unless the contrary be proved, presumed by law to be sane and to be accountable for his actions. R. v. Oxford, 9 C. & P. 525; R. v. Layton, 4 Cox 149; Code sec. 11 (3).

*Mistake of fact.*]—Ignorance or mistake of fact may constitute a valid excuse for the inadvertent commission of a crime where the accused acted under an honest and reasonable belief in a state of things which, if true, would have justified the act done. R. v. Tolson, 23 Q.B.D. 168.

In that case a woman had been convicted of bigamy, having gone through the ceremony of marriage within seven years after she had been deserted by her husband, and the jury had found that at the time of the second marriage she, in good faith and on reasonable grounds, believed her husband to be dead; it was held, on a case reserved, that such belief constituted a good defence. That doctrine as regards bigamy is now embodied in Code sec. 275 (3).

So if A. make a thrust with a sword at a place in his house where he had good reason to suppose a burglar to be concealed, and killed a person who was not a burglar, A. would be in the same position as if the person killed were in fact a burglar.

But where a statute made it unlawful to take an unmarried girl under the age of sixteen years out of the possession and against the will of her father, it was held to be no defence that the defendant believed on good grounds that the girl was above that age. R. v. Prince, L.R. 2 C.C.R 154; 44 L.J. M.C. 122; it being considered that the Legislature's object being to prevent a scandalous invasion of parental rights, it should be presumed that the Legislature intended that the wrongdoer should act at his peril. The belief in such a case is declared immaterial by sec. 283 (3) of the Criminal Code. The scope of the statute and the object for which it appears to have been passed are to be taken into consideration for the purpose of ascertaining whether a mistaken belief is material to the offence. R. v. Bishop, 5 Q.B.D. 259; Cundy v. Lecocq (1884), 13 Q.B.D. 207.

**8. Application of Part II.**—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.

**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.

This is in accordance with the common law under which a child under the age of seven years is doli incapax and no evidence was admissible to rebut that presumption. Marsh v. Loader, 14 C.B.N.S. 535.

**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.

Children after attaining the age of fourteen years are presumed by the law to be doli capaces, and capable of discerning good from evil, and are with respect to their criminal actions subject to the same rule of construction as others of more mature age. 1 Hale 25.

Where the offender is between the ages of seven and fourteen, evidence of a mischievous discretion on his part may be given to rebut the presumption of law arising from his tender years, but such evidence must be clear and strong beyond all doubt and contradiction. R. v. Vamplew, 3 F. & F. 520. Two questions are in that case to be left to the jury: (1) Whether he committed the offence; (2) whether at the time he had a guilty knowledge that he was doing wrong. R. v. Owen, 4 C. & P. 236; R. v. Smith, 1 Cox 260.

It is to be conclusively presumed that a party is physically incompetent to commit an unnatural offence under Cr. Code, sec. 174, if under the age of fourteen, such presumption is not affected by the provisions of this section which refers exclusively to mental capacity to distinguish between right and wrong. R. v. Hartlen (1898), 2 Can. Cr. Cas. 12 (N.S.). But although a minor under fourteen cannot be convicted of sodomy, he may, if the act be committed against the will of the other party, be punished for an indecent assault upon another male person under Cr. Code, sec. 260. Ibid.

By Cr. Code, sec. 266, it is enacted that no one under the age of fourteen can commit the offence of rape.

The leading case of R. v. Brimilow (1840), 9 C. & P. 366, 2 Moody C.C. 122, was decided under the statute 1 Vict. (Imp.), ch. 85, sec. 11, which enacted, "that on the trial of any person for any felony where the crime charged shall include *assault*, the jury may acquit of the felony and find the party guilty of an assault, if the evidence shall warrant such finding." Brimilow was charged with rape, and on it being proved that he was under fourteen years of age, it was left to the jury to say whether he was guilty of an assault, and on conviction, and a case reserved, it was held that he could, on an indictment for rape, be legally convicted of an assault under that statute.

A boy under fourteen cannot in point of law be guilty of an assault *with intent* to commit a rape. R. v. Phillips (1839), 8 C. & P. 736, nor of carnally knowing and abusing a girl, although proved that he had arrived at puberty. R. v. Jordan (1839), 9 C. & P. 118, nor of the offence of carnal knowledge of a girl under thirteen. R. v. Waite (1892), 2 Q.B. 600.

**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.

A grand jury should not on the ground of the insanity of the accused return "no bill" to an indictment. R. v. Hodges, 8 C. & P. 195. As to procedure on the trial of an indictment where this defence is raised see Code secs. 736-741.

The rule laid down by the judges in reply to a question put to them by the House of Lords, in McNaghten's Case (1843), 4 St. Tr. N.S. 847, 10 Clark & F. 200, 1 Car. & K. 130, was as follows: "Notwithstanding the party accused did the act complained of, with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law; by which expression we mean, the law of the land." And this rule was followed and applied in R. v. Riel (No. 2) (1885), 1 Terr. L.R. 23.

The burden of proof of insanity is upon the defence. McNaghten's Case, 10 Cl. & F. 200, Regina v. Stokes, 3 C. & K. 185, Regina v. Layton, 4 Cox C.C. 149. Without evidence to go to the jury, the prisoner cannot be acquitted upon the plea of insanity. If there is in such a case to be any appeal after a conviction, it must be on the ground that the evidence is so overwhelming in favour of the insanity of the prisoner that the court will feel that there has been a miscarriage of justice—that a poor, deluded, irresponsible being has been adjudged guilty of that of which he could not be guilty if he were not deprived of the power to reason upon the act complained of, to determine by reason if it was right or wrong. A new trial should not be granted if the evidence were such that the jury could reasonably convict or acquit. Per Killam, J., in R. v. Riel (No. 2) (1895), 1 Terr. L.R. at page 63.

One deaf and dumb from his birth, who has no means of learning to discriminate between right and wrong, or of understanding the penal enactments of the law as applicable to particular offences, is by presumption of law an idiot, but if it can be shewn that he has the use of understanding, which many of that condtion discover by signs, then he may be tried and suffer judgment, although great caution should be observed in such proceedings: 1 Hale 34; R. v. Berry, 1 Q.B.D. 447.

The proper question to be put to the jury as to the prisoner's state of mind where the defence of insanity is raised is, whether the accused had a sufficient degree of reason to know that he was doing an act that was wrong, but this question should be accompanied with such observations and explanations as the circumstances of each particular case may require. McNaghten's Case, 4 St. Tr. N.S. 931. This is preferable to putting the question generally and in the abstract as to whether the accused at the time of doing the act knew the difference between right and wrong. Ibid.

*Proof of insanity.*]—Insanity may be proved without medical testimony, and may be inferred from the behaviour of the accused and facts proved. R. v. Dart, 14 Cox C.C. 143. If the accused was deranged shortly before committing the offence and there is no reason for believing that he had recovered his senses in the interim, he should be acquitted. R. v. Hadfield, cited in Collinson on Lunacy, p. 480.

*Medical evidence.*]—A medical man, conversant with the disease of insanity, and who never saw the prisoner previously to the trial but was present during the whole trial and the examination of all the witnesses, cannot, in strictness, be called as a witness to give his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law or whether he was labouring under any and what delusion at the time, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide; and the questions are not mere questions upon a matter of science in which case such evidence is admissible. But where the facts are admitted or not disputed and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right. McNaghten's Case, 4 St. Tr. N.S. 932.

But the witness may be asked whether, assuming certain facts sworn to by other witnesses to be true, such facts in his opinion indicate insanity. R. v. France, 4 Cox C.C. 57; R. v. Wright, R. & R. 456; R. v. Searle, 1 M. & Rob. 75.

It is not permissible for counsel to quote in his address to the jury the opinions of medical writers as expressed in medical books, where such opinions have not been referred to in the testimony of the witnesses. R. v. Taylor, 13 Cox C.C. 77.

*Dementia through intoxication.*]—Though voluntary drunkenness does not constitute an excuse for the commission of crime, yet where the question is whether an act was premeditated or done only from sudden heat or impulse, the fact that the accused was intoxicated is a circumstance proper to be taken into consideration. R. v. Grindley (1819), 1 Russell on Crimes, 6th ed. 144; R. v. Pearson, 2 Lewin 144; R. v. Thomas, 7 C. & P. 817; R. v. Moore, 3 C. & K. 319; R. v. Doody, 6 Cox C.C. 463; but see contra, R. v. Carroll, 7 C. & P. 145 and R. v. Meakin, 7 C. & P. 297. Where the question is whether words have been uttered with a deliberate purpose or are merely low and idle expressions, the drunkenness of the person uttering them is proper to be considered; but if there is really a previous determination to resent a slight affront in a barbarous manner, the state of drunkenness in which the prisoner was ought not to be regarded, for it would furnish no excuse. R. v. Thomas, 7 C. & P. 817, per Parke, B. If the very essence of the crime is the intention with which the act was done, it may be left to the jury to say whether the prisoner was so drunk as not to be capable of forming any intention whatever, and, if so, they may acquit him of the intent. R. v. Cruse, 8 C. & P. 541; R. v. Monkhouse, 4 Cox C.C. 55.

Delirium tremens if it produces dementia rendering the person incapable of distinguishing right from wrong while affected by it is such insanity as will constitute a defence. R. v. Davis, 14 Cox C.C. 563; and see R. v. Baines (1886), cited in Wood-Renton on Lunacy, p. 912.

*Feigned insanity.*]—The various forms of mental disorders which can be feigned are acute mania, dementia or chronic insanity as distinguished from acute mania, monomania and melancholia. With regard to the first of these, mania, although this may be simulated, it is a difficult thing to impose upon those acquainted with the disease. It is a physical impossibility for a person of sound mind to present the continual watchfulness, excitement or resistance seen in the true complaint, or to resist the influence of the remedies. In most cases of true mania there are certain premonitory indications associated with and accompanying it—disorders of the digestive functions, headache, sleeplessness, a peculiar form of raving, all of which are absent with the simulator. One important characteristic in true mania is the absence of all feelings of hunger and thirst, and a want of all sense of decency and cleanliness, which cannot be feigned or assumed for any length of time. The reaction following the violence of feigned lunacy must end in sleep, the individual being unable to keep up the deception during the night, while sheer exhaustion compels him to fall asleep. The real maniac continues his ravings during many days and many nights, and seems possessed of abnormal powers of endurance, the restless nights not causing any material difference in his condition, or diminution in his strength. The chief characteristics of monomania are the presence of a false idea or hallucination. The most marked distinction between real and feigned cases of monomania is the condition of the power of reasoning. A real monomaniac cannot be reasoned out of his false ideas, in maintaining which he will set all the principles of logic at defiance, which the impostor would not, from a fear of discovery, venture to do. In true monomania there is no relation between his delusion and anything surrounding him. His ideas are inconsistent, and he is indifferent as to the fact. In the feigner there will exist a desire to modify his delusions and to associate them with what is going on around him, and he is more coherent in his

ideas. The impostor will endeavour to force his delusion on others, while the real monomaniac rarely alludes to his erroneous views unless when led up to them or questioned thereon, or when the conversation bears upon what is uppermost in his abnormal mind.

**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 sub-section 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.

So where several persons, engaged in a rebellion, forced another to join the rebel army and to do duty as a soldier by threats of death continuing during the whole of his service, it was held that the person acting under such compulsion was not guilty. R. v. McGrowther, 18 St. Trials, 394; and see Code sec. 65 (*f*).

Threats of future injury, or the command of any one not the husband of the offender, do not excuse the offence. Stephen's Digest, Art. 31.

**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.

The former common law principle that a wife was exempt from liability in certain criminal acts upon the ground of coercion on the part of her husband, did not apply where the wife had committed the offence by her husband's order or procurement, if she committed it in his absence. R. v. Williams (1878), 42 U.C.Q.B. 462. And a plea of compulsion was rebutted by proof that the wife was the more active party, even when the offence was committed in the presence of her husband. Per Gwynne, J., in R. v. Williams (1878), 42 U.C.Q.B. 462.

If, however, there is evidence that the wife acted under the coercion and control of the husband such may still be a defence in certain cases. Brown v. Attorney-General of N.Z., [1898] A.C. 234; R. v. Torpey, 12 Cox 45; R. v. Dykes, 15 Cox 771.

Where both husband and wife were jointly indicted for a robbery with violence and the jury found that the wife who had taken an active part in the offence had acted under the coercion of her husband, who had previously planned the crime, the verdict was held equivalent to one of not guilty as to her. R. v. Torpey, 12 Cox 45.

As to a husband or wife being an accessory after the fact in respect of an offence committed by the other of them, see Code sec. 63.

**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.

All persons are bound to know and obey the laws. R. v. Mailloux, 3 Pugsley (N.B.) 493; R. v. Moodie, 20 U.C.Q.B. 399.

Although ignorance of the law is not a defence, it constitutes a ground for an application to the Executive for mercy. R. v. Madden, 10 L.C. Jur. 344.

**15. Execution of 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 process by court officer.**—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.

As to irregular process, see sec. 21.

**17. Execution of 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.

By sec. 564 every warrant authorized by this Act may be issued and executed on a Sunday or statutory holiday.

Under a warrant of arrest on a charge of an indictable offence, articles found in the possession of the accused and in respect of which or with which the offence is believed to have been committed, may be taken possession of by the constable, and detained as evidence in support of the charge. Dillon v. O'Brien, 16 Cox C.C. 245.

To constitute an arrest the party need not be touched by the officer, it being sufficient if he is commanded to give himself up and does so. 2 Bishop Cr. Law 33.

**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 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.

*Defective process.*]—A search warrant affords absolute justification to the officer executing it if it has been issued by competent authority and is valid on its face, although the warrant may in fact be bad and although it be set aside by reason of a failure to comply with legal requirements. Sleeth v. Hurlbert (1896), 3 Can. Cr. Cas. 197 (S.C. Can.).

A conviction for resisting a sheriff's officer will be supported nothwithstanding the fact that the date of the judgment under which it was issued was erroneously stated therein, such an error being an irregularity only and amendable. R. v. Monkman, 8 Man. R. 509.

And a warrant of commitment which is valid on its face is a justification to the constable who executes it, although the imprisonment it directs is not authorized by law. R. v. King, 18 O.R. 566.

The defendant M. laid an information before the defendant J., a justice of the peace, charging plaintiff with obtaining from him a suit of clothes for one W. under the false pretence that she would pay for the same the following week. The information having been sworn to, J. issued a warrant under which plaintiff was arrested. In an action brought by plaintiff claiming damages for false arrest, the Supreme Court of Nova Scotia was divided in opinion. McDonald, C.J., and Ritchie, J., held that the representation that plaintiff would pay for the clothes the following week was not the representation of a fact, either past or present, within the meaning of the Code; and that as the information did not allege that plaintiff had been guilty of any crime, the arrest was illegal and made without any authority; that even if the magistrate were acting bonâ fide, and believed he had jurisdiction, no circumstances were brought to his notice which if true would give him jurisdiction, and his belief on the subject was without ground on which it could be based, and was unreasonable. But in the opinion of Henry, J., and Graham, E.J., the justice having acted with some colour of reason, and with a bonâ fide belief that he was acting in pursuance of his legal authority, was entitled to protection, although he may have proceeded illegally or in excess of his jurisdiction. Mott v. Mylne (1899), 35 C.L.J. 81 (N.S.).

Where a person has been illegally taken into custody upon a criminal charge under a defective warrant he may be legally arrested or detained upon that criminal charge on the defect being remedied, without being first set free from the illegal custody and placed at liberty. Southwick v. Hare (1893), 24 O.R. 528.

But a person in illegal custody upon a criminal charge, or supposed criminal charge, cannot, before being liberated therefrom, be legally and properly taken into custody upon civil process—such as a ca. sa.—the reason assigned being that if such an arrest or taking into custody were held to be good, this would enable a plaintiff in a civil proceeding to take an advantage of his own wrong. Re Alfred Eggington, 2 E. & B. 717.

Where a person was convicted of an assault and fined by a magistrate in the county of H., and the magistrate issued a warrant for his arrest for the non-payment of the fine, directed to a constable, who went after the plaintiff and found him in an adjoining county, and the constable told him he had a warrant of commitment for him for his arrest, and at his request allowing him to read it, whereupon the plaintiff said he would go with him, which he did, it was held that what took place constituted an arrest. Aldrigh v. Humphrey (1898), 34 C.L.J. 385 (Ont.).

**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.

**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.

The right of civil action for the wrongful arrest is not affected by this section.

**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: 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.

This section, as well as secs. 19 and 20, refers only to the criminal responsibility for the unlawful act. Where sec. 18 applies, the process is a justification, and neither civil nor criminal responsibility accrues.

**22. Arrest by peace officer.**—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.

This section operates, not merely to protect the officer from civil or criminal proceedings, but also to authorize the arrest and make it lawful; and it applies, not only when the arrest could be made by any person without a warrant, but also to cases in which a peace officer only may so arrest. R. v. Cloutier (1898), 2 Can. Cr. Cas. 43.

If a justice of the peace is not himself personally arresting the offender on view or upon suspicion, or personally acting in effecting the arrest by calling some one to his assistance in making the same, he can legally direct the arrest only by a warrant issued upon a written complaint or information upon oath. 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. McGuiness v. Dafoe, 3 Can. Cr. Cas. 139, 23 Ont. App. R. 704.

Neither a magistrate nor a constable is allowed to act officially in his own case, except "flagrante delicto," while there is otherwise danger of escape, or to suppress an actual disturbance and enforce the law while it is in the act of being resisted. P. hearing of a complaint against him from the constable who had the warrant, went voluntarily before the magistrate, who did not examine into the matter and bail him, but allowed him to depart, with a direction to appear at the police office in the morning; and afterwards the magistrate sent the constable to whom the warrant had before been delivered, to take him in custody to the station house, which he did that evening, it being alleged that he had assaulted the magistrate on the previous evening. It was held that this did not warrant the imprisonment, as the magistrate might at the time of the assault have ordered him into custody; but here, the act was over, and time had intervened, so there was no present disturbance. Powell v. Williamson (1843), 7 U.C.Q.B. 154.

A constable in the service of a municipality is not justified in taking a person into custody and depriving him of his liberty, on a criminal charge, without any sworn complaint having been made, and without a warrant issued by competent authority—more especially where there was no reason to suspect that he would attempt to evade arrest. Unsworn statements made to the officer, to the effect that the person had committed a larceny on the previous day, are insufficient. But where the officer has acted in good faith, and on information which excuses him to some extent, these facts should be taken into consideration in the award of damages. Mousseau v. City of Montreal (1898), Q.R. 12 S.C. 61.

**23. Persons assisting peace officer.**—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.

Sections 22 and 23 of the Code are a codification of the common law with respect to the right of a peace officer, whether justice or constable, to personally arrest on view, or on suspicion, or by calling on some one present to assist him. They do not authorize a justice to direct a constable to make an arrest elsewhere without warrant. McGuinness v. Dafoe (1896), 3 Can. Cr. Cas. 139, 23 Ont. App. R. 704, affirming 27 Ont. R. 117.

**24. Arrest without warrant of persons found committing offences.**—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 without warrant after commission of offence.**—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.

The words "*may be*" in this section refer to those provisions of the Code which authorize arrest without warrant, and include the offence of unlawfully wounding, under sec. 242, that being one of the following sections referred to in sec. 552, which provides for arrest without warrant in certain cases. Jordan v. McDonald (1898), 31 N.S.R. 129.

Defendant, a police officer in and for the town of Windsor, in the County of Hants, arrested plaintiff at Halifax, in the County of Halifax, on a charge of having unlawfully assaulted, beaten, wounded and illtreated P., a police officer, while in the discharge of his duty, occasioning actual bodily harm. Defendant, at the time, held a warrant for plaintiff's arrest, but it had not been indorsed for execution in another county. Apart from the warrant defendant had actual knowledge of the commission of the offence for which the arrest was made. In an action by plaintiff claiming damages for unlawful arrest and imprisonment, it was held that it was competent for defendant to contend that the arrest was made independent of the warrant, and to justify such arrest by shewing that at the time the arrest was made he was aware that plaintiff had committed the offence of unlawfully wounding. Jordan v. McDonald (1898), 31 N.S.R. 129, 34 C.L.J. 425.

Subject to the provisions of sub-sec. (4) of sec. 552, when a private person—that is, a person not by office a keeper of the peace, or a justice, or a constable—takes upon himself to arrest another without a warrant for a supposed offence in respect of which a warrant is not required, he must be prepared to prove that such an offence has been committed, for in that respect he acts at his own peril. Mere suspicion that such an offence has been committed by some one will not do, though if he is prepared to shew that it has really been committed by some one, then he may justify arresting a particular person, upon reasonable grounds of suspicion that he was the offender; and mistake on that point, when he acts sincerely upon strong

grounds of suspicion, will not be fatal to his defence. McKenzie v. Gibson (1851), 8 U.C.Q.B. 100.

Where the accused, found committing a criminal offence which may be summarily tried under Part LV., is arrested without warrant by a peace officer, and on being brought before a police magistrate a written charge not under oath is read over to him, and he thereupon consents to be tried summarily, the police magistrate has jurisdiction to try the case although no information has been laid under oath. R. v. McLean (1901), 5 Can. Cr. Cas. 67 (N.S.).

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

*By night.*]—This expression is defined by sec. 3 (*q*) to mean the interval between 9 p.m. and 6 a.m.

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

See also sec. 552.

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

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.

By sec. 552 (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.

Any peace officer is authorized by sec. 552 (7) to take into custody, without warrant, 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. The person arrested under the powers conferred by sub-sec. 7 of sec. 552 may be detained until he can be brought before a justice of the peace to be dealt with according to law, but that must take place before noon of the following day. See. 552 (7). R. v. Cloutier (1898), 2 Can. Cr. Cas. 43.

*Finds committing.*]—A person is "found committing" an offence if he is either caught in the act or is pursued immediately and continuously after he had been seen committing it; but in the latter case there must be such fresh and continuous pursuit of him from the time of his being seen that both events may be said to be part of the one occurrence. R. v. Curran (1828), 3 C. & P. 397. Pursuit begun after the lapse of three hours from the commission of the offence is insufficient to justify the apprehension under this clause. Downing v. Capel, L.R. 2 C.P. 461.

**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.

*Reasonable and probable grounds.*]—See secs. 22 and 25.

*Flight as evidence.*]—The fact of the flight of the accused or his attempts to escape, is a circumstance in the chain of evidence from which guilt may be inferred, unless it appear that the act was for another reason. Lawson's Presumptive Ev., 2nd ed. 619.

So a prisoner's attempt to escape implies guilt and operates against the party like a confession, but the fact that the prisoner had an opportunity or offer of assistance to escape but did not avail himself of it is not relevant. Ibid. 621. The fact that the accused fled because of a fear of violence at the hands of their pursuers overthrows the presumption. Ibid. And if the suspected person had changed his residence but it appeared that he was a peddlar and accustomed to go from place to place, no presumption of guilt would arise. Best Ev., sec. 461. Evidence of the flight of persons charged as co-conspirators with the prisoner is not admissible against him. People v. Sharp, 107 N.Y. 427. And where a prisoner confined in gaol for two distinct offences attempts to escape, it has been held that the attempt is not evidence of guilt as to either charge, as it is impossible to say which offence prompted the attempt. People v. McKean, 19 N.Y. 486.

**30. Other statutory powers 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 executing process or arrest.**—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.

Where an officer of justice is resisted in the legal execution of his duty he may repel force by force, and if in doing so he kills the party resisting him, it is justifiable homicide. Archbold's Cr. Plead. (1900), 778; 1 Hale, 494; R. v. Porter, 12 Cox C.C. 444.

Although a police constable may not be bound in the execution of his duty to assist the occupier of a house in putting out an intruder, yet he may lawfully do so, and if he is assaulted by the intruder while so doing, the latter, though he may not be indictable for assaulting a peace officer in the execution of his duty, will be liable to a conviction for an assault, as he cannot justify resistance to the force lawfully used to eject him. R. v. Roxburgh, 12 Cox C.C. 8.

By sec. 142, every one is guilty of an indictable offence and liable to six months' imprisonment who, having reasonable notice that he is required to assist a peace officer in the execution of his duty in arresting any person or in preserving the peace, without reasonable excuse omits so to do.

**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.

*Manner of arrest.*]—Where a constable tells a person given into his charge that he must go with him before a magistrate, and such person, in consequence, goes quietly, and without force being used, it is an arrest. Chinn v. Morris, 2 C. & P. 361; Joyce v. Perrin, 3 U.C.O.S. 300.

And where the constable said to the plaintiff "You must go with me," on which the plaintiff said he was ready to go, and went with the constable towards a police office, without being seized or touched, this was ruled to be an imprisonment. Pocock v. Moore, Ry. & M. 321; Forsyth v. Goden, 32 C.L.J. 499.

If the party is under restraint and the officer manifests an intention to make a captive, it is not necessary that there should be an actual contact. Grainger v. Hill, 4 Bing. N.C. 212, Vaughan, J.; McIntosh v. Demeray, 5 U.C.Q.B. 343; Wilson v. Brecker, 11 U.C.C.P. 268.

Defendant was convicted of a fourth offence under The Canada Temperance Act. A warrant was placed in the hands of a constable, who after keeping it for some time went to defendant to execute it, and told him he would have to come to gaol with him. Defendant, complaining of the great inconvenience he would be put to if placed in custody at that time, induced the constable to hold off for a week or two longer by agreeing to deposit $100 with him. Later on the constable arrested the defendant on the same warrant and lodged him in gaol. It was held on an application for his discharge by habeas corpus on the ground that he had been twice arrested on the same warrant, that even if an arrest had been effected on the first occasion when the constable agreed to hold off, it was called off by defendant's own request and he was therefore estopped, and the application was refused. Ex parte Doherty (1899), 35 C.L.J. 765, 5 Can. Cr. Cas. 14 (N.B.).

*Right of search on arrest.*]—The right of an officer to search the person of one arrested for felony has always been assumed, as well as the right to keep the goods found on him if necessary for the purposes of the trial. See Tomlin's Law Dictionary, sub-tit. Constable, IV., "A constable must keep goods found on a felon till trial, and then return them according to the directions of the court." In the case of Dillon v. O'Brien, 16 Cox C.C., at page 245, the Irish Exchequer Division extended the rule to cases of misdemeanor. Palles, C.B., says:—"If, then, the right here claimed, does not

exist, even in treason and felony, it would follow upon the arrest of a murderer caught in the act and on the moment lawfully arrested, whilst the weapon with which the crime had been committed was in his hand it would be illegal for the constable to detain that weapon for the purpose of evidence; so also would it be illegal for the officers of the law to take possession of poisons found in the possession of one who had caused death by poison, and even in treason letters from co-traitors evidencing the common treasonable design, found in the possession of a traitor, would be safe from capture upon his arrest, although from the earliest times it has been the settled and unvarying practice to seize such proofs of guilt and give them in evidence at the trial." The case of Leigh v. Cole, 6 Cox C.C. 329 (cited with approbation by the Ontario Court of Appeal in Gordon v. Denison, 22 A.R., p. 326), was a charge to the jury by Mr. Justice Vaughan Williams on the subject of the right of constables to search and handcuff persons in custody for breaches of the peace, and the learned judge made use of the following language: "With respect to searching a prisoner there is no doubt that a man when in custody may so conduct himself, by reason of violence of language or conduct, that a police officer may reasonably think it prudent and right to search him, in order to ascertain whether he has any weapon with which he might do mischief to the person or commit a breach of the peace; but at the same time it is quite wrong to suppose that any general rule can be applied to such a case. Even when a man is confined for being drunk and disorderly it is not correct to say that he must submit to the degradation of being searched, as the searching of such a person must depend on all the circumstances of the case." In the case of persons in custody not accused of an indictable offence no general rule can be applied, and it would always be for a jury to say whether the case is one in which a search should have been made. Ibid.

**33. Peace officer preventing escape.**—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. Preventing escape from arrest in other cases.**—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.

Where a prisoner escapes, if the escape be negligent merely, the gaoler or officer may retake him at any time without warrant; if voluntary, he cannot afterwards be retaken by virtue of the same warrant under which he was at first arrested, but he may be retaken on a fresh warrant or without warrant in cases where he might have been arrested without warrant originally. Archibald Cr. Plead. (1900), 852.

**37. Force used in preventing escape or rescue after arrest.**—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 witnesses a breach of the peace is justified in interfering to prevent 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. Prevention by peace officers of 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, witnesssed such breach of the peace.

*Peace officer.*]—The definition of this term is found in sec. 3 (*s*), ante.

*Finds committing.*]—See note to sec. 28.

*Breach of the peace.*]—A justice of the peace may apprehend, or cause to be apprehended by a verbal order merely, any person committing a breach of the peace in his presence. 2 Hale 86. A constable may also arrest for a breach of the peace committed in his presence. 1 Hale 587. But a private person is not justified in arresting or giving in charge of a policeman, without a warrant, a party who has been engaged in an affray, unless the affray is still continuing or there is reasonable ground for apprehending that he intends to renew it. Price v. Seeley (1843), 10 Clark & Fin. (H.L.) 28.

A private person cannot of his own authority arrest another for a bare breach of the peace after it is over. 3 Hawkins P.C. 164.

Any one who sees others fighting may lawfully part them and also stay them until the heat be over, and then deliver to the constable who may carry them before a justice of the peace in order to their finding security for the peace. Hawkins P.C., book 1, ch. 63, sec. 11. And while those are assembled together who have committed acts of violence, and the danger of their renewal continues, the affray itself may be said to continue; and during the affray the constable may, not merely on his own view, but on the information and complaint of another, arrest the offenders or either of them. Price v. Seeley, 10 Cl. & F. 28.

*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. Sec. 90.

*Riot and unlawful assembly.*]—See secs. 79 and 80.

**40. Suppression of riot by magistrates and officers.**—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.

A riot is an unlawful assembly which has begun to disturb the peace tumultuously. Sec. 80. As to the duty of sheriffs, justices and other officers in cases of riot, see secs. 83 and 84.

The neglect of a peace officer to do his duty in suppressing a riot is an indictable offence under sec. 140.

**41. Suppression of riot 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.

Magistrates must keep the peace when a riot occurs and restrain the rioters, and they may call upon all subjects to render assistance, and the latter may be given firearms for that purpose. R. v. Pinney, 5 C. & P. 261.

A person who after reasonable notice omits without reasonable excuse to assist any sheriff, or peace officer, in suppressing a riot is guilty of an indictable offence. See. 141.

**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.

By the common law, a private individual might lawfully endeavour, of his own authority and without any warrant or sanction from a magistrate, to suppress a riot by every means in his power; he might disperse or assist in dispersing those assembled and stay those engaged in it from executing their purpose, as well as stop and prevent others whom he saw coming up from joining the rest. Phillips v. Eyre, L.R. 6 Q.B. 15. If the occasion demanded immediate action and no opportunity occurred for procuring the advice or sanction of a magistrate, it was the duty of every subject to act for himself and upon his own responsibility in suppressing a riotous and tumultuous assembly, and the law protected him in all that he honestly did in the prosecution of that purpose. Ibid, per Willes, J., approving the charge of Tindal, C.J., to the grand jury of Bristol (1832), 5 C. &. P. 261 (*n*).

**43. Suppression of riot by military force.**—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 secs. 41, 42, 83 and 84.

**44. Force in prevention of certain offences.**—Every one is justified in using such force as may be reason-

ably necessary in order to prevent the commission of any offence for which, if committed, the offender might be arrested without warrant, 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.

The offences for which an arrest without warrant is allowed are set forth in sec. 552.

Where A., to prevent B. from fighting with his brother, laid hold of him and held him down but struck no blow, upon which B. stabbed A., it was held that if A. had done nothing more than was necessary to prevent B. from beating his brother, and had died of the stab, the offence of B. would have been murder; but that if A. did more than was necessary to prevent the beating of his brother, it would have been manslaughter only. R. v. Bourne, 5 C. & P. 120.

And where, under circumstances that might reasonably have induced the belief that a man was cutting his wife's throat, their son shot at and killed his father, it was held that if the son had reasonable grounds for believing and honestly believed that his act was necessary for the defence of his mother, the homicide was excusable. R. v. Rose, 15 Cox 540, Lopes, J.

**45. Self-defence against unprovoked assault.**—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 grevious 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 grevious 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.

*Self-defence in assault, etc.*]—It is a good defence in justification, even of a wounding or mayhem, to prove that the prosecutor assaulted or beat the defendant first, and that the defendant committed the alleged battery merely in his own defence. Archbold's Crim. Plead. (1900), 802. The difficulty arises in drawing the line between mere self-defence and fighting. R. v. Knock, 14 Cox C.C. 1.

If the prosecutor lifted up his cane and offered to strike him, the defendant is justified in striking the prosecutor without waiting for the blow. Buller N.P. 18.

A husband may justify a battery in defence of his wife, a wife in defence of her husband, a parent in defence of his child, a child in defence of his parent, a master in defence of his servant, and a servant in defence of his master. 1 Hawkins P.C., ch. 60, secs. 23, 24; Code sec. 7. If, however, the battery were greater than was necessary for mere defence, or if it were after all danger from the assailment was passed and by way of revenge, the prior assault will not justify. R. v. Driscoll, C. & M. 214; Anon., 2 Lewin C.C. 48.

Ordinarily the person beset is permitted to act only in self-defence; he cannot take the law into his own hands to inflict punishment for the injury. R. v. Milton, 3 C. & P. 31; R. v. Mabel, 9 C. & P. 474; 2 Bishop Crim. Law 44.

But where there is a manifest intent or endeavour by the assailant to commit *by violence or surprise* an offence formerly a felony, such as murder, robbery, burglary and the like, the party assailed is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and if he kill him in so doing, it is called justifiable self-defence. 1 East P.C. 271.

If in attempting to turn a mere trespasser out of a house, the householder is assaulted by the trespasser, he may kill him if he was not able by any other means to avoid the assault or retain his lawful possession, and in such case a man need not fly as far as he can as in other cases of self-defence for he has a right to the protection of his own house. 2 Burn's Justice, 13th ed., p. 1315. In the New Brunswick case of R. v. Theriault (1894), 2 Can. Cr. Cas. 444, a new trial was ordered where the trial judge had instructed the jury that, to justify or excuse the homicide, the prisoner must be found to have had reasonable grounds for apprehending imminent peril to his life or the lives of his wife and children, and had made no mention of a reasonable apprehension of grievous bodily harm as a ground of justification although the evidence pointed to both.

*Not having provoked such assault.*]—The provocation may be given by blows, words or gestures. Sec. 46 (2).

**46. Self-defence against provoked assault.**—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 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.

*Declining further conflict.*]—Two or more persons engage in a mutual combat, without any original intent to proceed to extreme measures; or, after an assailant has been met by his adversary, he becomes weary of a conflict which is likely to be more serious than he anticipated or too much for him to withstand; here, if one of the combatants already in the wrong either as a beginner or continuer of the fight wishes to retrace his error, he must retreat. 2 Bishop Cr. Law 565. And though, contrary to his original expectation, he finds himself so hotly pressed as renders the killing of the other necessary to save his own life, he is guilty of a felonious homicide if he kills him unless he first actually puts into exercise this duty of withdrawing from the place. Foster 227; The State v. Hill, 4 Dev. & Bat. 491. If the first assailant, knowing his advantage of strength or skill or weapon,

retreated to the wall merely as a design to protect himself under the shelter of the law, as in his own defence, but really intended the killing of the other man, then it is murder or manslaughter as the circumstance of the case requires. 1 Hale P.C. 479, 480.

Where, upon a quarrel, one of the parties retreated fifty yards desiring to avoid the conflict, but the other pursued him with uplifted arm and a deadly weapon, and being first struck by the retreating one with the fist, the other stabbed and killed him, the case was held to be one of murder, for the law did not require the deceased to wait till the prisoner had executed his threat but justified him in anticipating the premeditated assault. The State v. Howell, 9 Ired. 485.

*Provocation.*—[See sec. 229.

**47. Prevention of insulting assault.**—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 movable property against trespasser.**—Every one who is in peaceable possession of any movable 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.

In the case of trespass in taking goods the owner may justify beating the trespassor in order to make him desist. 1 Hale 486; R. v. Wild, 2 Lewin C.C. 214.

A battery is justifiable by proving that it was committed to restrain another from unlawfully taking or destroying his goods. 2 Rol. Abr. 549.

**49. Defence of movable property with claim of right.**—Every one who is in peaceable possession of any movable 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. No justification on defence of movable property without claim of right.**—Every one who is in peaceable possession of any movable 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.

It has been held that a guest in a house is justified in defending the house. Curtis v. Hubbard, 4 Hill N.Y. 437; Coopers Case, Cro. Car. 544; also that the neighbours of the occupant may assemble for its defence. Semayne's Case, 5 Co. 91.

*Dwelling house.*]—Every permanent building in which the renter or owner or his family dwells is a dwelling house. Archbold Cr. Evid. (1900), 593; and see Code sec. 407. And it will be sufficient if any one of the family habitually sleeps in that building. R. v. Westwood, R. & R. 495.

The mere temporary absence of the householder and his family will not prevent its remaining in contemplation of law a dwelling house. R. v. Murray, 2 East P.C. 496. But where the householder moved away from the house, not intending to return to live in it, but retained it as a warehouse in which some of his employees slept for the purpose of taking care of it, it was held not to be his dwelling house. R. v. Flannagan, R. &. R. 187. And where the landlord of a dwelling house after the tenant had quitted it, put a servant into it to sleep there at night until he should re-let it to another tenant, but had no intention to reside in it himself, it could not be deemed the dwelling house of the landlord. R. v. Davis, 2 Leach 876; R. v. Harris, 2 Leach 701. A tenant put his furniture into a house preparatory to moving in with his family, but neither he nor any of his family had as yet slept in it; it was held not to be a "dwelling house" as regards burglary. R. v. Hallard, 2 East P.C. 498; R. v. Lyons, 1 Leach 185.

A temporary booth or tent in a fair or market is not a dwelling house although the owner lodge in it. 1 Hawk., ch. 38, sec. 35. But it is otherwise in respect of a permanent building although used only for the purposes of a fair. R. v. Smith, 1 M. & Rob. 256.

At common law in cases where buildings were attached to a dwelling house and were more or less connected with it, it was frequently a matter of dispute whether they formed a part of the dwelling house so that entering them would be burglary. The different tests proposed were principally three:—(1) Whether the building in question was within the same curtilege; (2) Whether it was under the same roof; (3) Whether it had an internal communication with the principal building. Roscoe Crim. Evid., 11th ed. 348. An outhouse separated from the dwelling house and not within the same curtilege was not within the term from the mere fact that it was occupied with it at the same time. R. v. Garland, 2 East P.C. 493. But a building might constitute a part of the dwelling house although having no internal communication therewith. R. v. Brown, 2 East P.C. 493; R. v. Chalking, Russ. & Ry. 334; R. v. Burrowes, 1 Moody C.C. 274. But as regards the offences of burglary and house-breaking it is now provided by sec. 407 (*a*) that a building occupied with and within the same curtilege with any dwelling house shall be deemed to be part of the said dwelling house if there is between such building and dwelling house a communi-

cation either immediate or by means of a covered and inclosed passage leading from the one to the other, but not otherwise.

*Breaking and entering.*]—The definition of the term "to break" given in sec. 407 (*b*) in terms applies only to Part XXX. but is in accordance with the previous decisions on the subject. The same section provides that 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. It would seem, however, that as to secs. 51 and 52 the common law definition applies and not that of sec. 407, and, at common law, if the instrument were used not for the purpose of committing the contemplated felony but only for the purpose of effecting the entry, its introduction was not such an entry as constituted burglary. R. v. Hughes, 2 East P.C. 491; R. v. Rust, 1 Moody C.C. 183.

**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 mere threat of parties standing outside of a dwelling house that they will break in, does not justify the householder in shooting at and wounding them, unless the householder has first warned them to desist and depart or that he would fire. Spires v. Barrick, 14 U.C.Q.B. 420.

**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.

If A., a trespasser, enters B.'s house and refuses to leave, B. has a right to remove A. by force, but not to kick or strike him unless the force used to remove him be necessary. Wild's Case, 2 Lewin C.C. 214. But if the trespasser resists such force the householder may use any degree of force necessary to defend himself and to remove the trespasser from the house. 1 Hale P.C. 486.

In the case of a trespass in law merely, without actual force, the owner must first request the trespasser to depart before he can justify laying his hand on him for the purpose of removing him; and even if he refuse he can only justify so much force as is necessary to remove him. Weaver v. Bush, 8 T.R. 78.

*Resists such attempt.*]—The words are "if such trespasser resists *such* attempt," the word "such" applies to an attempt by force referred to in the former part of the section, and will not apply to mere words of warning or of request to leave. Packett v. Pool (1896), 11 Man. R. 275, 32 C.L.J. 523. The latter part of the section does not apply until 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. Ibid.

**54. Peaceable entry on claim of right to house or land.**—Every one is justified in peaceably entering in the daytime 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 under his care, provided that such force is reasonable under the circumstances.

*Apprentices.*]—Formerly a right of chastisement of servants by way of correction was recognized. R. v. Mawgridge, 16 St. Tr. 57; but as to servants who are not apprentices it is in desuetude. Archbold Crim. Evid. (1900) 762.

*Child.*]—The law as to correction of children has reference only to a child capable of appreciating correction and not to an infant two years and a half old. R. v. Griffin, 11 Cox C.C. 402. If the correction be inflicted with a deadly weapon and the party dies of it it will be murder; if with an instrument not likely to kill, though improper for the purpose of correction, it will be manslaughter. Foster 262; R. v. Hopley (1860), 2 F. & F. 201.

**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.

This right includes the right of the shipmaster to inflict reasonable corporal punishment at sea on seamen for disobeying orders. The Agincourt, 1 Hagg. 271; Lamb v. Burnett, 1 Cr. & J. 291.

**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.

In these cases there is no difference between a licensed physician or surgeon and a person acting as physician or surgeon without license; in either case if a party having a competent degree of skill and knowledge makes an accidental mistake in his treatment of a patient, through which mistake death ensues, he is not thereby guilty of manslaughter; but if, where proper medical assistance can be had, a person totally ignorant of the science of medicine takes on himself to administer a violent and dangerous remedy to one labouring under disease, and death ensues in consequence of that dangerous remedy having been so administered, then he is guilty of manslaughter. R. v. Webb, 1 M. & Rob. 405, 2 Lewin 196, per Lord Lyndhurst; R. v. Williamson, 3 C. & P. 635.

It must appear that there was gross ignorance or inattention to human life. R. v. Long, 4 C. & P. 423. If any person, whether he be a regular or licensed medical man or not, professes to deal with the life or health of His Majesty's subjects, he is bound to have competent skill to perform the task that he holds himself out to perform, and he is bound to treat his patients with care, attention and assiduity. R. v. Spiller, 5 C. & P. 333.

It is for the jury to say whether in the execution of the duty which the prisoner had undertaken to perform he is proved to have shewn such a gross want of care, or such a gross and culpable want of skill, as any person undertaking such a charge ought not to be guilty of. R. v. Ferguson, 1 Lewin C.C. 181. See also sec. 212.

**58. Excess of force.**—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.

**59. Consent to homicide.**—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.

If two persons enter into an agreement to commit suicide together and the means employed to produce death prove fatal to one only, the survivor is guilty of murder. R. v. Jessop, 16 Cox C.C. 204.

It is uncertain to what extent any person has a right to consent to his being put in danger of death or bodily harm by the act of another. Burbidge Cr. Law 201.

**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.

PART III.

## PARTIES TO THE COMMISSION OF OFFENCES.

SECT.



**61. Parties to offences.**—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.

By this and the following section accessories before the fact and aiders and abettors are declared to be guilty of the offence itself and may be charged as principals in the first degree. As to accessories after the fact see sec. 63. As to aiding and abetting suicide see sec. 237.

*Aiding or abetting.*]—The words aider, abettor, accessory and accomplice, as applied to crime, are often used as having the same meaning. But they are by no means synonymous. It is unlawful to aid or encourage the commission of crime. It is unlawful under certain circumstances to conceal the commission of crime. One who aids is, in ordinary language, called an aider or abettor. An accessory is one who takes an active but subordinate part. An accomplice, according to the ordinary meaning of the word, would seem to imply one who not only takes an active part, but positively aids in the accomplishment or completion of the crime. R. v. Smith, (1876), 38 U.C.Q.B. 218, 227.

To make a person an "aider and abettor" he must have been present either actually or constructively.

A person is present in construction of law aiding and abetting if with the intention of giving assistance he is near enough to afford it should occasion arise; thus if he was watching at a proper distance to prevent a surprise, or to favour the escape of those who were immediately engaged, then he would be a principal in the second degree. Per MacMahon, J., in R. v. Lloyd (1890), 19 O.R. 352.

If a person sees that a crime is about to be committed in his presence and does not interfere to prevent it, that is not a participation rendering him liable, without evidence that he was there in pursuance of a common

unlawful purpose with the principal offender. R. v. Curtley, 27 U.C.Q.B. 613.

Aid rendered to the principal offenders after the commission of the crime is alone insufficient to justify the conviction of the person so aiding, as a principal under this section. R. v. Graham (1898), 2 Can. Cr. Cas. 388.

Aiders and abettors are principals in the second degree and are sometimes called accomplices; but the latter term will not serve as a definition as it includes all the participes criminis, whether they are considered as principals in the first or second degree or merely as accessories before or after the fact. R. v. Smith (1876), 38 U.C.Q.B. 218, 228.

*Form of charge.*]—An information and warrant of arrest thereunder, charging the accused as an accessory to the violation of a statute named, without specifying the fact as to which he is alleged to be an accessory is void for uncertainty. R. v. Holley (1893), 4 Can. Crim. Cas. 510 (N.S.).

Such a warrant charges no offence, and neither it, nor a remand thereon is validated by Code sec. 578, which provides that no irregularity or defect in the substance or form of the warrant shall affect the validity of any proceeding at or subsequent to the preliminary enquiry before the justice. Ibid.

It has been held that the owner of a house who leases it to another person knowing and assenting when the lease was made to the purpose of the latter to maintain it as a common bawdy house, thereby does an act for the purpose of aiding the lessee to commit the indictable offence of keeping a disorderly house, and he may be indicted and convicted as a principal under sec. 61 (*b*). R. v. Roy, 3 Can. Cr. Cas. 472 (Que.).

*In cases of theft.*]—On an indictment for, with three other persons, attempting to steal goods in a store, evidence was given by an accomplice that prisoner went with him to see a store, that prisoner went into the store to buy something to see how the store could be got into and that they and others planned the robbery and fixed the date; prisoner saw them off but did not go with them, the others went out and madet he attempt, which was frustrated. It was held that as those actually engaged were guilty of the attempt to steal the prisoner was properly convicted under 27 and 28 Viet. ch. 19, sec. 9, which enacted that whosoever shall aid, abet, counsel or procure the commission of any misdemeanour shall be liable to be tried, indicted and punished as a principal offender. R. v. Esmonde (1866), 26 U.C.Q.B. 152.

A person who knowingly assists a thief to conceal stolen money which he is in the actual and proximate act of carrying away, by receiving the money for the purpose of concealing it, is guilty of aiding and abetting in the theft, and may under sub-sec. (*c*) be convicted as a principal. R. v. Campbell (1899), 2 Can. Cr. Cas. 357.

Although the theft may be complete by the mere taking and carrying away of stolen property, the subsequent carrying of same to a place of concealment by a person who did not participate in the taking, if done with a guilty knowledge and as a continuation of and proximately at the same time as the theft, is an "aiding and abetting" of the same. Ibid.

An act done which may enter into the offence, although the crime may be complete without it, may be considered as a continuation of the criminal transaction so as to make the participator an aider and abettor, although his participation occurs only after such acts have been done as in themselves would constitute the crime. Ibid.

If the accused were not an aider and abettor or a principal in the second degree in the commission of the theft, the circumstance that he was an accessory before the fact by counselling and procuring the commission of the theft, and therefore liable under sec. 61 to be convicted as a principal, does not prevent his conviction for the substantive offence of afterwards receiving the stolen property knowing it to have been stolen. Such an accessory

before the fact who afterwards becomes a receiver of the stolen property may be legally convicted both of the theft and of "receiving." R. v. Hodge (1898), 2 Can. Cr. Cas. 350.

*Under liquor laws.*]—If it be contrary to law to sell liquor or any other article in a shop a sale by any clerk or assistant in his shop would prima facie be the act of the shopkeeper. It may be, if he could shew that the act of sale was an isolated act, wholly unauthorized by him, and not in any way in the course of his business, but a thing done wholly by the unwarranted or wilful act of the subordinate, he might escape personal responsibility. Where one H. swore that he got a bottle of brandy and paid for it $1 in K.'s shop, that a woman served him, and no one else was in the store at the time, K. was convicted and the court upheld the conviction. R. v. King (1869), 20 U.C.C.P. 247. (Hagarty, C.J., Gwynne and Galt, JJ.)

A buyer of liquor cannot, in respect of an illegal sale thereof made to him contrary to the Canada Temperance Act, be regarded in point of law as an aider or abettor. R. v. Heath (1887), 13 O.R. 471; Ex parte Armstrong, 30 N.B.R. 425.

*In gaming.*]—A broker who merely acts as such for two parties, one a buyer and the other a seller, without having any pecuniary interest in the transaction beyond his fixed commission and without any guilty knowledge on his part of the intention of the contracting parties to gamble in stocks or merchandise, is not liable as an accessory. R. v. Dowd (1899), 4 Can. Cr. Cas. 170 (Que.).

Where an hotel keeper was not aware that gaming was being carried on in his hotel, and the only employee who knew it was not in charge of the premises, but was employed in a menial capacity, the hotel keeper was held not to be guilty of "suffering" gaming to be carried on in his premises contrary to a Licensing Act. Somerset v. Hart, 12 Q.B.D. 360.

*Joint indictment.*]—If the abettor and principal are indicted together as principals, the abettor may be convicted although the principal is acquitted. R. v. Burton, 13 Cox C.C. 71.

**62. Offence committed other than the offence intended.**—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 or procuring.

If A. advises B. to murder C. by shooting and B. murders C. by stabbing, A. is nevertheless an accessory to the murder. Foster 369.

And if A. describes C. to B. and instigates B. to murder C., and B. murders D. whom he believes to be C. because D. corresponds with A.'s description of C., A. is an accessory before the fact to the murder of D. Foster 370.

A. instigates B. to rob C., B. does so and C. resists and B. kills C. A. is guilty as an accessory. Foster 370.

But where A. advised B. to murder the latter's wife by giving her a roasted apple containing poison and B. did so but the woman after eating a small part of it gave it to her child and A. made only a faint effort to save

the child whom he did not wish to injure and stood by and saw the child eat the apple and the child died as the result, it was held that A. was not guilty as an accessory to the murder which B. thereby committed. Saunder's Case. Plowd. 475, 1 Hale 431.

**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.

At common law the term accessory after the fact only applied to felonies for in misdemeanors all were principals. R. v. Tisdale, 20 U.C.Q.B. 273; R. v. Campbell, 18 U.C.Q.B. 417; R. v. Benjamin, 4 U.C.C.P. 189.

*Punishment.*]—Accessories after the fact to treason are liable to two years imprisonment under sec. 67. And by sec. 235 "every one is guilty of an indictable offence and liable to imprisonment for life who is an accessory after the fact to murder." Where no express provision is made by the Code for the punishment of an accessory after the fact to an indictable offence, for which the principal would be liable, on a first conviction, to imprisonment for fourteen years or over or to imprisonment for life, such accessory is liable to seven years imprisonment. Sec. 531. And where the principal cannot be sentenced to imprisonment for so long a term as fourteen years, the accessory after the fact to any other indictable offence is liable to one half of the longest term to which a person the principal may be sentenced, except where there is an express provision of law for the punishment of such accessory. Sec. 532.

*Who are accessories.*]—Any assistance given to the person known to be the offender, in order to hinder his apprehension, trial or punishment is sufficient to make the assisting party an accessory after the fact, as for instance, that he concealed him in his house. Dalt. 530, 531; or shut the door against his pursuers until he should have a chance of escaping. 1 Hale 619; or took money from him to allow him to escape. Year book, 9 H. 4 pl. 1; or supplied him with money, a horse or other necessaries in order to enable him to escape. Hale's Sum. 218. 2 Hawk., ch. 29, sec. 26; or that the principal was in prison, and the alleged accessory after the fact bribed the gaoler to let him escape, or conveyed instruments to him to enable him to break prison and escape. 1 Hale 621.

It is necessary that the accessory have notice, direct or implied, at the time he assists or comforts the offender, that he had committed the offence. 2 Hawk., ch. 29, sec. 32; and the assisting party is an accessory after the fact to whatever offence is complete at the time the assistance is given. So if one wounds another mortally, and after the wound is given but before death ensues, a person assists or receives the delinquent, this does not make him accessory to the homicide, for until death ensues no murder or manslaughter is committed. 2 Hawk., ch. 29, sec. 35, 4 B.C. Com. 38.

*Assisting prisoner to escape.*]—See secs. 165-8.

*Who are not accessories.*]—But to merely suffer the principal to escape will not make the party an accessory after the fact, for it amounts at most but to a mere omission. Year book, 9 H. 4, pl. 1, 1 Hale 619. A physician or surgeon may professionally attend a sick or wounded man, although he knew him to be a felon. 1 Hale 332. A person does not become an accessory by advising the principal offender's friends to write to the witnesses not to appear against him at the trial although they do so write. 1 Hale 620. There must be an act to assist the felon personally to constitute an accessory after the fact. R. v. Chapple, 9 C. & R. 355. And it is not sufficient that the person knew of the felony and did not disclose it. 1 Hale 371, 618; or that he agreed for money not to give evidence against the offender. Moor 8.

The receiving of stolen goods did not at common law constitute the receiver an accessory but was a separate and distinct misdemeanor, punishable by fine and imprisonment. Hale 620; and it is treated in the Code as a distinct offence. See sec. 314.

*Husband or wife.*]—At common law a wife was not punishable as accessory after the fact in receiving and assisting her husband for she was presumed to act under his coercion. R. v. Manning, 2 C. & K. 903 (*n*). But a husband receiving and assisting his wife after the felony became liable as an accessory. 1 Hale 48, 621. This is now changed by sub-sec. 2, supra.

*Other relationships.*]—No other relationship than that of husband and wife will excuse the wilful receiving or assisting of the offender; a father cannot legally assist his child, a child his parent, a brother his brother, a master his servant, or a servant his master. 1 Hale 48, 621.

*Misprision.*]—It was a misdemeanor at common law for any person, who knew that another had committed a felony, to "conceal or procure the concealment thereof." 3 Co. Inst. 140, 1 Hawkins P.C. 731, 1 Hale 373. The common law as to crimes is still in force except in so far as the Code has otherwise provided, and it would seem that technically this offence remains in respect of what was formerly a felony. Its definition is extremely vague and there have been few, if any, prosecutions for it in modern times. Burbidge Cr. Law 508.

**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.

Special provision is made by the Code in respect of "attempt" offences as follows: To break prison, sec. 162; to commit sodomy, sec. 175; to procure girl to have unlawful carnal connection with a third party, sec. 185; to commit murder, sec. 232; to commit suicide, sec. 238; to cause bodily injuries by explosives, sec. 248; to commit rape, sec. 268; to defile children under fourteen, sec. 269; to set fire to crops, sec. 485; to wreck, sec. 494; to injure or poison cattle, sec. 500; to commit other indictable offences punishable by imprisonment, secs. 528 and 529; to commit other statutory offences, sec. 530.

An assault with intent to commit an offence is an attempt to commit such offence, and, on an indictment for rape, a conviction for an assault with intent to commit rape is valid. R. v. John (1888), 15 Can. S.C.R. 384, Code sec. 713.

*Criminal intent.*]—The general rule is that in order to constitute a crime it is necessary that there should be not only an act, but also a criminal intent. This is embodied in the maxim "actus non facit reum, nisi mens sit rea," 3 Inst. 107; Broom's Legal Maxims 226.

Intent should not be confounded with motive. The terms "intention" and "motive" are often used indiscriminately to denote the same thing, but motive and intention are really two different things, and a distinction ought to be made in the use of the terms. Motive is the moving cause or that which induces an act, while intent is the purpose or design with which it is done. Motive has to do with desire, and intent with will. Burrill's Circ. Evid. 283, 284. Motive generally precedes intent, for a man usually has some inducement or cause for doing a thing before he makes up his mind to do it. There are some cases in which no more need be done to shew the criminal intent than to prove the mere doing of the act; as where the act is such as to shew within itself the guilty intent, so that there can be but one reasonable inference, which of necessity arises from the facts proved. Every sane man is presumed to contemplate the ordinary natural and probable consequences of his acts. Townsend v. Wathen, 9 East 277; R. v. Dixon, 3 M. & S. 15.

The question of fraudulent intent or guilty mind (mens rea) enters into the majority of criminal offences. In the recent case of Bank of N.S.W. v. Piper (1897), 66 L.J.P.C. 76, the law is stated as follows: "It is strongly urged that in order to the constitution of a crime whether common law or statutory, there must be a mens rea on the part of the accused, and he may avoid conviction by shewing that such mens rea did not exist. This is a proposition which their lordships do not desire to dispute; but the questions whether a particular intent is made an element of a statutory crime, and, when that is not the case, whether there is an absence of mens rea in the accused, are questions entirely different, and depend on different considerations. In cases where a statute requires a motive to be proved as an essential element of the crime, the prosecution must fail if it is not proved. On the other hand, the absence of mens rea really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent. The case of Sherras v. De Rutzen, 64 L.J. M.C. 218; L.R., [1895] 1 Q.B. 918, is an instance of its absence."

If a man knowingly does acts which are unlawful, the presumption of law is that the mens rea exists; and ignorance of the law will not excuse him. R. v. Mailloux, 3 Pugsley (N.B.) 493.

It is a general principle of criminal law that there must be, as an essential ingredient in a criminal offence, some blameworthy condition of mind; sometimes it is negligence, sometimes malice, sometimes guilty knowledge—but as a general rule, there must be something of that kind which is designated by the expression mens rea. Moreover, it is a principle of our criminal law that the condition of mind of the servant is not to be imputed to the master. A master is not criminally responsible for a death caused by his servant's negligence, and still less for an offence depending on his servant's malice; nor can a master be held liable for the guilt of his servant in receiving goods, knowing them to have been stolen. And this principle of the common law applies also to statutory offences, with this difference, that it is in 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 offence, although there was no blameworthy condition of mind about him; but inasmuch as to do so is contrary to the general principle of the law, it lies on 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 A. should be punished for B. Per Cave, J., in Chisholm v. Doulton (1889), 22 Q.B.D. at p. 741; approved in Somerset v. Wade, [1894] 1 Q.B. at p. 576; R. v.

Vachon (1900), 3 Can. Cr. Cas. 558 (B.C.). Vide also Massey v. Morris, [1894] 2 Q.B. 412; Bank of New South Wales v. Piper, [1897] 66 L.J.P.C. at p. 76

*Charging the intent.*]—Before the passing of the Code, where the intent with which an act was committed was a necessary ingredient of the offence, such intent must have been alleged in the indictment or charge, and there are some provisions of the Code which lend themselves to the view that it is still necessary to allege it, such as for instance sec. 618, which provides that in an indictment for an offence under sec. 361 it shall not be necessary to allege that the act was done with intent to defraud. The intent to defraud is not necessary to constitute an offence under the latter section, and if it is unnecessary to allege the intent in cases where it is an ingredient, it seems unnecessary to provide that it need not be alleged in certain cases where it forms no part of the offence. Sub-sec. 1 of sec. 611 provides that every count of an indictment "shall contain . . . in substance a statement that the accused has committed some indictable offence therein specified." It might reasonably be contended that, where the law provides that an act shall be a criminal offence only in cases where it is done with a certain intent, an indictment alleging that the accused had done the act without alleging that it was done with that intent would not contain in substance a statement that the accused had committed an offence.

Sub-sec. 4 of sec. 611, however, provides that the statement may be in any words sufficient to give the accused notice of the offence with which he is charged, and Form FF in the schedule which expressly refers to sec. 611 gives examples of the manner of stating offences under it. Form C states an offence under sec. 359 for obtaining goods by false pretences. A reference to that section will shew that the intent to defraud is necessary to constitute that offence and yet Form C contains no allegation of such intent.

It has therefore been held that if in the particular case the defendant could not be said to have any further or better notice of the offence with which he was charged were a specific allegation of intent included than he would have without it, then its omission is not fatal. R. v. Skelton (1898), 4 Can. Cr. Cas. 467 (N.W.T.).

An indictment, charging that the accused unlawfully attempted to steal from the person of an unknown person the property of such unknown person, without giving the name of the person against whom the offence was committed, or the description of the property the accused attempted to steal, is sufficient. R. v. Taylor (1895), 5 Can. Cr. Cas. 89 (Que.).

*Possession of instruments for coining.*]—See sec. 466.

*Evidence.*]—Where on an indictment for a principal offence and for an attempt to commit such an offence, the evidence is wholly directed to the proof of the principal offence, the jury's verdict of guilty of the attempt only, will not be set aside, although there were no other witnesses in respect of the attempt than those whose testimony, if wholly believed, shewed the commission of the greater offence. R. v. Hamilton (1897), 4 Can. Cr. Cas. 251 (Ont.).

It is within the province of the jury, to believe, if it sees fit to do so, a part only of a witness's testimony, and to disbelieve the remainder of the same witness's testimony, and it may therefore credit the testimony in respect of a greater offence only in so far as it shews a lesser offence. Ibid.

To shew the animus of an act, evidence of previous and subsequent conduct in the commission of other acts of a like character is admissible, although such other acts are in themselves crimes. R. v. McBerny (1897), 3 Can. Cr. Cas. 339 (N.S.).

Where a prisoner is indicted for an attempt, and the proof establishes that the principal offence was actually committed, the jury may convict of the attempt unless the court discharges the jury and directs that the prisoner be indicted for the complete offence. See. 712; R. v. Taylor (1895), R.J.Q., 4 Q.B. 226, 5 Can. Cr. Cas. 89.

# TITLE II.

## OFFENCES AGAINST PUBLIC ORDER, INTERNAL AND EXTERNAL.

### PART IV.

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

SECT.



---

**65. Treason.**—Treason is—

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

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

(*c.*) the act of killing the eldest son and heir apparent of His 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 His 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 His Majesty, or to do him any bodily harm tending to death or destruction, maim or wounding, or conspiring with any person to imprison or restrain him; or

*(Amendment of 1894)*

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

(i.) with intent to depose His 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 His Majesty's dominions or countries or;

(ii.) in order, by force or constraint, to compel His Majesty to change his 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 His Majesty with any such intent or for any such purpose as aforesaid; or

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

(*i.*) assisting any public enemy at war with His 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.

*Levying war within Canada.*]—See sec. 68.

At common law a British subject was not exempt from the penalties of treason because he held a commission in the enemy's forces. Napper Tandy's Case, 27 St. Tr. 1191; Macdonald's Case, Fost. 59. Alien friends might be convicted. R. v. de la Motte, 21 St. Tr. 687. But not alien enemies unless they had accepted British protection during the war. Fost. 185; Forsyth's Const. Cases, 200.

There is no reason to suppose that it was not intended that the Parliament of Canada should have power to legislate regarding the crime of treason in Canada. It seems to be given when power is given to make laws for the peace, order and good government of Canada. Even jurisdiction to declare what shall be and what shall not be acts of treason, when committed within Canada, against the person of the Sovereign herself, might safely be committed to the Parliament of Canada when the Sovereign is a part of Parliament, and has also power of disallowance of Acts, even after they have been assented to by the Governor-General. R. v. Riel, 1 Terr. L.R. at p. 58, per Killam, J.

The Treason Act of England, 25 Edw. III., st. 5, ch. 2, declared it treason to "compass and imagine the death of the King," but it was necessary that the evidence should be applied to the proof of overt acts for the overt act is the charge upon which the prisoner must apply his defence. Archbold Cr. Plead. 893.

The indictment must state overt acts, and no evidence is admissible of any overt act not stated, unless it is otherwise relevant as tending to prove some overt act stated. See 614.

Words spoken or written and published may constitute an overt act if relating to a treasonable act or design. R. v. Wedderburne, 18 St. Tr. 425; R. v. Charnock, 12 St. Tr. 1377; but not unpublished writings. R. v. Lord Preston, 12 St. Tr. 645; R. v. Layer, 16 St. Tr. 93, 280. And by sec. 551 (2) no person shall be prosecuted under the provisions of this section 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.

*Levying war.*]—It is not necessary to set out in the indictment the particular acts of the defendant further than to allege generally that he assembled with a multitude armed and arrayed in a warlike manner and levied war. Fost. 220.

A mere rising or tumult is not treasonable unless for a purpose of a public or general nature. R. v. Hardie, 1 St. Tr. (N.S.) 609. It is not necessary that great numbers should assemble or that military arms or array should be displayed to constitute the levying of war. Ibid; R. v. Gallagher, 16 Cox C.C. 291. Enlisting and marching are sufficient without coming to battle. Vaughan's Case, 13 St. Tr. 485, 2 Salk. 634. But there must be an insurrection and it must be for an object of a general nature, and there must be force accompanying insurrection. R. v. Frost, 9 C. & P. 129. If an armed body of men enter a town with the object merely of making a demonstration of their strength to the magistracy in order to procure the liberation of prisoners convicted of some political offence or to have their punishment mitigated, this, although an offence of a serious nature, is not treason. Ibid.

Where the levying of war is direct, i.e., open rebellion for the purpose of deposing the Sovereign, all persons assembled and marching with the rebels are guilty of treason unless compelled to join and continue with them pro timore mortis. R. v. Earl of Essex, 1 St. Tr. 1333; R. v. Slavin, 17 U.C.C.P. 205; Fost. 216. But where it is indirect or constructive only, i.e., when levied for the purpose of effecting innovations of a public and general nature by an armed force or to obtain the redress of a public grievance, real or pretended, those only of the rabble who actually aid and assist in doing those acts of violence which form the constructive treason can be convicted of treason, and the rest are merely rioters. R. v. Messenger, 6 St. Tr. 879; R. v. Gordon, 21 St. Tr. 485.

Notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing some supposed grievances or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law. R. v. Riel (1885), 2 Man. R. 321, 1 Terr. L.R. 23, 10 App. Cas. 675.

*Corroboration.*]—No person accused of an offence under this section shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused. See. 684.

*Time for prosecution.*]—A 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. Sec. 551.

*Bail.*]—Sec. 603 re-enacting R.S.C. c. 174, s. 83) provides that—

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 commited, or of one of the judges thereof, or, in the province of Quebec, by order of a judge of the Court of King's Bench or Superior Court.

*Special provisions regarding trial.*]—See sec. 658.

The ordinary power of amending indictments (sec. 629) does not extend to authorize the court to add to the overt acts charged in an indictment for treason or other offence under Part IV. Sec. 614 (2).

**66. 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.

*Evidence.*]—Where a conspiracy is laid as an overt act the acts of any of the conspirators in furtherance of the common design may be given in evidence against all. R. v. Hardy, 1 East P.C. 98; R. v. Stone, 6 T.R. 527; R. v. McCafferty, 10 Cox C.C. 603.

The first thing to be proved is the conspiracy and that the defendant was connected with it, and afterwards, if it is intended to put in evidence the acts of a co-conspirator, it must be shewn that such co-conspirator was a member of the same conspiracy, and that the act done was in furtherance of the common design. R. v. Sidney, 9 St. Tr. 817; R. v. Lovat, 18 St. Tr. 529.

**67. Accessories after the fact.**—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.

**68. Levying war by citizens of a state at peace with His Majesty.**—Every subject or citizen of any foreign state or country at peace with His Majesty, who—

(*a.*) is or continues in arms against His Majesty within Canada; or

(*b.*) commits any act of hostility therein; or

(*c.*) enters Canada with intent to levy war against His Majesty, or to commit any indictable offence therein for which any person would, in Canada, be liable to suffer death; and

Every subject of His Majesty within Canada who—

(*d.*) levies war against His Majesty in company with any of the subjects or citizens of any foreign state or country at peace with His Majesty; or

(*e.*) enters Canada in company with any such subjects or citizens with intent to levy war against His 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 His 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.

Sections 6 and 7 of the Act respecting treason and other offences against the King's authority, R.S.C. ch. 146, still remain in force (Code sec. 983). They are as follows:—

(6) If any person, being a citizen or subject of any foreign state or country at peace with His Majesty, is or continues in arms against His Majesty, within Canada, or commits any act of hostility therein, or enters Canada with design or intent to levy war against His 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 His Majesty, within Canada, who levies war against His Majesty, in company with any of the subjects or citizens of any foreign state or country then at peace with His Majesty, or enters Canada in company with any such subjects or citizens with intent to levy war on His 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 His 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 His Majesty may be tried and punished under the next preceding section.

This offence is triable either before a superior court of criminal jurisdiction or by a militia general court-martial. The Superior Court has no discretion as to the punishment to be awarded, but a court-martial has. Burbidge Cr. Law Dig. 56.

**69. Other treasonable offences.**—Every one is guilty of an indictable 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 His 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 His Majesty's dominions or countries;

(*b.*) an intention to levy war against His Majesty within any part of the said United Kingdom, or of Canada, in order by force or constraint to compel him to change his 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 His Majesty's dominions or countries under the authority of His Majesty. R.S.C. c. 146, s. 3.

A prosecution under this section cannot be commenced after the expiration of three years from the time of the commission of the offence. Sec. 551 (*a*). And no person shall be prosecuted under the provisions of this section 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. Sec. 551 (2).

**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.

On demurrer to an indictment for conspiracy to bring about a change in the government of the Province of Ontario by bribing members of the Legislature to vote against the government, it was held that such was an indictable offence as a common law misdemeanor. R. v. Bunting, 7 Ont. R. 524. The fact that the Legislature has power by statute to punish as for a contempt does not oust the jurisdiction of the courts where the offence is of a criminal character; the same act may be in one aspect a contempt of the Legislature and in another aspect an indictable offence. Ibid.

**71. Assaults on the King.**—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 His Majesty, any arm or destructive or dangerous thing with intent to use the same to injure the person of, or to alarm, His Majesty; or

(*b.*) wilfully and with intent to alarm or to injure His Majesty, or to break the public peace:

(i.) points, aims or presents at or near His Majesty any firearm, loaded or not, or any other kind of arm;

(ii.) discharges at or near His Majesty any loaded arm;

(iii.) discharges any explosive material near His Majesty;

(iv.) strikes, or strikes at, His Majesty in any manner whatever;

(v.) throws anything at or upon His 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 His Majesty's forces by sea or land from his duty and allegiance to His Majesty, or to incite or stir up any such person to commit any traitorous or mutinous practice.

This section is derived from the Imperial Statute 37 Geo. III., ch. 70, the Incitement to Mutiny Act of 1797.

By Code sec. 614 indictments under Part IV. of the Code, in which this section appears, must state overt acts, and no evidence is admissible of any overt act not stated unless it is otherwise relevant as tending to prove some overt act stated. The power of amending indictments (sec. 629) does not authorize any addition to the overt act stated. Sec. 614 (2).

A sailor who has been in the sick hospital for thirty days and who is, therefore, not entitled to pay nor liable to a court-martial, is still "serving" within this section. R. v. Tierney, R. & R. 74.

**73. Enticing soldiers or sailors to desert.**—Every one is guilty of an indictable offence who, not being an enlisted soldier in His Majesty's service, or a seaman in His 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 His Majesty's military or naval service; or

(*b*.) conceals, receives or assists any deserter from His 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, secs. 1 and 4.

By R.S.C. ch. 169, sec. 9, it is further provided that one moiety of the amount of any penalty recovered under this provision 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.

Every one who is reasonably suspected of being a deserter from His 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. Sec. 561.

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 incurs a penalty of eighty dollars, recoverable on summary conviction in like manner as other penalties under the Code. Ibid.

**74. Resisting execution of warrant for arrest of deserters.**—Every one who resists the execution of any warrant authorizing the breaking open of any building to search for any deserter from His 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.

See note to sec. 73.

**75. Enticing militiamen or members of the N.-W. mounted police to desert.**—Every one is guilty of an offence and liable, on summary conviction, to six months' 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.

**76. Interpretation of secs. 77 and 78.**—In the two following sections, unless the context otherwise requires—

(*a.*) Any reference to a place belonging to His 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 His 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 His 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. Unlawfully obtaining and communicating official information.**—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 His 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 His Majesty, takes, or attempts to take, without authority given by or on behalf of His 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 interests of the state, to be communicated at that time; or

(*c*.) after having been intrusted in confidence by some officer under His Majesty with any document, sketch, plan, model or information relating to any such place as aforesaid, or to the naval or military affairs of His 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 His Majesty, or to the naval or military affairs of His 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 interests 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 intrusted 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.

This, and the following section, are an adaptation of the Imperial statute 52 & 53 Vict., ch. 52, the Official Secrets Act 1889. That Act was by its terms made applicable to British possessions not within the United Kingdom; but it is provided that if by any law made before or after the passing thereof by the legislature of any British possessions provisions are made which appear to His Majesty the King to be of the like effect as those contained in such Act, His Majesty may by order in council suspend the operation within such British possession of such Act or of any part thereof, so long as such law continues in force there and no longer (sec. 5). But the suspension in any British possession is limited by a proviso that it shall not extend to the holder of any office under His Majesty the King who is not appointed to that office by the government of that possession.

*Interpretation.*]—See sec. 76.

By sec. 543 it is provided that no person shall be prosecuted for the offence of unlawfully obtaining and communicating official information, as defined in this and the following section, without the consent of the Attorney-General or of the Attorney-General of Canada. 53 Vict., ch. 10, sec. 4.

**78. Communicating information acquired by holding office.**—Every one who, by means of his holding or having held an office under His 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 His 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 His 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 His Majesty. 53 V., c. 10, s. 2.

See sec. 76 and note to sec. 77.

By sec. 543 the consent of the Attorney-General or of the Attorney-General of Canada is required for the prosecution, as in the case of the preceding section.

An indictment for inciting the commission of an offence under sub-sec. 2, in respect of the offence mentioned in sec. 77 (*d*), was quashed for want of an averment that the person incited had obtained possession or control of the document. R. v. Stuart (1899), Central Cr. Court, Archbold Cr. Plead. 965.

PART V.

## UNLAWFUL ASSEMBLIES, RIOTS, BREACHES OF THE PEACE.

SECT.



---

**79. Definition of 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.

*Examples of unlawful assembly.*]—The difference between a "riot" and an "unlawful assembly" is that the former is a tumultuous meeting of persons upon some purpose which they actually execute with violence, and the latter is a mere assembly of persons for treasonable or seditious purposes; R. v. Rankin, 7 St. Tr. (N.S.) 711; or upon a purpose which, if executed, would make them rioters, but which they do not execute nor make any motion to execute. R. v. Kelly, 6 U.C.C.P. 372; R. v. Birt, 5 C. & P. 154. The offence formerly known as "rout" was an unlawful assembly in which the parties had made some motion to execute the purpose, which, if executed, would make them rioters. R. v. Vincent, 9 C. & P. 91. But such would now be "riot" under the statutory definitions contained in sec. 80.

The march of a Salvation Army band through the streets of a town in which street music was prohibited, and which resulted in a breach of the peace, was held not to be an unlawful assembly where the bandsmen did not have any reason to believe that their acts would cause a breach of the peace. R. v. Clarkson, 17 Cox C.C. 483.

Persons assembling with intent to carry out a common purpose must not do so in such a manner as to needlessly and without any reasonable occasion provoke other persons to disturb the peace tumultuously, and if they do so, and persons in the neighborhood are on reasonable grounds afraid that such a result will follow, the assembly will be unlawful under the definition in the section. This extends the common law offence and makes the decision in Beatty v. Gillbanks (1882), 9 Q.B.D. 308, inapplicable.

In that case members of the Salvation Army assembled together in the street for a lawful object, but with a knowledge that their assembly would be opposed and resisted by other persons in such a way as would in all probability tend to the commission of a breach of the peace on the part of the opposing persons. The procession of the Salvation Army was forcibly opposed by a number of persons but no violence was used by the Salvation Army members. It was held by Field and Cave, JJ., that the assembly of the latter was not unlawful, and that a man is not to be convicted for doing a lawful act, although he knows that his doing it may cause another to do an unlawful act.

A meeting lawfully convened may become unlawful if seditious words are spoken of such a nature as to be likely to produce a breach of the peace. R. v. Burns (1886), 16 Cox C.C. 355.

Assemblies to obstruct the officers of the law are unlawful. R. v. McNaughten, 14 Cox C.C. 576; or to witness a prize fight. R. v. Billingham, 2 C. & P. 234; R. v. Perkins, 4 C. & P. 537. See sec. 95 as to the offence of promoting a prize fight.

*Suppressing unlawful assembly.*]—The magistrates and the police are justified in dispersing an assembling which is unlawful. O'Kelly v. Harvey, 15 Cox C.C. 435. Redford v. Birley, 1 St. Tr. (N.S.) 1071, 1239; R. v. Neale, 3 St. Tr. (N.S.) 1312. After refusal to disperse, force may be used to compel them to do so, and the persons resisting may be punished as rioters. R. v. Jones, 6 St. Tr. (N.S.) 811; R. v. Fursey, St. Tr. (N.S.) 543, 6 C. & P. 81. Nor is it necessary to first read the Riot Act or to proclaim the meeting unlawful before using force to disperse it. Ibid.

*Punishment.*]—See sec. 81.

**80. Definition of riot.**—A riot is an unlawful assembly which has begun to disturb the peace tumultuously.

At common law a riot was "a tumultuous disturbance of the peace by three persons or more assembling together of their own authority, with an intent mutually to assist one another against any who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner to the terror of the people, whether the act intended was of itself lawful or unlawful." Hawkins P.C., c. 28, sec. 1, p. 513, and where before the Code a person was indicted for a riot and assault, and the jury found him guilty of a riot, but not of the assault charged; it was held that the conviction for riot could not be sustained, the assault, the object of the riotous assembly, not having been executed; although the defendant might have been guilty of joining in an unlawful assembly. R. v. Kelly (1857), 6 U.C.C.P. 372. The present section makes it unnecessary that the object of the disturbance should have been actually carried out if there has been a tumultuous disturbance of the peace.

A procession having been attacked by rioters, the prisoner, one of the processionists, and in no way connected with the rioters, was proved during the course of the attack to have fired off a pistol on two occasions, first in the air and then at the rioters. So far as appeared from the evidence, the prisoner acted alone and not in connection with any one else. It was held that a conviction for riot could not be sustained. R. v. Corcoran (1876), 26 U.C.C.P. 134.

*Punishment and procedure.*]—See secs. 82-86 inclusive.

**81. Punishment of unlawful assembly.**—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.

*Unlawful assembly defined.*]—See sec. 79.

*Evidence of other meetings.*]—It has been held in New Brunswick that it is not a ground for quashing a conviction for unlawful assembly on a certain day that evidence of an unlawful assembly on another day has been improperly received, if the latter charge was abandoned by the prosecuting counsel at the close of the case, and there was ample evidence to sustain the conviction. R. v. Mailloux, 3 Pugsley (N.B.) 493. And evidence of the conduct of the accused persons on the day previous to their alleged unlawful assembly is not admissible on their behalf to explain or qualify their conduct at the time of the alleged offence. Ibid.

**82. Punishment of riot.**—Every rioter is guilty of an indictable offence and liable to two years' imprisonment with hard labour. R.S.C. 1. 148, s. 13.

*Suppression of riot.*]—See secs. 40-43 inclusive, 81, 83-86 inclusive, and 140-142 inclusive.

If the magistrate neither reads the Riot Act nor restrains nor apprehends the rioters, nor gives any orders to fire on them, nor makes use of an available military force, such will be prima facie evidence of criminal neglect on his part. R. v. Kennett, 5 C. & P. 282. He is justified in using such force as he on good faith and on reasonable and probable grounds believes necessary, but it must not be out of proportion to the danger to be reasonably apprehended from a continuance of the riot. Sec. 40: Stevenson v. Wilson, 2 L.C.J. 254; R. v. Pinney (1832), 5 C. & P. 254.

*Evidence.*]—To prove a person to be a rioter, it is not sufficient to merely shew that the riot took place and that the accused was present among them. It must be shewn that he did something by word or act to take part in, help or incite the riotous proceedings. R. v. Atkinson, 11 Cox 330. If, however, his assistance is demanded by officers of the law to aid in suppressing the riot, his failure to aid them is indictable under sec. 141. R. v. Sherlock, 10 Cox C.C. 170; R. v. Brown, C. & Mar. 314.

The acts of the rioters may be proved severally, as in conspiracy, before evidence is given to connect their fellow rioters. R. v. Cooper, 1 Russ. Crimes, 6th ed. 585.

**83. Reading the Riot Act.**—It is the duty of every 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 Lord the King 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 KING."

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, whether such proclamation is not made; or

(*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, ss. 1 and 2.

The Riot Act is not validly proclaimed if the concluding words of the proclamation, "God save the King," are omitted. R. v. Child, 4 C. & P. 442.

A prosecution under the second sub-section for opposing the reading of the Riot Act or for assembling (quære continuing assembled) after proclamation, must be brought within one year from the commission of the offence. See. 551 (*c*).

**84. Duty of justice if rioters do not disperse.**—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 apprehension 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.

See secs. 40 to 43 inclusive, and secs. 140 and 141.

**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 movable, 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, waggonway or track for conveying minerals from any mine. R.S.C. c. 147, s. 9.

It is not a defence that the offender believed he had a right to act as he did, unless he actually had such a right. See. 86 (2). Formerly if the demolition was executed in pursuance of the bona fide belief that the house belonged to one of the rioters, this would be a defence although the belief was erroneous. R. v. Langford, Carr. & M. 602; R. v. Casey (1874), Irish R. 8 C.L. 408.

As to similar offences without riot, see Part XXXVII., secs. 482-511; and as to riotous injury or damage to buildings, see sec. 86.

*Begin to demolish.*]—This means not simply the demolition of a part, but of a part with intent to demolish the whole. R. v. Ashton, 1 Lewin C.C. 296. In that case the parties first broke the windows and then entered the house and set fire to the furniture, but no part of the house was burned. Park, J., thus instructed the jury:—"If you think the prisoners originally came there without intent to demolish, and that the setting fire to the furniture was an afterthought but with that intent, then you must acquit because no part of the house having been burned there was no beginning to destroy the house. If they came originally without such intent but had

afterwards set fire to the house the offence is arson. If you have doubts whether they originally came with an intent to demolish, you may use the setting fire to the furniture under such circumstances and in such manner as that the necessary consequence, if not for timely interference, would have been the burning of the house, as evidence to shew that they had such intent, although they began to demolish in another manner." Ibid.

If rioters destroy a house by fire the offence is within this section, and they need not be indicted for arson. R. v. Harris, Carr. & M. 661.

If some of the prisoners set fire to the house itself, and others carried furniture out of the house and burned it in a fire made outside, it will be for the jury to say whether the latter were not encouraging and taking part in a general design of destroying both the house and the furniture, and if so the jury ought to convict. Ibid.

Where rioters destroy a house by fire it is not essential to prove that the person accused was present when the house was originally set on fire, if it was shewn that he was one of the rioters present while the fire was burning. R. v. Simpson, Carr. & M. 669.

It is immaterial that the principal intent of the rioters was the capture or personal injury of an individual therein, if it was also their object to demolish the house. R. v. Batt, 6 C. & P. 329.

Where the rioters break the doors and windows and destroy furniture in the house and then go away, although there was nothing to prevent them committing further injury, the offence is not within this section, for their going away under the circumstances shews that they had completed their purpose and had done all the injury they intended to do. R. v. Thomas, 4 C. & P. 237; R. v. Adams, Carr. & M. 299.

**86. Riotous 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 a right to act as he did, unless he actually had such a right. R.S.C. c. 147, s. 10.

See note to preceding section.

**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 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.

The prosecution must be commenced within six months from the commission of the offence. See. 551 (*d*).

**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.

The prosecution must be commenced within six months from the time when the offence was committed. See. 551 (*d*).

**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 peaceful 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.

*Forcible entry.*]—"Entering" here means not merely going upon land or trespassing upon it; there must accompany the act of going upon the land some intent to take possession of the land itself and deprive the possessor of the land. Such an interference with the possession as trespassing upon it for the purpose of taking away chattels upon the land is not an "entering" within the Code. R. v. Pike (1898), 2 Can. Cr. Cas. 314, 12 Man. L.R. 314.

Lord Tenterden, C.J., expressed himself as follows, in Rex v. Smyth, 5 C. & P. 201: "An indictment for a forcible entry cannot be supported by evidence of a mere trespass; but there must be proof of such force, or at least of such kind of force as is calculated to prevent any resistance."

To enter upon lands with such force as to exceed a bare trespass and so as to cause a public breach of the peace was an indictible offence at common law. R. v. Wilson, 8 T.R. 357; R. v. Bake, 3 Burr. 1731.

Everyone commits the offence of forcible entry, who, in order to take possession thereof, enters upon any lands or tenements in a violent manner, whether such violence consists in actual violence applied to any other person, or in threats, or in breaking open any house, or in collecting together an unusual number of persons for the purpose of making such entry. Stephen's Digest of Crim. Law, p. 51.

Where, therefore, from thirty to forty employees of the G. W. Railway Co. went upon land then in possession of the S. & H. Railway Co., and those resisting had good reason to apprehend violence in the event of further resistance, and yielded possession in the apprehension of such violence, it was held that the entry was a forcible one. R. v. Smith (1878), 43 U.C.Q.B. 369.

The gist of the offence is the forcible depriving of the other's actual and peaceable possession in a manner likely to cause a breach of the peace. R. v. Cokely, 13 U.C.Q.B. 521; R. v. Studd, 14 W.R. 806; Beddall v. Maitland, 17 Ch. D. 174. Even if the defendant had a right of entry, the assertion of that right "with strong hand or with multitude of people" is equally an offence as if he had no right. Taunton v. Costar, 7 T.R. 431.

A landlord may not so eject his tenant although the term of the tenancy has expired. But it has been held that the English statute regarding forcible entry (5 Ric. 2, ch. 7) does not apply to the ejectment of a mere trespasser. Browne v. Dawson, 12 A. & E. 624; Scott v. Browne, 51 L.T. 747.

A person who forcibly enters upon lands of his own which are in the custody of his servant or bailiff, is not guilty of forcible entry. 1 Hawk., ch. 64, sec. 32.

Actual possession does not necessarily imply actual residence, either personally or by a servant or agent. 13 Am. & Eng. Encyc. of Law, 2nd ed., p. 750.

*Restitution.*]—On a conviction for forcible entry the court is not bound to order a writ of restitution, but may in its discretion grant or refuse the writ. R. v. Jackson, Dra. Rep. (U.C.) 53; R. v. Wightman (1869), 29 U.C.Q.B. 211.

*Forcible detainer.*]—Everyone commits the offence called forcible detainer, who, having wrongfully entered upon any lands or tenements, detains such lands and tenements in a manner which would render an entry upon them for the purpose of taking possession forcible. Stephen's Digest of Crim. Law, p. 51.

The evidence which supported the allegation of forcible entry in the case of R. v. Smith, supra, was held to support the allegation of forcible detainer. Ib., p. 383. It is within the discretion of the judge who tries the cause either to grant or refuse restitution. R. v. Wightman (1869), 29 U.C.Q.B. 211; R. v. Smith (1878), 43 U.C.Q.B. 369.

**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.

If the fighting be in private it is not an affray, but an assault. 4 Bl. Com. 145; R. v. Hunt, 1 Cox C.C. 177. Mere quarrelsome words will not make an affray. 1 Russ. Cr. 5th ed. 390. It differs from a riot in that two persons may be guilty of an affray, but it requires three or more to constitute a riot. Secs. 79 and 80.

**91. Challenge 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.

It was a very high offence at common law to challenge another, either by word or letter, to fight a duel; or to be the messenger of such a challenge or even barely to provoke another to send such a challenge or to fight, e.g., by dispersing letters to that purpose containing reflections and insinuating a desire to fight. Hawk. P.C., b. 1, ch. 63, sec. 3; R. v. Phillips, 6 East 464; R. v. Rice, 3 East 581.

If the defendant's intent does not sufficiently appear from the words proved, the prosecution should give evidence of circumstances from which the jury may infer the intent. R. v. Phillips, 6 East 464; Archbold Cr. Evid. 1060.

Where a letter challenging to fight is put into the post office in one county and delivered to the party in another, the venue may be laid in the former county. R. v. Williams (1810), 2 Camp. 506. The *sending* of the challenge is the offence and the offence is complete if the letter be mailed, although it does not in fact reach the person to whom it is addressed. Ibid.

**92. Prize-fighting defined.**—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.

A sparring match with gloves, fairly conducted, is not unlawful. R. v. Young, 10 Cox C.C. 371. If, however, the parties meet intending to fight till one gives in from exhaustion or injury received, such fighting is unlawful whether the combatants fight with gloves or not. R. v. Orton, 14 Cox C.C. 226.

The defendants advertised a boxing exhibition which was effectively held in a public hall, and was accompanied by all the particulars and circumstances of a prize-fight. Complainant submitted that the accused came within the provision of the statute; and on behalf of the defendants it was contended that the encounter was merely a scientific boxing match, and moreover only a sham fight, not forbidden by law:—Held, that, as the proof adduced established that the encounter in question was accompanied by all the circumstances and elements which constitute a prize-fight, the defendants committed an infraction of the law, for which they must be found guilty. *Steele* v. *Maber*, 19 Que. S.C. 392. Per Mulvena, D.M.

The injuries given and received in prize-fights are injurious to the public, both because it is against the public interest that the lives and the health of the combatants should be endangered by blows and because prize-fights are disorderly exhibitions, mischievous on many obvious grounds. R. v. Coney, 8 Q.B.D. 534, 30 W.R. 678, per Stephen, J. The consent of the parties to the blows which they may mutually receive does not prevent those blows from being assaults. Ibid.

The fight must be for a prize or one on the result of which the handing over or transfer of money or property depends, otherwise it is not a prize-fight; sec. 97; but may be punished under the latter section by a fine not exceeding $50.

**93. Challenging to fight a prize-fight, etc.**—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. Engaging as 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.

Sections 6, 7 and 10 of the Act respecting prize-fighting, R.S.C., ch. 153, still remain in force (Code sec. 983). They are as follows:—

(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 goal of the county, district or city within which such inquiry takes place, or if there is no common goal there, then to the common goal 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 recognizances 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.

**95. Attending or promoting a prize-fight.**—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. 5.

**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. When discretionary to discharge or fine.**—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 *bona 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.

See note to sec. 92.

**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 Indians, 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.

SECT.



---

**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, 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.

By the common law of England to manufacture or to keep in large quantities in towns or closely inhabited places gunpowder, or other explosive substances, constitutes a nuisance and indictable offence. R. v. Lister, 1 D. & B. 209, citing R. v. Taylor, 2 Strange 1167, and R. v. Williams, 1 Russell on Crimes 298, note *o.*, and the causing of danger is the gist of the offence; but it is not necessary to allege carelessness in the indictment, or that the quantities deposited were so great that care would not produce safety. R. v. Holmes (1884), 17 N.S.R. 499.

*Explosive substance.*]—This expression is defined by the interpretation clause (sec. 3 (*i*)) as 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.

*Property.*]—This term includes 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. Sec. 3 (*r*).

*Likely to endanger life.*]—It is not necessary to prove actual injury, and it is sufficient if such exposure to risk or chance of injury be shewn as will satisfy the jury that actual danger to life was caused. R. v. McGrath, 14 Cox C.C. 598.

**100. Acts with intent to cause dangerous 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. 3.

If several persons are connected in a common design to have explosive substances made for an unlawful purpose, each of the confederacy is responsible in respect of such articles as are in the possession of others connected in the carrying out of their common design. R. v. Charles, 17 Cox C.C. 499.

The Imperial Act, 24 & 25 Vict., ch. 97, sec. 10, declared it an offence to "unlawfully and maliciously place or throw in, against or near any building any gunpowder or other explosive substance with intent to destroy or damage any building, etc., whether or not any explosion take place and whether or not any damage be caused." On a prosecution under that statute for throwing gunpowder against a house, the evidence proved that the prisoner had thrown a bottle containing gunpowder against the house, 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, as, "if the fuse was not lighted, it could not cause an explosion and it would be merely throwing a bottle against a house." R. v. Sheppard (1868), 11 Cox C.C. 302.

**101. Unlawfully making or possessing explosive substances.**—Every one is guilty of an indictable offence and liable to seven years' imprisonment 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 shew 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.

If any person is charged before a justice of the peace with the offence of making or having explosive substances, as defined in section 100, no further proceeding 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. Sec. 545.

**102. Possession of arms for purposes dangerous to the public peace.**—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.

A prosecution under this section shall not be commenced after the expiration of six months from the commission of the offence. Sec. 551 (*d*).

**103. Two or more persons openly carrying dangerous 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.

The prosecution must be commenced within one month from the commission of the offence. Sec. 551 (*f*).

**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.

**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 His 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 shewn 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.

The limit of time for prosecution is one month. See. 551 (*f*).

As to soldiers, peace officers, etc., see the exception contained in sec. 112.

*Peace officer.*]—See the definition of this term in sec. 3 (*s*).

**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 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.

The limit of time for prosecution is one month. See. 551 (*f*).

**107. Having weapons on person 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.

The limit of time for prosecution is one month. See. 551 (*f*).

As to soldiers, peace officers, etc., see the exception contained in sec. 112.

**108. Having weapons on the person with intent.**—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.

The limit of time for prosecution is one month. See. 551 (*f*).

A conviction for "procuring" a pistol with intent unlawfully to do injury to another person, is not to be held a sufficient conviction for "having on his person a pistol, etc.," and is bad as not disclosing an offence known to the law. R. v. Mines (1894), 1 Can. Cr. Cas. 217 (Ont.).

**109. Pointing firearm at person.**—Every one who, without lawful excuse, points at another person any firearm or air-gun, 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.

The limit of time for prosecution is one month. See. 551 (*f*).

**110. Carrying offensive weapons about the person.**—Every one who carries about his person any bowie-knife, 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.

The limit of time for prosecution is one month. See. 551 (*f*).

**111. Carrying sheath-knives in seaports.**—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.

As to sailors in His Majesty's service and certain others see the exception provided in the following section.

The limit of time for prosecution is one month. Sec. 551 (*f*).

Code sections 107 to 111 inclusive are taken from R.S.C. ch. 148 (sees. 2 to 6 inclusive), an Act respecting the improper use of firearms and other weapons, and sec. 7 of that statute remains unrepealed (Code sec. 983) and is to be read with these sections of the Code. Sec. 7 is as follows:—

(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.

**112. Exception as to soldiers, &c.**—It is not an offence for any soldier, public officer, peace officer, sailor or volunteer in His 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.

This section constitutes an exception from the operation of secs. 107, 110 and 111. Sec. 105 by its terms also excepts the same classes from its operation. A justice of the peace is a peace officer; sec. 3 (s); and so is a mayor, warden, reeve, sheriff, deputy sheriff, sheriff's officer, or officer employed for the service or execution of civil process. Ibid.

**113. Refusing to deliver offensive weapon to a justice.**—Every one 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.

The prosecution must be commenced within one year from the commission of the offence. Sec. 551 (*c*).

Sections 1, 2 and 3 of the Act respecting the preservation of peace at public meetings, R.S.C. ch. 152, still remain in force (Code sec. 983). They are as follows:—

(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 unadvoidable accident, has been actually destroyed or lost out of the possession of such justice without his wilful default.

**114. Coming armed within two miles of 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 imprisonment 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.

The limit of time for prosecution is one year. See. 511 (*c*).

**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.

The limit of time for prosecution is one year. See. 551 (*c*).

**116. Sale of arms in the N.-W. 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 smooth-bore shot-guns; and the expression "ammunition" means fixed ammunition or ball cartridge. R.S.C., c. 50, s. 101.

Sec. 101 of the North-West Territories Act, R.S.C. ch. 50, remains unrepealed (Code sec. 983). It is as follows:—

(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.

Sub-sec. 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 a term not exceeding six months, or to both.

Sub-sec. 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.

Sub-sec. 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.

Sub-sec. 5. The provisions of this section respecting the possession of arms and ammunition shall not apply to any officer or man of His Majesty's forces, of the Militia force, or of the North-West Mounted Police force.

Sub-sec. 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.

Sub-sec. 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.

Sub-sec. 8. All courts, judges and justices of the peace shall take judicial notice of any such proclamation.

**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, etc., 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 retailing 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.

Section 2 of the Act respecting the preservation of peace in the vicinity of public works, R.S.C. ch. 151, provides as follows:—

(2) 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.

Sub-sec. 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.

Sub-sec. 3. No such proclamation shall have effect within the limits of any city.

Sub-sec. 4. All courts, magistrates and justices of the peace shall take judicial notice of every such proclamation.

**119. Intoxicating liquors on board His Majesty's ships.**—Every one 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 His Majesty's ships or vessels; or

(*b.*) approaches or hovers about any of His 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 His Majesty's service, on board any such ship or vessel, any intoxicating liquor. 50-51 V., c. 46, s. 1.

PART VII.

## SEDITIOUS OFFENCES.

SECT.



---

**120. Oaths to commit certain offences.**—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.

This and the follow.ng two sections are taken from the Quebec consolidated statutes of 1860, C.S.L.C. ch. 10, secs. 1, 2, 3 and 4, and those sections are repealed by Code sec. 981 and schedule 2. The other sections, 5 to 9 inclusive, of C.S.L.C. ch. 10, as amended by the statute of the Province of Canada, 29 Viet. (1865, 2nd session), ch. 46, and by 58-59 Viet. (Can.), ch. 44, remain in force in the Province of Quebec. On the revision of the Canada statutes in 1886, the whole of the Quebec statute respecting seditious and unlawful associations and oaths, C.S.L.C. ch. 10, and the amending Act of 1865 were not included in the revision but were classed in Schedule B. to the Revised Statutes of Canada amongst the "Acts and parts of Acts of a public general nature which affect Canada and have relation to matters not within the legislative authority of Parliament, or in respect to which the power of legislation is doubtful or has been doubted and which have in consequence not been consolidated, and also Acts of a public general nature which for other reasons have not been considered proper Acts to be consolidated."

Under the unrepealed sections, certain classes of secret societies operating in Quebec province without incorporation or other sanction of the law are declared illegal and their members are indictable. An exception is made whereby the statute does not apply to the Masonic fraternity, C.S.L.C. ch. 10, sec. 9, 29 Viet. (Can.), ch. 46, 58-59 Viet. (Can.), ch.44. The statute mentioned was modelled upon the English statute of 1799 respecting Unlawful Societies, 39 Geo. III., ch. 79, referred to in R. v. Dixon, 6 C. & P. 601.

Although the oath were read from a paper at the time it was administered, it may be proved by parol evidence without giving the accused notice to produce the paper. R. v. Moors, 6 East 419 (*n*).

**121. Other unlawful oaths.**—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.

See note to sec. 120.

A similar enactment is contained in the Imperial Statute, 37 Geo. III., ch. 123, known as the Unlawful Oaths Act of 1797.

*Seditious purpose.*]—Sedition whether by words spoken or written, or by conduct was a misdemeanour at common law. Stroud's Case, 3 St. Tr. 242. It embraces all those practices whether by word, deed or writing, which fall short of treason (as to which see sec. 65, et seq.), but directly tend or have for their object to excite discontent or dissatisfaction, to excite ill-will between different classs of the King's subjects, to create public disturbance or to lead to civil war, to bring into hatred or contempt the sovereign or the government, the laws or constitution of the realm, and generally all endeavours to promote public disorder, or to incite people to unlawful associations or assemblies, insurrections, breaches of the peace, or forcible obstruction of the execution of the law. Archbold Cr. Ev. (1900) 942; R. v. Pigott, 11 Cox C.C. 44; R. v. Fussell, 3 Cox C.C. 291. But a bona fide intention to point out errors or defects in the government or in the administration of justice or to excite His Majesty's subjects to attempt to procure by lawful means the alteration of any matter in the state, is not seditious; see. 123 (*b*); nor the like intention to point out, *in order to their removal*, matters which are producing or have a tendency to produce feelings of hatred and ill-will between different classes of His Majesty's subjects; see. 123 (*c*); or to shew that His Majesty has been misled or mistaken in his measures; see. 123 (*a*).

A writer may criticise or censure the conduct of the servants of the Crown or the acts of the Government, he can do it freely and liberally, but it must be without malignity and not imputing corrupt or malicious motives; the law only interferes when plainly and deliberately the limits of frank and candid and honest dicussion are passed. R. v. Sullivan, 11 Cox C.C. 44; R. v. Burns, 16 Cox C.C. 355; R. v. Lambert, 2 Camp. 398, 11 Revised Reports 748.

**122. Compulsion in administering and taking oaths.**—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 His 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.

See note to sec. 120.

**123. Seditious offences defined.**—No one shall be deemed to have a seditious intention only because he intends in good faith—

(*a.*) to shew that His Majesty has been misled or mistaken in his 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 His 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 of hatred and ill-will between different classes of His 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.

See sec. 124.

**124. Punishment of seditious offences.**—Every one is guilty of an indictable offence and liable to two years' imprisonment who speaks any seditious words or publishes any seditious libels or is a party to any seditious conspiracy.

*Seditious words.*]—This expression here means words expressive of a seditious intention, sec. 123 (2). Where the words are spoken at a meeting, those who do anything, as by expressions of approval, to help the speaker to produce upon the hearers the natural effect of the words spoken, are guilty of uttering seditious words just as if they spoke them themselves. R. v. Burns, 16 Cox C.C. 355; but a person merely standing by when they are uttered, and himself saying nothing, does not thereby make himself guilty of the uttering. Ibid.

*Seditious libel.*]—A seditious libel is defined by the preceding section, 123 (3), as being "a libel expressive of a seditious intention." A seditious libel may be evidenced by a woodcut or engraving. R. v. Sullivan, 11 Cox C.C. 44, 51. Publication must be proved, but if the manuscript of it be proved to be in the handwriting of the accused, and it be also proved to have been printed and published, such is evidence to go to the jury that the publication was *by* the accused, although there is no express evidence that he authorized the printing or publishing. R. v. Beare, 1 Ld. Raym. 414; R. v. Lovett, 9 C. & P. 462.

It is not necessary to prove the falsity of a seditious libel. R. v. Duffy, 2 Cox C.C. 45; Ex parte O'Brien, 15 Cox C.C. 180. Sec. 634 of the Code which allows a plea of the truth of the libel and of its publication in the public interest is limited to defamatory libels, and no such rule applies to seditious libels. But after verdict, the defendant has been allowed to prove in mitigation of sentence that he had published the libel through having himself read it in a newspaper in which it had previously appeared. R. v. Burdett, 4 B. & Ald. 95.

*Seditious conspiracy.*]—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. Sec. 61 (2).

**125. Libels on foreign sovereigns.**—Every one is guilty of an indictible offence and liable to one year's imprisonment who, without lawful justification, publishes any libel tending to degrade, 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.

**126. Spreading false news damaging to a public interest.**—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.

The ancient statute, 3 Ed. 1, ch. 34, enacted as follows:—"Forasmuch as there have been oftentimes found in the country devisers of tales whereby discord, or occasion of discord, hath many times arisen between the King and his people, or great men of the realm, for the damage that

hath and may thereof ensue it is commanded, that, from henceforth, none be so hardy to tell or publish any false news or tales, whereby discord or occasion of discord or slander may grow between the King and his people, or the great men of the realm; and he that doth so shall be taken and kept in prison until he hath brought him into the court which was the first author of the tale."

This statute proceeds on the idea, that, by the common law, as well understood at the time, and enforced by the courts, the author of the tale was punishable by indictment—as undoubtedly was the propagator of it also—and the statute merely provided a means by which he should be effectually discovered and brought to justice. Bishop on Criminal Law, 5th ed. (1872), para. 473.

In 1778 Alexander Scott was indicted at the Old Bailey "for that he on the 23rd of April last, unlawfully, wickedly, and maliciously did publish false news, whereby discord, or occasion of discord, might grow between our lord the King and his people, or the great men of the realm, by publishing a certain printed paper, containing such false news; which said printed paper is of the tenor following:—'In pursuance of His Majesty's order in council to me directed, these are to give public notice, that war with France will be proclaimed on Friday next, etc., etc.'" The defendant was a bill sticker; and it appearing on the trial that he had been imposed upon, and induced to stick up the bills containing the false matter believing it to be true whereas it was a forgery, he was acquitted. There does not seem to have been any doubt that the act with which he was charged was indictable. Scott's Case, 5 New Newgate Calender 284.

PART VIII.

## PIRACY.

SECT.



---

**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 committing or attempting to commit such crime the offender murders, attempts to murder or wounds any 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.*]—The offence of piracy at common law is nothing more than robbery upon the high seas; but by statutes passed at various times and still in force many artificial offences have been created which are to be deemed to amount to piracy. Roscoe Cr. Evid., 11th ed., 817

*Slave trading.*]—By the Imperial Statute, 5 Geo. IV., ch. 113, secs. 9 and 10, the carrying away, conveying, or removing of any person upon the high seas for the purpose of his being imported or brought into any place as a slave, or being sold or dealt with as such or the embarking or receiving on board any person for such purpose, is declared to be piracy. The provisions of that statute apply not only to acts done by British subjects in furtherance of the slave trade in England and the British colonies but to acts done by them outside of the British dominions. R. v. Zulueta, 1 C. & K. 215.

*Evidence.*]—The subject of a friendly foreign power may be punished for piracy committed upon British property. Roscoe Cr. Evid., 11th ed., 820.

Where several seamen on board a ship seized the captain and after putting him ashore carried away the ship and subsequently committed several piracies, it was held that the seizure of the captain and of the ship was an act of piracy. R. v. May, 2 East P.C. 796.

And where certain pilots had in collusion with the master of a vessel cut away a cable for the purpose of defrauding the underwriters for the benefit of the owners, it was held that they were rightly convicted of piratically stealing the cable. R. v. Curling, Russ. & Ry. 123.

But where the master of a vessel with goods on board ran the goods ashore and burned the ship with intent to defraud the owners and insurers, it was held that, as the accused held the goods under a special trust, he could not, before that trust was ended, be guilty of piracy by converting them to his own use. R. v. Mason, 2 East P.C. 796.

**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:—

(*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 His 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 His 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 His 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.

By sec. 542 it is enacted that proceedings for the trial and punishment of a person who is not a subject of His Majesty, and who is charged with any offence committed 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.

In a recent Nova Scotia case, R. v. Heckman (1902), not yet reported, it was held that a charge against a seaman not a British subject on a British ship for inciting a revolt upon the ship while on the high seas cannot, if taken only under Code sec. 128, be made without the consent of the Governor-General, under sec. 542, obtained prior to the laying of the information. Mr. Justice Ritchie held further that if the proceedings for the offence are taken under the Merchant Shipping Act 1894 (Imp.), s. 686, the consent of the Governor-General is not required and Code sec. 542 would not apply. But a different view was taken by Mr. Justice Weatherbe who held that sec. 542 applies to the procedure in Canadian Courts in respect of offences committed within the Admiralty jurisdiction whether the proceedings are taken under the Criminal Code or the Imperial Merchant Shipping Act or the Admiralty Offence Act, 1849 (Imp.).

**129. Piracy with violence.**—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.

See note to preceding section.

**130. Failure to fight 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.

# TITLE III.

## OFFENCES AGAINST THE ADMINISTRATION OF LAW AND JUSTICE.

### PART IX.

### CORRUPTION AND DISOBEDIENCE.

SECT.



---

**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 one holding any judicial office shall be prosecuted for the offence of judicial corruption, as defined in this section, without the leave of the Attorney-General of Canada. Sec. 544.

**132. Corruption of prosecuting officers.**—Every one is guilty of an indictible 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.

*Peace officer.*]—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. Sec. 3 (*s*).

*Public officer.*]—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. Sec. 132 (*e*).

*(Amendment of 1893).*

**133. Frauds upon the Government.**—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 considera-

tion 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, compensation 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 Government, 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 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 His Majesty in the right of Canada or of any province thereof.

No prosecution for this offence shall be commenced after the expiration of two years from its commission. Sec. 551 (*b*).

Misbehaviour in office is an indictable offence at common law and it is not essential that pecuniary damage should have resulted to the public by reason of such irregular conduct, nor that the defendant should have acted from corrupt motives. R. v. John R. Arnoldi (1893), 23 O.R. 201. A man accepting an office of trust concerning the public, especially if attended with profit, is answerable criminally to the King for misbehaviour in his office. R. v. Bembridge, 22 St. Tr. 1; 3 Dong. 327. And where there is a breach of trust, fraud or imposition in a matter concerning the public, though as between individuals it would only be actionable, yet as between the King and the subject it is indictable. Ibid.

**134. Disability on conviction for such offence.**—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' imprisonment, 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.

On the trial of an indictment charging a misdemeanour against the Principal Registrar of Deeds of a County and his deputy jointly for misfeasance in not recording deeds in their due order, it was objected that they could not be indicted together in one indictment, and legally convicted at one and the same time; but it was held by the Full Court on the points reserved, that though the principal might perhaps not be indictable for the wrongful act of his deputy committed in his absence and without his knowledge or consent, it is a different thing when he is present and knowing and consenting to the act; that in such a case both are wrong doers and *particeps criminis*. It was also contended, in the same case, that the deputy registrar could not be legally convicted so long as his principal legally held the office; but it was held that the deputy was liable to be indicted not only while the principal holds office, but even after the deputy himself has been dismissed from his office. R. v. Benjamin (1853), 4 U.C.C.P. 179.

**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 paragraph 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 an offence under this section shall be commenced after the expiration of two years from its commission. Sec. 551 (*b*).

**137. Selling public office or appointment.**—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 negotiation about any office, or under pretense of using any such interest, making any such request or being concerned in any such negotiation; 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 negotiation 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 of 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 deputations to any such office and every participation in the profits of any office or deputation.

No specific punishment being provided for an offence under this section, it falls within sec. 951, which provides that "every person convicted of an indictable offence for which no imprisonment is specially provided shall be liable to imprisonment for five years."

**138. Wilful 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.

A wilful disobedience of the statute must be shewn. Re E. J. Parke (1899), 3 Can. Cr. Cas. 122 (Ont.).

**139. Disobedience to orders of court.**—Every one is guilt 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.

**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.

The procedure governing the calling out of the militia in aid of the civil power is contained in the Militia Act, R.S.C. 1886, ch. 41, secs. 34 to 36 inclusive, which are as follows:—

(34) The Active Militia, or any corps thereof, shall be liable to be called out for active service with their arms and ammunition, in aid of the civil power in any case in which a riot, disturbance of the peace, or other emergency requiring such service occurs, or is, in the opinion of the civil authorities hereinafter mentioned, anticipated as likely to occur, and, in either case, to be beyond the powers of the civil authorities to suppress, or to prevent or deal with,—whether such riot, disturbance or other emergency occurs, or is so anticipated within or without the municipality in which such corps is raised or organized:

2. The senior officer of the Active Militia present at any locality shall call out the same or such portion thereof as he considers necessary for the purpose of preventing or suppressing any such actual or anticipated riot or disturbance, or for the purpose of meeting or dealing with any such emergency as aforesaid, when thereunto required in writing by the chairman or custos of the Quarter Sessions of the Peace, or by any three justices of the peace of whom the warden, mayor, or other head of the municipality

or county in which such riot, disturbance or other emergency occurs or is anticipated as aforesaid, may be one; and he shall obey such instructions as are lawfully given to him by any justice of the peace in regard to the suppression of any such actual riot or disturbance, or in regard to the anticipation of such riot, disturbance or other emergency, or to the suppression of the same, or to the aid to be given to the civil power in case of any such riot, disturbance or other emergency:

3. Every such requisition in writing, as aforesaid, shall express on the face thereof the actual occurrence of a riot, disturbance or emergency or the anticipation thereof, requiring such service of the Active Militia in aid of the civil power for the suppression thereof:

4. Every officer and man of such Active Militia, or any portion thereof, shall, on every such occasion, obey the orders of his commanding officer; and the officers and men, when so called out, shall, without any further or other appointment, and without taking any oath of office, be special constables, and shall be considered to act as such as long as they remain so called out: but they shall act only as a military body, and shall be individually liable to obey the orders of their military commanding officer only:

5. When the Active Militia, or any corps thereof, is so called out in aid of the civil power, the municipality in which their services are required shall pay them, when so employed, the rates authorized to be paid for actual service to officers and men, and one dollar per diem for each horse actually and necessarily used by them, together with an allowance of one dollar to each officer, fifty cents to each man per diem in lieu of subsistence, and fifty cents per diem in lieu of forage for each horse,—and, in addition, shall provide them with proper lodging, and with stabling for their horses; and the said pay and allowances for subsistence and forage, as also the value of lodging and stabling, unless furnished in kind by the municipality, may be recovered from it by the officer commanding the corps, in his own name, and, when so recovered, shall be paid over to the persons entitled thereto:

6. Such pay and allowances of the force called out, together with the reasonable cost of transport may, pending payment by the municipality, be advanced in the first instance out of the Consolidated Revenue Fund of Canada, by authority of the Governor in Council; but such advance shall not interfere with the liability of the municipality, and the commanding officer shall at once, in his own name, proceed against the municipality for the recovery of such pay, allowances and cost of transport, and shall, on receipt thereof, pay over the amount to His Majesty. 46 Vict., ch. 11, sec. 27, part.

(35) Whenever a municipality within the limits of which a railway passes whereon His Majesty's mails are conveyed, has incurred expenses by reason of the Militia being so called out in aid of the civil power, for preventing or repressing a riot or disturbance of the peace beyond the power of the civil authorities to deal with, and not local or provincial in its origin, by which riot or disturbance of the peace the conveyance of such mails might be obstructed, the Governor in Council may pay or reimburse out of any moneys which are provided by Parliament for the purpose, such part as seems just of the proper expenses incurred by any municipality, by reason of any part of the Active Militia being so called out in aid of the civil power:

2. An account of any such expenditure shall be laid before Parliament as soon as possible thereafter. 46 Vict., ch. 11, sec. 27, part.

(36) If it appears to the satisfaction of the Lieutenant-Governor of the Province of Manitoba, that a riot, disturbance of the peace or other emergency, requiring the services of the Active Militia in aid of the civil power, has occurred in the North-West Territories or in the District of Keewatin, or that such riot, disturbance or other emergency is anticipated as likely to occur, and, in either case, to be beyond the powers of the civil authorities

to suppress, or to prevent or deal with, the Lieutenant-Governor may, by a writing, expressing on the face thereof the actual occurrence of such riot, disturbance or emergency, or the anticipation thereof, require the senior officer of the Active Militia present in the Province of Manitoba to call out the same, or such portion thereof as he considers necessary for the purpose of preventing or suppressing any such actual or anticipated riot or disturbance, or for the purpose of meeting and dealing with any such emergency as aforesaid:

2. Such officer shall comply with such requisition and obey such instructions as are lawfully given him by the Lieutenant-Governor, or by such justice of the peace as is designated for the duty by the Lieutenant-Governor, in regard to the suppression of any such actual riot or disturbance or in regard to the anticipation of such riot or disturbance or other emergency, or to the suppression of the same, or to the aid to be given to the civil powers in case of any such riot, disturbance or other emergency:

3. Every officer and man of such Active Militia, or any portion thereof, shall, on every such occasion, obey the orders of his commanding officer:

4. The officers and men, when so called out, shall, without any further or other appointment, and without taking any oath of office, be special constables, and shall be considered to act as such so long as they remain so called out; but they shall act only as a military body, and shall be individually liable to obey the orders of their military commanding officer only; and they shall be paid, when so employed, the rates authorized to be paid for actual service to officers and men, and one dollar per day for each horse actually and necessarily used by them, together with an allowance of one dollar to each officer, and fifty cents to each man per day, in lieu of subsistence, and fifty cents per day in lieu of forage for each horse:

5. Such pay and allowances and the reasonable cost of transport to and from the place where the services of the force are required, may be paid out of the Consolidated Revenue Fund of Canada by authority of the Governor in Council. 46 Vict., ch. 11, sec. 27, part.

It was an indictable misdemeanor at common law to refuse to assist a peace officer in quelling a riot. R. v. Brown, C. & Mar. 314; R. v. Sherlock, L.R. 1 C.C.R. 20, 10 Cox C.C. 170.

**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.

**143. Misconduct of officers intrusted with execution of process.**—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 intrusted with the execution of any writ, warrant or process, willfully 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.

*At common law.*]—Every malfeasance or culpable non-feasance of an officer of justice with relation to his office was a misdemeanor at common law and punishable with fine or imprisonment, or both. 1 Russ. Cr., 6th ed. 416.

*Evidence.*]—On a charge against a constable for negligently permitting an escape, the warrant of commitment may be proved either by its production, or, after proving the service upon the accused of a notice to produce it, by parol or other secondary evidence of its contents. It should then be proved that the warrant was delivered to the defendant and that he was one of the peace officers to whom it was addressed, and that the defendant had the person against whom the warrant was issued in actual custody under it. The escape from custody must then be proved, and the law thereupon presumes the defendant's negligence. I Hale 600.

But the presumption is rebuttable, and it is open to the defendant to shew that the escape was not due to his negligence, that the person under arrest rescued himself by force or was forcibly rescued by others and that the defendant made fresh pursuit after him for the purpose of recapturing him. Archbold Crim. Evid. (1900) 983.

*Punishment.*]—Imprisonment five years (sec. 951), fine in the discretion of the Court (sec. 934).

**144. Obstructing public or peace officer in the 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.

The accused can be tried summarily by a police magistrate under the summary convictions clauses of the Code, or he can be tried before a magistrate as for an indictable offence. R. v. Nelson (1901), 8 B.C.R. 112. (Drake, J.).

The provisions of this section as to summary conviction are not controlled by Code sections 783 and 786 as to "summary trial," and the charge may be summarily adjudicated upon by a magistrate without the consent of the accused. R. v. Nelson (1901), 4 Can. Cr. Cas. 461, per Drake, J. (B.C.), but see contra The Queen v. Crossen (1899), 3 Can. Cr. Cas. 153 (Man.).

In Crossen's case the Appeal Court of Manitoba held that the accused when charged before a "magistrate," as that term is defined by sec. 782, could only be tried under the "Summary Trials" clauses (Part LV.), notwithstanding the provisions of section 144.

Where the process of an inferior court is void by reason of its containing a direction to a peace officer to seize certain goods at a place outside of the territorial jurisdiction of the court, such process is insufficient upon which to base a conviction for resisting the officer in its execution. R. v. Finlay (1901), 4 Can. Cr. Cas. 539 (Man.).

Where a bailiff obtained possession of goods under a writ of replevin, but at the request of the party in whose possession they were seized they were given by the bailiff into the possession of a third party, the latter giving the bailiff an undertaking or agreement to deliver him the goods on demand, it was held that in attempting to retake the goods in the possession of the third party the bailiff was not acting in the execution of any "process," but merely upon the undertaking. R. v. Carley, 18 C.L.T. 26.

PART X.

## MISLEADING JUSTICE.

SECT.



---

**145. Perjury defined.**—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 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.

By statute 32-33 Viet. (Can.), ch. 23, sec. 7, all evidence and proof whatsoever, whether given orally or by affidavit, etc., was declared to be material with respect to the liability for wilful and corrupt perjury, and that section was incorporated in the Perjury Act (R.S.C. 1886, ch. 154, sec. 5).

*Perjury.*]—Under the Code, the giving of false evidence constitutes perjury, whether such evidence is material or not, if the false assertion were known to such witness to be false, and intended by the witness to mislead the court, jury, or person holding the proceeding.

A false statement, made in a statutory declaration administered under the "Canada Evidence Act, 1893," may be the subject of a charge akin to perjury under Code sec. 147, for the object of the Evidence Act (sec. 26), was to provide a means by which certain statements not authorized to be made on oath could be verified.

*At common law.*]—It has always been an offence at common law for a witness upon oath in a judicial proceeding, before a court of competent jurisdiction, to give evidence material to the issue, which he believes to be false. The common law, however, stopped there and took no notice of false statements, whether made upon oath or not, made under other conditions. The perjury had also to be in a judicial proceeding before a competent tribunal. R. v. Townsend, 10 Cox C.C. 356; R. v. Row (1864), 14 U.C.C.P. 307. And it was therefore formerly the law that false evidence given upon an examination in the absence of the authority competent to hold such examination was not perjury. R. v. Lloyd, L.R. 19 Q.B.D. 213; R. v. Gibson, 7 Revue Legale (Que.) 573.

The witness must also have been a competent one. R. v. Baker, [1895] 1 Q.B. 797; R. v. Clegg, 19 Eng. L.T. 47.

*Known to be false.*]—The false oath must be taken deliberately and intentionally, for if done from inadvertence or mistake it cannot amount to voluntary and corrupt perjury. 1 Hawk. ch. 69, sec. 2. Where perjury is assigned on an affidavit, the part on which the perjury is assigned may be explained by reference to the remainder of the affidavit. 1 Sid. 419.

The evidence of the false statement must be clear and precise and not ambiguous. R. v. Bird, 17 Cox C.C. 387.

*Intended to mislead.*]—Although an "intent to mislead" is an essential ingredient of the offence, a charge which does not specifically allege such intent may be sufficient if it gives to the accused notice that he is charged with having "falsely, wilfully and corruptly" sworn to, or solemnly declared a statement to the effect and in the words set forth. R. v. Skelton (1898), 4 Can. Cr. Cas. 467; 2 N.W.T. Rep. 210, 215; R. v. Dewar, 2 N.W.T. Rep. 194; Cr. Code, sec. 611 (3).

*Contradictory evidence.*]—If the evidence adduced in proof of the crime of perjury consist of two opposing statements of the prisoner and nothing more, he cannot be convicted; for if only one was delivered under oath, it must be presumed, from the solemnity of the sanction, that that declaration was the truth, and the other an error or a falsehood, though the latter being inconsistent with what he has sworn may form important evidence, *with other circumstances*, against him. 1 Greenleaf on Evidence, 259. And if both the contradictory statements were delivered under oath, there is still nothing to shew which of them is false, where no other evidence of the falsity is given.

If a person swears one thing at one time, and another at another, he cannot be convicted where it is not possible to tell which is the true and which is the false. R. v. Jackson, 1 Lewin C.C. 270. Nor is it a necessary consequence that a person has committed perjury when he has sworn on both occasions to conflicting statements, for there are cases in which a person might very honestly and conscientiously swear to a particular fact from the best of his recollection and belief, and from other circumstances at a subsequent time be convinced that he was wrong, and swear to the reverse, without meaning to swear falsely either time. Ibid., per Holroyd, J.

*Joint affidavit.*]—A joint affidavit made by the defendant and one D. stated: "Each for himself maketh oath and saith that he this deponent is not aware of any adverse claim to or occupation of said lot." The defendant having been convicted of perjury on this latter allegation, it was held that there was neither ambiguity or doubt in what each defendant said, but that each in substance stated that he was not aware of any adverse claim to or occupation of said lot. R. v. Atkinson (1866), 17 U.C.C.P. 295. And it has been held that a statutory declaration made jointly by several persons that they know certain alleged facts is to be construed as a statement by each of them severally that he knows the matters alleged. R. v. Skelton (1898), 4 Can. Cr. Cas. 467 (N.W.T.).

**146. Punishment of perjury.**—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.

**Form FF.**—(*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 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."

*Trial by Police Magistrate.*]—A police magistrate in Ontario has jurisdiction with the consent of the accused to try the offence of perjury. R. v. Burns (No. 2) (1901), 4 Can. Cr. Cas. 330 (Ont.); and by sub-sec. (2) of sec. 785, added by the amendment of 1900, police magistrates of cities and incorporated towns in every other part of Canada have the like jurisdiction.

*Form of indictment.*]—An indictment following the statutory form (F.F.) will be sufficient if it charges that the accused "committed perjury" by swearing that (specifying the false oath), without including a specific statement that it was so done knowing the same to be false. R. v. Bain (1877), Ramsay's Cases (Que.) 192; R. v. Bownes, Ramsay's Cases (Que.) 192.

Where a prosecutor has been bound by recognizance to prosecute and give evidence against a person charged with perjury in the evidence given by him on the trial of a certain suit, and the grand jury have found an indictment against the defendant, the court will not quash the indictment because there is a variance in the specific charge of perjury contained in the information and that contained in the indictment, provided the indictment sets forth the substantial charge contained in the information. R. v. Broad (1864), 14 U.C.C.P. 168; and see sec. 611.

A count charging the accused with having committed perjury at an inquest before a coroner is not invalid by reason of the fact that the tribunal was a coroner and a jury. Code sec. 611; R. v. Thompson (1896), 4 Can. Cr. Cas. 265 (N.W.T.).

*The Perjury Act.*]—Sec. 4 of the Act respecting perjury (R.S.C. ch. 154) still remains in force (Code sec. 983). It 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 or 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.

*Evidence.*]—D. being charged with perjury, in the assignments of perjury and in the negative averments certain facts sworn to by D. in answering to faits et articles on the contestation of a saisie arret or attachment were distinctly negatived, in the terms in which they were made. It was held that under the general terms of the negative averments it was competent for the prosecution to prove special facts to establish the falsity of the answers given by D. in his answers on faits et articles, and the conviction could not be set aside because of the admission of such proof. Downie v. R (1888), 15 Can. S.C.R. 358.

In a prosecution for perjury where it appears that the false oath was taken before a justice receiving the complaint of an offence committed within his jurisdiction, and acting in the matter within his jurisdiction, it is unnecessary to offer further evidence that he had authority to administer an oath. R. v. Callaghan (1860), 19 U.C.Q.B. 364.

*Corroboration.*]—As to the corroboration required, see sec. 684.

*Proof of judicial proceedings.*]—Evidence of any proceeding or record whatsoever of, in, or before any court or before any justice of the peace or any coroner in any province of Canada, may be made 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. Can. Evid. Act, sec. 10; subject however to the provision that the party intending to produce the same shall before the trial give 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. Ibid., sec. 19.

The provisions of the Canada Evidence Act are in addition to and not in derogation of any powers of proving documents given by any existing statute or existing at law. Ibid., sec. 20.

Subject to the provisions made by federal law the laws of evidence in force in the province in which such proceedings are taken, apply. Ibid., sec. 21.

A witness present at the trial when the alleged perjury was committed may be called to state from recollection the evidence given by the accused. It will be sufficient if the witness can state with certainty that what he relates was all the evidence given by the accused on the point regarding which perjury is charged and that the accused said nothing to qualify it, although he is unable to state in effect all the evidence which the accused then gave. R. v. Rowley, 1 Mood. C.C. 111; R. v. Munton, 3 C. & P. 498; R. v. Browne, 3 C. & P. 572.

Where perjury is assigned in respect of evidence given in a criminal proceeding, all evidence which would have been admissible on the trial thereof is admissible on the trial for the perjury. R. v. Harrison, 9 Cox C.C. 503.

Besides proving the whole of what is set out in the indictment as having been falsely sworn to, the prosecution should prove the evidence connected with and necessary for the explanation of the alleged false evidence. R. v. Jones, Peake 51; R. v. Dowlin, Peake 227. But statements made by the judge presiding when the alleged perjury was committed are not admissible. R. v. Britton, 17 Cox C.C. 627.

The judge's notes are not admissible except to refresh the memory of the judge if called as a witness. R. v. Child, 5 Cox C.C. 197; R. v. Morgan, 6 Cox C.C. 107.

The conviction or judgment in the case in which the false evidence was given is not evidence on the perjury trial. R. v. Goodfellow, C. & M. 569.

*Perjury in pending civil action.*]—The court may properly postpone the trial of an indictment for perjury arising out of a civil action until that action is determined, unless the civil action has been stayed for the purpose of first trying the perjury charge. R. v. Ingham, 14 Q.B. 396; R. v. Ashburn, 8 C. & P. 50; Peddell v. Rutter, 8 C. & P. 340.

*Procuring Death by False Evidence.*]—By sec. 221 it is enacted that procuring by false evidence the conviction and death of any person by the sentence of the law shall not be deemed to be homicide.

**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.

On a charge under sec. 147, of making a false statutory declaration, it is not necessary to allege in the indictment that the false statement was made with intent to mislead. R. v. Skelton (1898), 4 Can. Cr. Cas. 467 (N.W.T.).

A statutory declaration jointly made by several persons and stating the matter declared in the following form, *i.e.*:—"*We* know that, etc., is to be construed as a statement by each of the declarants severally, that he knows the matters alleged. Ibid.

The permission granted by the Canada Evidence Act to certain officials to "receive" the solemn declarations of persons voluntarily making the same in the statutory form includes an authorization to the declarant to make the same, and constitutes him a person "authorized by law to make a solemn declaration." Ibid.

**148. False affidavits, etc.**—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 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.

A person applying for a ballot at a Dominion election in the name of another person entitled to vote may be convicted of perjury in taking the oath of identity with that person, although the Elections Act authorizes the administration of the oath of qualification to an "elector" only, and that term must be held to include, for the purposes of administering such oath and prosecuting the personator, the person representing himself at the polls as an elector. R. v. Chamberlain, 10 Man. R. 261; Dominion Elections Act, 1900, 63-64 Vict., ch. 12, sec. 65.

**149. Making false affidavit out of Province in which it is used.**—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 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 declaration to officer, etc.**—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.

**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.

The offence is complete if the evidence is fabricated with intent to mislead a judicial tribunal even if the evidence is not used. R. v. Vreones, [1891] 1 Q.B. 360; 17 Cox C.C. 267; 60 L.J.M.C. 62.

Where an act has been proved and the question is whether it was done by a given party, the fabrication or suppression of evidence is one of the circumstances of subsequent conduct, admissible to connect the person procuring the same with the original transaction. Phipson Evid. (1898) 117.

*Inciting to give false evidence.*]—It is a common law misdemeanor to incite a witness to give particular evidence where the inciter does not know whether it be true or false. Ex parte Overton, 2 Rose 257. This offence differs from subornation in that it is not necessary to prove that the evidence was in fact given, or was false to the knowledge of the witness. Archibold Cr. Evid. (1900), 1019. And by Code sec. 62 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 or procuring. (Sub-sec. 2).

*Dissuading witness from giving evidence.*]—See sec. 154.

**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.

By the Canada Evidence Act, 1893, sec. 22, 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. 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. Ibid. Sec. 23. And 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 solem affirmation in the words following, viz.: "I, A.B., do solemnly affirm," etc.; which solemn affirmation shall be of the same force and effect as if such person had taken an oath in the usual form. Ibid, sec. 24.

The witness whose evidence is admitted or who makes such affirmation is liable to indictment and punishment for perjury in all respects as if he had been sworn. (Sec. 24 (2)).

**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, prevent or defeat the course of justice. R.S.C., c. 173, s. 30.

*Embracery.*]—Any attempt to corrupt or influence or instruct a jury or to incline them to be more favourable to one side than the other, by money, promises, letters, threats or persuasions, except only by the strength of the evidence and the arguments of the counsel in open court at the trial of the cause constituted the common law offence of embracery, whether the jurors gave any verdict or not and whether the verdict given were true or false. R. v. Cornellier, 29 L.C.J. 69; Hawk. P.C., b. 1, ch. 85, sec. 1. And the giving of money to a juror after the verdict without any preceding contract is an offence savouring of embracery; but it is otherwise of the payment of a juror's travelling expenses. Ibid, sec. 3.

It is essential that there should be a judicial proceeding pending at the time of the alleged offence. R. v. Leblanc, 8 Montreal Legal News 114.

At one time it seems to have been considered that a mere stranger could not lawfully labour a juror to appear and act according to his conscience; Hawk. P.C., b. 1, ch. 85, sec. 2; but such appears to be no longer the law for an honest exhortation to do justice should never be construed into guilt. Bishop Crim. Law 317.

*Tampering with witnesses.*]—At common law interference with witnesses in courts of justice by threats or persuasion to induce them not to give evidence was an indictable misdemeanour. R. v. Steventon, 2 East 362; Stone's Justice's Manual, 28th ed., 242. It is also punishable summarily as a contempt of court. Bromilow v. Phillips (1891), W.N. 209; 1 Russ. Crim., 6th ed., 487 (*n*).

*Proof of complete offence on charge of attempt.*]—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: 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. Sec. 712.

*Conspiracy to pervert public justice.*]—By sec. 527 every one is guilty of an indictable offence and liable to seven years' imprisonment who conspires with any person to commit an indictable offence in cases not specially provided for in the preceding sections of the Code.

A conspiracy whereby a witness bound over to attend a trial was to absent himself is indictable. R. v. Hamp, 6 Cox C.C. 157. And so is a conspiracy to charge a man falsely with any crime. Poulterer's Case, 9 Co. Rep. 55; R. v. Spragg, 2 Burr. 993, 1027; R. v. Macdaniel, 1 Leach C.C. 45; and see Code sec. 405.

It is immaterial whether the conspiracy proceeds so far as actually indicting the person falsely accused; and if the object of the conspiracy is extortion, the truth or falsity of the charge is immaterial. R. v. Hollingberry, 4 B. & C. 329.

Where a money lender to whom a small sum of money was due conspired with a solicitor by abuse of legal process to enforce payment of a sum known not to be legally due, a conviction for the conspiracy was upheld. R. v. Taylor, 15 Cox C.C. 265.

*Temperance Acts.*]—It is provided by the Canada Temperance Act, R.S.C. 1886, ch. 106, sec. 121, that every one who on any prosecution under that Act or any Act in force in any province respecting the issue of licenses for the sale of fermented or spirituous liquors, or "The Temperance Act of 1864," tampers with a witness, either before or after he is summoned or appears as such witness on any trial or proceeding under any such Act, or by the offer of money, or by threats, or in any other way, either directly or indirectly, induces or attempts to induce any such witness to absent himself or to swear falsely, shall incur a penalty of fifty dollars for each offence. This special provision is not affected by the Code. R. v. Gibson, 29 N.S.R. 88.

A conviction may be made under this section of the Code for dissuading a person by corrupt means from giving evidence under the Ontario Liquor License Act. R. v. Holland, 14 C.L.T. 294.

If there be a combination of persons for the purpose, the offence is indictable as a conspiracy to pervert the course of justice. R. v. Gill, 2 B. & Ald. 204.

**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.

*Compounding penal actions.*]—The compounding of an information on penal statutes is a misdemeanour against public justice, by contributing to make the laws odious to the people. Therefore in order to discourage malicious informers, and to provide that when offences are once discovered they shall be duly prosecuted, 18 Eliz., ch. 5 was passed. But that statute did not apply to penalties which are only recoverable by information before justices, and an indictment for making a composition in such a case was held bad in arrest of judgment. R. v. Crisp, 1 B. & Ald. 282, cited by Richards, C.J., in R. v. Mason (1867), 17 U.C.C.P. 534.

The statute 18 Eliz., ch. 5, enacted that if any person informing under pretence of any penal law makes any composition without leave of the court or takes any money or promise from the defendant to excuse him he shall forfeit £10 and be for ever disabled to sue on any penal statute.

And by sec. 31 of R.S.C. (1886), ch. 173, consolidated from 27-28 Vict. (Can.), ch. 43, sec. 2, every private prosecutor in the Province of Quebec who being a plaintiff in a qui tam action discontinues or suspends such action without the permission or direction of the Crown was declared guilty of a misdemeanour.

*Compounding criminal prosecution.*]—It is not every misdemeanour the compounding of which is an offence. Fallowes v Taylor, 7 T.R. 475; Keir v. Leeman, 9 Q.B. 371. An indictment will lie if the offence compounded is of such a public nature that its predominating feature is that the public must be protected against it as distinguished from misdemeanours essentially in the nature of private injuries. State v. Carver, 39 Atl. Rep. 973, (N.H.); 1 Bishop Cr. Law sec. 711. And the receipt of money in consideration of the non-prosecution of a charge for the infraction of liquor laws is indictable as compounding a misdemeanour of a public nature. Re Fraser, 1 C.L.J. 326; R. v. Mabey, 37 U.C.Q.B. 248; State v. Carver, supra.

If an offence which was formerly a misdemeanour were compounded under circumstances constituting a conspiracy to obstruct or defeat the course of justice, the accused might be punished for the conspiracy. And a conspiracy with a witness bound over to attend a trial to absent himself from the trial is indictable. R. v. Hamp, 6 Cox 157. And where an assault is coupled with riot a compromise of the charge is illegal and will not bar an action for malicious prosecution, although riot is only a misdemeanour at common law. Keir v. Leeman, 6 Q.B. 308; 9 Q.B. 371.

It has been held that where the prosecutor has the choice between civil and criminal remedies, he may legally compromise as to the criminal remedy, ex gr. for a trade-mark offence. Fisher v. Appolinaris Co., L.R. 10 Ch. App. 297. So also the offence of common assault may be compromised. Keir v. Leeman, 6 Q.B. 308; 9 Q.B. 371.

Where, however, the offence was not under former law a felony, and the compounding is not an indictable conspiracy, there seems to be no precedent for holding that the compounding of an offence which was only a misdemeanour before the Code, is in itself indictable. Archbold Cr. Pleading (1900), 1035.

An agreement after conviction to pay part of the expenses of a prosecution for misdemeanour has been held legal. Beely v. Wingfield, 11 East 46. But such arrangements are seldom approved by the court. Re Parkinson, 76 L.T.N.S. 215.

Compounding a felony is a misdemeanour at common law, punishable by fine and imprisonment. It consists in an agreement for reward not to prosecute an indictment for any felony. Roscoe Crim. Ev., 11th ed., 395. The offence of compounding is complete when the agreement not to prosecute is made whether it be performed or not. R. v. Burgess, 16 Q.B.D. 141.

Where the owner of goods stolen took back the goods or received other amends on condition of not prosecuting, it constituted the offence of theft-bote at common law, and this offence is not usually described as compounding a felony. Archbold Cr. Pleading (1900), 1035; Hawk. P.C., book 1, ch. 59, sec. 7.

A prosecution for a felony is not the property of those that institute it to deal with it as they please; the public have a higher interest in having redress rendered and wrong punished to deter others from offending in like manner. R. v. Hammond, 9 Sol. Jour. 216.

Unless a nolle prosequi is entered by the Attorney-General, it is necessary to obtain the leave of the court to abandon a prosecution after the indict-

ment is found, whether the prosecution desire to effect that purpose by offering no evidence or otherwise. R. v. Nicholson Cent. Cr. Court, 1899, per Darling, J., cited Archbold Cr. Pleading (1900), 1035.

*Misprision of felony.*]—This offence is now in desuetude. Archbold Cr. Pleading (1900), 1238; Williams v. Bayley, L.R. 2 H.L. 200. It consisted in concealing or procuring the concealment of a felony known to have been committed. 1 Hawk. ch. 59. It differed from the offence of being an accessory in that neither actual assistance to the felon nor privity to the commission of the felony had to be proved. 1 Hale 373.

**156. Taking reward for recovering stolen property without prosecution.**—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.

This section is in similar terms to the Imperial Statute, 24 & 25 Vict., c. 96, s. 101.

*Evidence.*]—It is not necessary to shew that the accused had any connection with the commission of the previous offence; it is sufficient if the evidence satisfies the jury 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. R. v. King, 1 Cox C.C. 36.

Unless due diligence is used in prosecuting the thief it has been held to be an offence under the section to take money under pretence of helping a man to recover goods stolen from him, though the defendant had no acquaintance with the felon and did not pretend that he had, and notwithstanding that he had no power to apprehend the felon, that the goods were never restored, and that the defendant had no power to restore them. R. v. Ledbitter, 1 Mood. C.C. 76.

Where A. was charged with corruptly receiving from B. money under pretence of helping B. to recover goods theretofore stolen from B. and with not causing the thieves to be apprehended the following questions were left to the jury:—(1) Did A. mean to screen the guilty parties or to share the money with them? The answer was no. (2) Did A. know the thieves and intend to assist them in getting rid of the property by promising B. to buy it? The answer was no. (3) Did A. know the thieves and assist B. as her agent and at her request in endeavoring to purchase the stolen property from them, not meaning to bring the thieves to justice? The answer was yes. It was held that B. was properly convicted. R. v. Pascoe, 1 Den. 456, 2 C. & K. 927, 18 L.J.M.C. 186.

**157. Advertising a reward for return of stolen property without prosecution.**—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.

A prosecution taken against the proprietor of a "newspaper" for publishing an advertisement offering a reward for the recovery of stolen property under paragraph (*d*) must be commenced within six months from the commission of the offence. Sec. 551 (*d*).

**158. Signing false declaration respecting 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.

PART XI.

## ESCAPES AND RESCUES.

SECT.



---

**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.

The fact of the sentence being in force when the defendant was found at large is sufficiently proved by the certificate of the conviction and sentence, if the judgment remains unreversed, and this although it appears on the face of the certificate that the sentence was one which could not legally have been inflicted on the defendant for the offence of which according to the certificate he had been convicted. R. v. Finney, 2 C. & K. 274.

*Escapes.*]—See secs. 163 and 164.

*Ticket of Leave.*]—It may be proved as a defence that the prisoner is at large conditionally under a license or ticket of leave or otherwise and that the conditions have been observed. 62-63 Vict. (Can.), ch. 49. The license issued under the authority of that statute and the amending statute of 1900 (63-64 Vict., ch. 48), known as the Ticket of Leave Acts, may be revoked by the Governor-General either with or without cause assigned. R. v. Johnson, 4 Can. Cr. Cas. 178 (Que.). The revocation by the Crown without cause assigned does not interrupt the running of the sentence, and the latter terminates at the same time as if no license had been granted. Ibid.

*Pardon.*]—A pardon is a good defence. R. v. Miller, W.Bl. 797, 1 Leach C.C. 74; but the sentence revives if the terms of a conditional pardon are not observed. R. v. Madan, 1 Leach C.C. 223; Aickles' Case, 1 Leach C.C. 390.

**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 His 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.

This offence is also covered by the Imperial Statute, 52 Geo. III., ch. 156, known as the Prisoners of War Escape Act. That statute in terms applies to His Majesty's dominions and is consequently still in force in Canada. See Code sec. 5.

Section 1 of that Act as varied by 54 & 55 Vict. (Imp.), ch. 69, sec. 1, provides that every person who shall from and after the passing thereof knowingly or wilfully assist any alien enemy of His Majesty being a prisoner of war in His Majesty's dominions, whether such prisoner shall be confined as a prisoner of war in any prison or other place of confinement or shall be suffered to be at large in His Majesty's dominions or any part thereof on his parole, to escape from such prison or other place of confinement or from His Majesty's dominions if at large on parole, shall, upon being convicted thereof, be adjudged guilty of felony and be liable to be transported as a felon for life or for such term not less than three years and not exceeding either five years or any greater period authorized by the enactment, at the discretion of the court. The same section also provides that where under any Act now in force or under any future Act a court is empowered or required to award a sentence of penal servitude, the court may in its discretion, unless such future Act otherwise provides, award imprisonment for any term not exceeding two years with or without hard labour.

**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.

*Evidence.*]—The proof required is:—(1) the nature of the offence for which the prisoner was imprisoned; (2) the imprisonment and the nature of the prison; and (3) the breaking of the prison. Roscoe Crim. Evid., 11th ed., 837.

*Any prison.*]—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. See. 3 (*u*).

*Prison breach.*]—An actual breaking of the prison with force, and not merely a constructive breaking, must be proved. If a gaoler sets open the prison doors and the prisoner escapes the latter is not guilty of prison breach. 1 Hale P.C. 611; and if the prison be fired and he escapes to save his life, this is not prison breach unless the prisoner himself set fire to the prison or procured it to be done. Hale P.C. 611.

If other persons without the prisoner's privity or consent break the prison and he escapes through the breach so made he is not guilty of breaking but only of the escape. 2 Hawk., ch. 18, sec. 10.

*Force essential to the offence.*]—Where a prisoner made his escape over the prison walls and in doing so threw down some bricks from the top of the wall which had been placed there loose without mortar in the form of pigeon holes for the purpose of preventing escapes, it was held that he was properly convicted of prison breach. R. v. Haswell, Russ. & Ry. 458.

*Retaking prisoner.*]—See note to sec. 163.

*Escape.*—See secs. 163 and 164.

**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.

**163. Escape from custody after conviction 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.

It is laid down by the late Mr. Justice Stephen, in his Digest of the Criminal Law, Article 199, that the intentional infliction of death or bodily harm is not a crime when it is done by any person in order to retake or keep in lawful custody a traitor, felon, or pirate who has escaped or is about to escape from custody, although such traitor, felon or pirate offers no violence to any person, provided that the object for which death or harm is inflicted cannot be otherwise accomplished. See also Code secs. 32-37, inclusive.

Lord Hale (1 Hale P.C. 489) says: "If a person be indicted of felony and flies, or being arrested by warrant or process of law upon such indictment escapes and flies, and will not render himself, whereupon the officer or minister cannot take him without killing of him, this is not felony, neither shall the killer forfeit his goods, or be driven to sue forth his pardon, but upon his arraignment shall plead not guilty, and accordingly it ought to be found by the jury. But if he may be taken without severity, it is at least manslaughter in him that kills him, therefore, the jury is to inquire whether it were done of necessity or not."

Sir Michael Foster draws especial attention to the distinction between cases of bare flight and cases of resistance to arrest (Foster C.L. 270), and he says: "Where a felony is committed and the felon fleeth from justice, or a dangerous wound given, it is the duty of every man to use his best endeavours for preventing an escape; and if in the pursuit the party fleeing is killed, where he cannot otherwise be overtaken, this will be deemed justifiable homicide; for the pursuit was not barely warrantable, it is what the law requireth and will punish the wilful neglect of."

Sergeant Hawkins (1 Hawk. P.C. 81), says that, "First, if a person having actually committed a felony will not suffer himself to be arrested, but stand on his own defence or fly, so that he cannot possibly be apprehended alive by those who pursue him, whether private persons or public officers, with or without a warrant from a magistrate, he may be lawfully slain by them. Secondly, if an innocent person be indicted of a felony

where in truth no felony was committed, and will not suffer himself to be arrested by the officer who has a warrant for that purpose, he may be lawfully killed by him if he cannot otherwise be taken; for there is a charge against him upon record, to which, at his peril, he is bound to answer. Thirdly, if a criminal, endeavouring to break the gaol, assault his gaoler, he may be lawfully killed by him in the affray."

And it is laid down in 1 East P.C. 330, touching the safe custody of persons arrested and in confinement, that, after an arrest once legally made, if the party escape, the officer may lawfully kill him—(1) in the case of a felony actually committed; (2) or whether committed by him or not if he had been arrested upon a proper warrant; (3) or hue and cry had been raised against him by name; (4) or he had stood indicted for felony; but if in any of these cases the officer might otherwise have taken him, it will be at least manslaughter.

*Escape from a reformatory.*]—The following section (9) of R.S.C. 1886, ch. 155, as amended by 53 Vict. (Can.), ch. 37, was not repealed by the Code and is still in force:—(9) 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,—

(1.) May remand him thereto for the remainder of his original term of imprisonment or detention; or,—

(2.) 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 shewn 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 sub-section, 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.

**164. Escape from lawful custody.**—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 escape in certain cases.**—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, 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.

*Rescue.*]—Rescue is the deliverance of a prisoner from lawful custody by a third person. 2 Bishop Crim. Law 893. It differs from prison breach only in this that prison breach is by the prisoner himself, while rescue is by another. Escape is the allowing, voluntarily or negligently, of a prisoner lawfully in custody to leave his confinement, and the same term is also used to denote the offence of a prisoner himself going away from the place of custody without a breaking of prison. 2 Bishop Crim. Law 893.

The rescuer, where the prisoner concurs in the rescue, is an aider at the fact, and therefore a principal in the prisoner's offence of prison breach. 1 Bishop Crim. Law 456.

The act of breaking with intent to let the prisoner escape may not be a technical rescue unless he does escape, but it is nevertheless indictable as an attempt. 2 Bishop Crim. Law 915; State v. Murray, 15 Maine 100.

**166. Assisting escape in other cases.**—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 not 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.

(*Amendment of 1900.*)

**166A. Permitting escape.**—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.

*Negligent or voluntary escape.*]—Wherever an officer having the custody of a prisoner charged with a criminal offence, knowingly gives him his liberty with an intent to save him either from his trial or punishment he is guilty of a "voluntary escape." 2 Bishop Crim. Law 920.

This formerly involved the officer in guilt for the same crime of which the prisoner was guilty and stood charged with. 2 Hawk. ch. 19, sec. 10.

A "negligent escape" is where the party arrested or imprisoned escapes against the will of him that arrests or imprisons him and is not freshly pursued and taken again before he has been lost sight of. Dalt. ch. 159, sec. 6.

A prisoner who is charged before justices with an indictable offence and who is verbally remanded, after the examination of witnesses, until the following day in order to procure bail or, in default, be committed, is not in the custody of the officer merely for the purpose of enabling him to procure bail, but under the original warrant, and the officer is liable to conviction if he negligently permits him to escape. R. v. Shuttleworth, 22 U.C.Q.B. 372.

*Presumption.*]—So strongly does the law incline to presume negligence in the officer where an escape occurs, that though such prisoner should break jail yet it seems that it will be deemed a negligent escape in the jailer, because it will be attributed to a want of due vigilance in the jailer or his officers. 1 Hale 601. But the presumption of default in the jailer in cases of escape may be rebutted by satisfactory proof that all due vigilance was used and that the jail was so constructed as to have been considered by persons of competent judgment a place of perfect security. 1 Russ. Cr. 371; 2 Bishop Cr. Law 921.

*De facto officer.*]—Whoever de facto occupies the office of jailer is liable to answer for a negligent escape, and it is not material whether or not his title to the office be legal, for the ill consequence to the public is the same in either case. 2 Hawk., ch. 19, sec. 23.

*Arrest by private person.*]—Wherever any person has another lawfully in his custody, whether upon an arrest made by himself or another, he is guilty of an escape if he suffers him to go at large before he has discharged himself by delivering him over to some other who by law ought to have the custody of him. 2 Hawk., ch. 20, sec. 1; 1 Hale 595.

**167. Aiding escape from prison.**—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.

*Aiding escape.*]—By the common law any assistance given to one known to be a felon in order to hinder his being apprehended or tried or suffering the punishment to which he was condemned, was sufficient to make the person giving such assistance an accessory after the fact to such felony. 2 Hawk., ch. 29, sec. 26. And the aiding and assisting any prisoner to escape out of prison, by whatever means it may have been effected or whatever was the nature of the offence with which such prisoner was charged, was viewed as an offence indictable as an obstruction to the course of justice. 1 Gabbett's Cr. Law 297, 303.

**168. Unlawfully procuring discharge of prisoner.**—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 prisoners.**—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.

# TITLE IV.

## OFFENCES AGAINST RELIGION, MORALS AND PUBLIC CONVENIENCE.

### PART XII.

### OFFENCES AGAINST RELIGION.

SECT.



---

**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.

*Blasphemy.*]—Blasphemy consists in "speaking evil of the Deity with an impious purpose to derogate from the divine majesty and to alienate the minds of others from the love and reverence of God. It is purposely using words concerning God, calculated and designed to impair and destroy the reverence, respect and confidence due to him as the intelligent creator, governor and judge of the world. It embraces the idea of detraction, when used towards the supreme being as 'calumny' usually carries the same idea when applied to an individual. It is a wilful and malicious attempt to lessen men's reverence of God, by denying his existence or his attributes as an intelligent creator, governor and judge of men, and to prevent their having confidence in him as such." Commonwealth v. Kneeland, 20 Pick. 106, 213, per Shaw, C.J.; 2 Bishop Cr. Law 69.

It is to be collected from the offensive levity, scurrilous and approbrious language, and other circumstances, whether the act of the party was malicious. 2 Bishop Cr. Law 74; Updegraph v. Commonwealth, 11 S. & R. 394, 405.

*Blasphemous libel.*]—Publications which in an indecent and malicious spirit assail 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 punishable as blasphemous libels. R. v. Bradlaugh, 15 Cox C.C. 217; R. v. Hetherington, 4 St. Tr. (N.S.) 563, 590; R. v. Pelletier (1900), 6 Revue Legale, N.S. 116. But if the decencies of con-

troversy are observed even the fundamentals of religion may be attacked without the writer being guilty of blasphemous libel. R. v. Ramsay & Foote, 15 Cox C.C. 231, 238, 1 Cab. & El. 126; Odgers' Libel, 3rd ed., 466.

*Defence.*]—No justification of a blasphemous libel can be pleaded nor is argument as to its truth permitted. Cooke v. Hughes, Ry. & M. 112; R. v. Tunbridge, 1 St. Tr. (N.S.), 1168; R. v. Hicklin, L.R. 3, Q.B. 360. The application of sec. 634 of the Code as to pleas of justification is limited to cases of defamatory libels.

**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 churchyard 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 pretense 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. 561, s. 1.

**173. Disturbing public worship.**—Every one is guilty of an 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.

*At common law.*]—Any disturbance of a congregation legally assembled for divine service is an indictable offence at common law. 1 Hawk., ch. 28, sec. 23; Wilson v. Greaves, 1 Burr. 243.

*Evidence.*]—Where in a contest for the office of clerk of a congregation, one of the candidates pulled the other from the desk, it was held that such constituted a disturbance within a corresponding English statute. R. v. Hube, 5 T.R. 542, 2 R.R. 669.

PART XIII.

## OFFENCES AGAINST MORALITY.

SECT.



---

**174. Unnatural offence.**—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.

*Buggery.*]—This offence, also called sodomy, is the carnal copulation against nature by human beings with each other or with a beast. 1 Bishop Cr. Law 380. There must be a penetration per anum. Archbold Cr. Plead. (1900), 879. A penetration of the mouth is not sodomy ; Rex v. Jacobs, Russ. & Ry. 331; but is an offence under sec. 178. Unlike rape, sodomy may be committed between two persons, both of whom consent, and even by husband and wife. R. v. Jellyman, 8 C. & P. 604. Whichever is the pathic, both may be indicted. R. v. Allen, 1 Den. C.C. 364; 2 C. & K. 869.

*Evidence.*]—The common law presumption is, that a person under fourteen is incapable of having carnal knowledge, not merely that such a person is incapable of committing rape. It is because of the presumption, so understood, that a person under fourteen cannot be convicted of rape. The report of the case of The Queen v. Allen, 1 Dennison Cr. Cas. 364, shows that the presumption applies to cases of unnatural crime. R. v. Hartlen (1898), 2 Can. Cr. Cas. 12 (N.S.).

Penetration alone is now sufficient to constitute the offence. Sec. 4 A.

Evidence is not admissible to prove that the defendant has a general disposition to commit the offence. R. v. Cole, 3 Russ. Cr., 6th ed., 251.

*Form of indictment.*]—"The jurors, etc., present that J. S. on the ——— day of ——— at the ——— with a certain ——— (animal), *or*, in and upon one J. N.], unlawfully, wickedly and against the order of nature had a veneral affair, and then unlawfully, wickedly and against the order of nature with the said ——— did commit and perpetrate that detestable and abominable crime of buggery, not to be named among Christians, against the form of the statute in such case made and provided and against the peace, etc."

*Excluding public from court room.*]—At the trial of any person charged with an offence under this, and the four following sections, 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. Sec. 550 A.

See secs. 259 to 260 as to indecent assaults and sec. 251 as to consent of minor.

**175. Attempt to commit sodomy.**—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.

*Excluding public from court room.*]—See note to last preceding section.

**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 the 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 V., c. 37, s. 8.

Incest was not an offence punishable at common law, but was dealt with by the English ecclesiastical courts, which had power to imprison for the offence. Stephen's Dig. Cr. Law, art. 170. It included other relationships than those specified in sec. 176 of the Code and applied to unlawful intercourse between parties related to each other within the degrees of consanguinity or affinity wherein marriage was prohibited by law. 2 Bishop Cr. Law 15.

Prior to the statute, 53 Vict. (Can.), ch. 37, sec. 8, from which sec. 176 is taken, it seems that incest, unless committed under circumstances amounting to rape, was not punishable in Ontario, as the ecclesiastical law of England was not introduced into that province. Re Lord Bishop of Natal, 3 Moo. P.C.N.S. 115.

There were, however, statutes dealing with the offence in the Provinces of Nova Scotia, New Brunswick and Prince Edward Island. R.S.N.S., 3rd

series, ch. 160, sec. 2; R.S.N.B., ch. 145, sec. 2; 24 Vict. (P.E.I.), ch. 27, sec. 3. Quære, whether those statutes do not still apply in those provinces as to cases of incest, for which no provision is made by sec. 176.

*Defence.*]—Oral evidence is not admissable to prove relationship on a charge of incest in the Province of Quebec, and the relationship must be established by the production of extracts from the registers of civil status, as required by the provincial laws of evidence made applicable to criminal proceedings by the Canada Evidence Act, sec. 21, unless the absence of such registers is proved. R. v. Garneau (1899), 4 Can. Cr. Cas. 69 (Que.).

It is not too late for the accused to object that oral evidence is insufficient proof, after the case for the prosecution has been closed. Ibid.

See sec. 188 as to conspiracy to induce, etc.

*Excluding public from court room.*]—See note to sec. 174.

**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 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. 58 V., c. 37, s. 6.

To publicly expose the naked person was a misdemeanor at common law. R. v. Sedley, 17 St. Tr. 155 (*n*); R. v. Rowed, 3 Q.B. 180.

But an indecent exposure seen by one person only was not an offence. R. v. Farrell, 9 Cox 446; R. v. Elliott, L. & C. 103. The presence of only one other person than the accused is now sufficient under this section.

A place out of sight of the public footway, where people had no legal right to go, but did habitually go without interference, is included. R. v. Wellard, L.R. 14 Q.B.D. 63.

*Excluding public from court room.*]—See note to sec. 174.

**178. Acts of 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 by any male person of, any act of gross indecency with another male person. 53 V., c. 37, s. 5.

This section is similar in its terms to the English Criminal Law Amendment Act of 1885, 48-49 Vict., ch. 69, sec. 11. Under it, it has been held that it is an offence for a male person to procure the commission with himself of an act of gross indecency by another male person. R. v. Jones, [1896] 1 Q.B. 4, 18 Cox C.C. 207.

*Excluding public from court room.*]—See note to sec. 174.

*(Amendment of 1900.)*

**179. Publishing obscene matter.**—Everyone 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.

*Particulars of indictment.*]—By sec. 615 it is provided that no count for (inter alia) selling or exhibiting an obscene book, pamphlet, newspaper or other printed or written matter shall be deemed insufficient on the ground that it does not set forth the words thereof; provided that the court may order that a particular shall be furnished by the prosecuton stating what passages in such book, pamphlet, newspaper, printing or writing are relied on in support of the charge. If the obscene words complained of are in a foreign language a translation of them should be set out in the particulars. Zenobio v. Axtell, 6 T.R. 162; R. v. Peltier, 28 St. Tr. 529.

*Obscenity.*]—"The test of obscenity is whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influence, and into whose hands a publication of this sort may fall." R. v. Hicklin, L.R. 3 Q.B. 371, per Cockburn, L.C.J.

The indiscriminate publication of a pamphlet, half of which relates to controversial questions which are not obscene, but the other half of which

is obscene, as relating to impure acts and words, is an offence, although the publisher does not sell the pamphlet for the purposes of gain or to prejudice good morals (although the indiscriminate sale of it is calculated to have that effect), but sells it as a member of a politico-religious society, to promote the objects of that society and to expose what he deems to be the errors of the Roman Catholic church and the immorality of the confessional. R. v. Hicklin, supra; Steele v. Brannan, L.R. 7 C.P. 261.

*Indecent show.*]—A herbalist, who publicly exposed in his shop a picture of a man naked to his waist and covered with sores, was held to be properly found guilty of a nuisance, though the motive for its exhibition was innocent. R. v. Grey, 4 F. & F. 73.

A person who openly exposes or exhibits in any way, street, road, highway or public place any indecent exhibition is liable to summary conviction as a "vagrant" under secs. 207 and 208.

*Drugs for abortion.*]—In a recent case the prisoner, who was a manufacturer and dealer in medicine advertised as a "Female Regulator," was indicted under the above sub-sec. (c) for that he "did unlawfully, knowingly, and without lawful justification or excuse, offer to sell, advertise and have for sale or disposal a certain medicine, drug or article, commonly known as "Friar's French Female Regulator," intended or represented as a means of preventing conception or causing of abortion or miscarriage, and did thereby then commit an indictable offence, contrary to the Crim. Code, sec. 179, (c)."

A box of the medicine was produced in evidence. On the back of this box, in conspicuous lettering, was printed, "Caution—ladies are warned against using these tablets during pregnancy." Circulars were also produced explaining that its object was to promote a natural condition in the patient—it having the properties of an emmenagogue—which accompanied the remedy. No evidence was offered shewing the ingredients of the tablets, and the Crown simply pressed for a conviction for the offence of advertising, and contended that the caution in realty counseled the employment of the medicine to avoid pregnancy.

It was held by McDougall, County Judge at Toronto, that the words used must be taken in their natural and primary sense, and could not in this view be treated as coming within the contemplation of the above section of the Code, and that the case must be dealt with as though the allegation had been the subject of a criminal libel. The learned judge directed the jury to return a verdict of not guilty, but reserved a case at the request of the Crown prosecutor which is now pending. R. v. Karn (1901), 38 C.L.J. 135.

*(Amendment of 1900.)*

**180. Posting immoral literature.**—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.

This section is taken from the Post Office Act, R.S.C. (1886), ch. 35, sec. 103.

*Any letter.*]—For the statutory definition of a "post letter" see ante, p. 15.

*(Amendment of 1893.)*

**181. Seduction of girl under sixteen.**—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 V., c. 37, s. 3.

*Limitation.*]—A prosecution under this section must be commenced within one year from the commission of the offence. Sec. 551 (c).

*Previously chaste character.*]—A similar statute of New York State does not punish seduction generally, but only when it is committed under promise of marriage, upon an unmarried woman of "previous chaste character." "Chaste character," as thus used in the statute, does not mean reputation for chastity, but actual personal virtue. Kenyon v. People, 26 N.Y. 203, 207. The girl must be actually chaste and pure in conduct and principle, up to the time of the commission of the offence. Carpenter v. People, 8 Barb. 603, 608.

The burden of proof of previous unchastity on the part of the girl is upon the accused. Sec. 183 A.

*Corroboration.*]—Sec. 684 of the Code enacts that "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.

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 the corroborative evidence "implicating the accused" required by Cr. Code sec. 684, in order to sustain a conviction. R. v. Vahey (Ont.), 2 Can. Cr. Cas. 258.

The prisoner's admission made after the girl reached the age of sixteen that he had had connection with her may be taken into consideration with the other facts, as corroboration of the charge of having had connection with her before she became of that age. R. v. Wyse (1895), 1 Can. Cr. Cas. 6. 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. Ibid.

*Proof of age.*]—By sec. 701 A the following is prima facie evidence to prove the age of the girl for the purposes of this section:—(a) Any entry or record by an incorporated society or its officers having had the control or care of the girl at or about the time of her 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 girl. Sec. 701 A was introduced into the Code by the Amending Act of 1900 and came into force January 1st, 1901.

A certificate of registration of birth, coupled with evidence of identity, is legal evidence of the age of the person mentioned in it. R. v. Cox, [1899] 1 Q.B. 179, 18 Cox C.C. 672; R. v. Weaver, L.R. 2 C.C.R. 85.

Proof of the date of birth may be given by some one who was present at the birth. R. v. Nicholls, 10 Cox 476.

The evidence of the girl as to her own age would not be admissible. R. v. Rishworth, 2 Q.B. 476; but quære, whether she might not identify the certificate of registration of her own birth if she were the custodian of it. Re Bulley (1886), W.N. 80.

*Excluding public from court room.*]—At the trial of any person charged with an offence under this, and the nine following sections, 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. Sec. 550 A.

**182. Seduction of girl under twenty-one 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.

*Limitation.*]—The prosecution must take place within one year from the commission of the offence. Sec. 551 (*c*).

*Corroboration.*]—A conviction is not to be made upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused. Sec. 684 (*c*); and see note to sec. 181.

*Under promise of marriage.*]—A subsisting promise of marriage between the seducer and the seduced is necessary. If the man is married, living with his wife and the woman knows it, his act of seduction is not within the section; if she were ignorant of his subsisting marriage the consequence would be otherwise, because the promise then would be binding on him to the extent of enabling her to maintain against him her civil suit for its breach. Wild v. Harris, 7 C.B. 999; Millward v. Littlewood, 5 Exch. 775; People v. Alger, 7 Parker 333.

A promise of marriage conditional upon her becoming pregnant as a result of the intercourse has been held not to be sufficient to support a charge under a similar New York law. People v. Van Alstyne, 39 N.E. Rep. 343.

It will be observed that while under sec. 181 the offence consists of either seducing *or* having illicit connection, the offence under this section is for seducing *and* having illicit connection. It is therefore necessary to prove that the intercourse was the result of the man's solicitation based upon the promise of marriage as a reason for her acquiescence.

*Subsequent marriage of parties.*]—The subsequent intermarriage of the seducer and the seduced is a good plea in defence of the charge. Sec. 184 (2).

*Previously chaste character.*]—See note to sec. 181. Under this, as well as the preceding section, the burden of proof of previous unchastity is upon the accused. Sec. 183 A.

*Under twenty-one.*]—As to proof of age, see note to sec. 181.

*Excluding public from court room.*]—See note to last preceding section.

*(Amendment of 1900.)*

**183. Seduction of ward or employee.**—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.

In the case of the seduction of a ward by her guardian their subsequent intermarriage is not a defence. Sec. 184 (2). The word "guardian" here includes any person who has in law or in fact the custody or control of the girl. Sec. 186 A.

*Limitation.*—The prosecution must be brought within one year from the time of the offence. Sec. 551 (*e*).

*Corroboration.*]—See sec. 684.

*Excluding public from court room.*]—See note to sec. 181.

*(Amendment of 1900.)*

**183 A. Burden of Proof.**—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.

The three sections referred to relate to the following offences: Seduction of girls under sixteen (sec. 181), seduction under promise of marriage (sec. 182), and seduction of a ward, or employee (sec. 183 as as amended in this statute).

**184. Seduction of female passenger on vessel by employee, etc.**—Everyone 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 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. ch. 65, sec. 37.

*Excluding public from court room.*]—See note to sec. 181.

**185. Procuring.**—Everyone 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 pretenses 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 stupefy or overpower so as thereby to enable any person to have unlawful carnal connection with such woman or girl. 53 Vict., ch. 37, sec. 9; R.S.C. ch. 157, sec. 7.

A conviction for "unlawfully procuring or attempting to procure" a girl to become a prostitute, is void for duplicity and for uncertainty. R. v. Gibson (1898), 2 Can. Cr. Cas. 302.

*Limitation.*]—Prosecutions for offences under this section must be brought within one year from the commission of the offence. Sec. 551 (*c*).

*Corroboration.*]—No person accused of an offence under this section shall be convicted upon the evidence of one witness unless such witness is corroborated in some material particular by evidence implicating the accused. Sec. 684.

In R. v. McNamara (1891), 20 O.R. 489, it was held that on an indictment for attempting to procure a woman to become a prostitute, it is admissible to prove in corroboration of the woman's evidence, that the house to which the prisoner had taken her had the general reputation of being a bawdy house; (Galt, C.J., Rose and MacMahon, JJ.,). Mr. Justice Rose there adopts the opinion of O'Neall, J., in State v. McDowell, Dudley's South Carolina Law & Eq. Reports 346, in which that judge propounds a much more extensive rule and says:—

"Every corrupting fact which can be supplied by general proof should be excluded. The general proof here is just as satisfactory as the most direct proof can be. . . . And in a case in which character is its very gist I am willing to make that which everybody says, the evidence on which a jury may, if they choose, convict defendants for keeping a bawdy house." Dudley S.C.L. & Eq. R. 346.

With reference to the opinion just quoted, Osler, J.A., says in The Queen v. St. Clair, 3 Can. Cr. Cas. 551, that he is not prepared to concur with it unreservedly.

*Search for women in house of ill-fame.*]—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 or 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. Sec. 574.

*Excluding public from court room.*]—See note to sec. 181.

**186. Parent or guardian procuring defilement of girl.**—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 Vict., ch. 37, sec. 9.

*(Added by Amendment of 1900).*

**186 A. "Guardian."**—The word "guardian" in secs. 183 and 186 includes any person who has in law or in fact the custody or control of the girl or child.

*Limitation.*]—A prosecution under this section must be commenced within one year from the commission of the offence. Sec. 551.

*Excluding public from court room.*]—See note to sec. 181.

*Proof of age.*]—See note to sec. 181.

*(Amendment of 1900.)*

**187. Householders permitting defilement.**—Every one who, being the owner or 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.

*Evidence.*]—A father was convicted under a similar section of the English Criminal Law Amendment Act, 1885, of knowingly suffering his daughter under sixteen to be on the premises for the purpose mentioned, although occupied by the father and daughter as their home. R. v. Webster, 16 Q.B.D. 134, 15 Cox C. C. 775; but a mother was held not to be guilty under it where, for the purpose of obtaining conclusive evidence against a man who had seduced her daughter, she permitted him to come to her house to repeat his unlawful intercourse. R. v. Merthyr Tydfil Justices, 10 Times L. R. 375.

*Corroboration required.*]—See section 684.

*Limitation.*]—The prosecution must be commenced within one year from the commission of the offence. Sec. 551 (*c*).

*Excluding public from court room.*]—See note to sec. 181.

**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.

*Corroboration.*]—See sec. 684.

*Excluding public from court room.*]—See note to sec. 181.

*(Amendment of 1900).*

**189. Carnally knowing idiots.**—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.

*Corroboration.*]—See sec. 684.

*Excluding public from court room.*]—See note to sec. 181.

**190. Prostitution of Indian women.**—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 wigwam, knowing or having probable cause for believing that such Indian woman is in or remains in such house, tent, or wigwam 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.

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., ch. 43, sec. 106; 50-51 Vict., ch. 33, sec. 11.

*Corroboration.*]—See sec. 684.

*Excluding public from court room.*]—See note to sec. 181.

PART XIV.

## NUISANCES.

SECT.



---

**191. Common nuisance defined.**—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 His Majesty's subjects.

This section is a statement of the common law in regard to indictable nuisances.

*Common nuisance.*]—The injury or annoyance must be to the whole community in general to constitute a common (*i.e.*, a public) nuisance, and whether or not the number of persons affected is sufficient to make it a common nuisance is a question for the jury. R. v. White, 1 Burr. 337.

The omission of an electric railway company operating their cars upon a highway to use reasonable precautions so as to avoid endangering the lives of the public using the highway in common with the company, is a breach of legal duty constituting a common nuisance under secs. 191 and 213, for which an indictment will lie. R. v. Toronto Ry. Co. (1900), 4 Can. Cr. Cas. 4 (Ont.).

The carrying on of an offensive trade is indictable where it is destructive of the health of the neigbourhood or renders the houses untenantable. R. v. Davey, 5 Esp. 217; R. v. Neil, 2 C. & P. 485. But if a noxious trade is

already established in a place remote from habitations and public roads, and persons afterwards come and build houses within the reach of its noxious effects; or if a public road be made so near to it that the carrying on of the trade becomes a nuisance to the persons using the road, in those cases the party is entitled to continue his trade because it was legal before the erecting of the houses in the one case and the making of the road in the other. R. v. Cross, 2 C. & P. 483, per Abbott, C.J.; R. v. Nevill, Peake R. 93. If, however, the annoyance is much increased by the extension of the trade carried on, a conviction is proper. R. v. Watt, Moo. & Mal. N. P. 281.

Manufacturing or keeping large quantities of gunpowder in towns or closely inhabited places is an indictable offence at common law. R. v. Williams, 1 Russ. Cr. 5th ed. 421; R. v. Taylor, 2 Str. 1167; Crowder v. Tinkler, 19 Ves. 617; and the same rule applies to the keeping and storing of large quantities of naphtha and rectified spirits of wine, the same being proved to be more inflammable than either spirits or gunpowder and there being no efficient means of putting out a fire if communicated to the premises. R. v. Lister, Dears. & B. 209, 26 L.J.M.C. 196. As to the illegal possession of explosives for an unlawful object, see sec. 101, ante.

Nuisance by noise if sufficiently great is indictable. Walker v. Brewster, L.R. 5 Eq. 25; Bellamy v. Wells, 39 W.R. 158; Christie v. Davey, [1893] 1 Ch. 316; excepting, however, noise made in the exercise of statutory powers and without negligence. Harrison v. Southwark W. W. Co., [1891] 2 Ch. 409.

*Omission to discharge a legal duty.*]—If the legal duty does not exist at common law, and a particular penalty is imposed by the statute creating the duty, the remedy by indictment for common nuisance is probably excluded. Bulbrook v. Goodere, 3 Burr. 1768; Saunders v. Holborn Board, [1895] 1 Q.B. 64, 61 L.J.Q.B. 101.

The object with which the omission is made is immaterial if the probable result is to affect the public or any appreciable part of the public injuriously in any of the ways stated in the section. R. v. Moore, 3 B. & Ad. 184; R. v. Carlisle, 6 C. & P. 636; R. v. Lloyd, 4 Esp. 200; Barber v. Penley, [1893] 3 Ch. 447.

*Master's liability.*]—Where works are so carried on as to be a nuisance, and the proprietor is indicted therefor, it has been held not to be a defence that he did not personally superintend the works and that he had given express orders to his employees that the works should be carried on in a manner which, had it been followed, would not have caused a nuisance. R. v. Stephens, L.R. 1 Q.B. 702.

*Time.*]—The public have a right to demand the suppression of a common nuisance though of long standing. Weld v. Hornby, 7 East 199; Anonymous, 3 Camp. 227; Fowler v. Sanders, Cro. Jac. 446. But where the alleged nuisance relates to the carrying on of a trade, the fact that it has been of long standing militates against a finding of nuisance. 1 Russ. Cr. 5th ed. 442; R. v. Nevill, Peake R. 93; R. v. Smith, 4 Esp. 111.

*Abatement.*]—If the nuisance is alleged in the indictment to be still continuing the judgment may direct that the defendant shall remove it at his own cost. 1 Hawk., ch. 75, sec. 14.

**192. Nuisance endangering public safety.**—Every one is guilty of an indictable offence and liable to one year's imprisonment or a fine who commits any common nuisance which endangers the lives, safety or health of the public, or which occasions injury to the person of any individual.

A railroad company was found guilty on an indictment for a nuisance by obstructing a public highway, by lowering the same at a point of intersection and thereby making the highway dangerous. Time having elapsed, and nothing having been done to abate the nuisance, a motion was made for judgment on the verdict, and it was held that the proper sentence was that defendants should pay a fine, and that the nuisance complained of be abated. R. v. The Grand Trunk Railway Co. (1858), 17 U.C.Q.B. 165.

Although a corporation cannot be guilty of manslaughter, it may be indicted, under Cr. Code sec. 252, 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. R. v. Union Colliery Co. (1900), 3 Can. Cr. Cas. 523 (B.C.), affirmed 4 Can. Cr. Cas. 400, 31 Can. S.C.R. 81.

Alterations authorized by statute to be made upon highways must be made with reasonable care and so as to cause no unnecessary danger to the travelling public or the parties doing the work may be indicted under this section. R. v. Burt, 11 Cox 399.

**193. Abatement of nuisance.**—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.

*Not a "criminal" offence.*]—Quære, whether the declaration made by this section that it shall not be deemed a criminal offence does not relegate the subject to the jurisdiction of the provincial legislatures.

*Obstructing highway.*]—It is the duty of a municipality, in whom a highway is vested, to see that obstructions on the highway are removed. R. v. Cooper (1876), 40 U.C.Q.B. 294.

It is a nuisance also to obstruct the navigation of a public river, but it is a question for the jury in each case to determine whether or not the erection of a bridge or wall partly in the river constitutes an actual obstruction. R. v. Betts, 16 Q.B. 1022.

A permanent obstruction erected upon a highway without lawful authority and which renders the way less commodious than before to the public is a common nuisance, although the safety of the public is not endangered. R. v. United Kingdom Telegraph Co., 31 L.J.M.C. 166. And this notwithstanding the fact that sufficient space was left for traffic and that the telegraph poles which constituted the obstruction were not placed on the travelled portion of the road. Ibid.

Where a county council is liable to repair a bridge, the proper remedy is indictment, not mandamus. "Indictment will lie; it is an adequate remedy, and that being so I do not see why I should take upon myself to grant an extraordinary remedy (mandamus)." Per Harrsion, C.J., in Re Jamieson and County of Lanark (1876), 38 U.C.Q.B. 647.

Where an indictment for obstructing a highway had been removed by certiorari, at the instance of the private prosecutor into the Court of Queen's Bench and defendant was acquitted, it was held that the court had no power to impose payment of costs on such prosecutor, except as a condition of any indulgence granted in such a case, such as a postponement of the trial, or a new trial. R. v. Hart (1880), 45 U.C.Q.B. 1.

Upon a verdict of guilty to an indictment charging a nuisance by the obstruction of the King's highway the proper judgment is that the nuisance be abated by the defendants within a time named in the judgment. R. v. Grover (1892), 23 O.R. 92.

But a Court of General Sessions in Ontario has no authority to make an order directing the plaintiff to abate a nuisance (not criminal), the only authority on which the sheriff can act in such case being by a writ of *de novo mento amovendo*. R. v. Grover (1892), 23 O.R. 92; Glen on Highways, 182. The Court of Sessions may, however, award the costs of prosecution against the defendants. Ibid.; Ovens v. Taylor, 19 U.C.C.P. 54.

In Ontario it has been held that a prosecution of a municipal corporation for a nuisance in not keeping a public street in repair must be by indictment, but no preliminary enquiry can be held. R. v. City of London (1900), 37 Can. Law Jour. 74.

After an acquittal upon an indictment for nuisance in obstructing a highway by placing a building on a portion of it, a certiorari will not be granted on the Crown's application to remove the indictment with a view of applying for a new trial; or to stay the entry of judgment, so that a new indictment might be preferred and tried without prejudice. R. v. Whittier (1854), 12 U.C.Q.B. 214.

*Intent.*]—Where the nuisance, instead of being merely a nuisance affecting an individual or one or two individuals, affects the public at large, and no private individual, without receiving some special injury, could have maintained an action, an indictment lies to prevent the recurrence of the nuisance. The prosecutor cannot proceed by action, but must proceed by indictment, but it is not strictly a criminal proceeding, and the doctrine of mens rea does not apply. R. v. Stephens (1866), L.R. 1 Q.B. 702.

*Compounding the offence.*]—All agreements which have for their object the stifling of a prosecution for a felony or for a misdemeanor in which the public are interested, are contrary to public policy and void, and the sanction of the magistrate cannot render that legal which is otherwise invalid. Corporation of Hungerford v. Lattimer (1886), 13 Ont. App. 315. But where in addition to the public misdemeanor an injury to the private rights of the prosecutor is also involved, then so long as the private rights of the public are preserved inviolate either by the conviction or acquittal of the accused, the question between the parties may, with the leave of the Court, be referred or otherwise made the subject of agreement. Ibid.; Keir v. Leeman (1844), 6 Q.B. 308, and in Error (1846), 9 Q.B. 371, and R. v. Blakemore (1852), 14 Q.B. 544.

And it has been held that an indictment for obstructing a public road cannot legally be referred to arbitration by an agreement between the prosecutor and the accused. Hungerford v. Lattimer (1886), 13 Ont. App. 315; but quære as to the effect of the declaration contained in this section of the Code that the offence is not to be deemed "criminal."

**194. Selling things unfit for 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.

*At common law.*]—The selling of food which is dangerous or unfit for human food with knowledge of the fact is an offence at common law. R. v.

Dixon (1814), 3 M. & Sel. 11; 15 R.R. 381; Shillito v. Thompson (1875), 1 Q.B.D. 12. If death ensues from eating such food, the seller knowing that it is dangerous is indictable for manslaughter. R. v. Stevenson (1861), 3 F. & F. 106; R. v. Kempson (1893), 28 L. J. (Eng.) 477.

*Procedure.*]—It is not competent for magistrates where an information charges an offence under this section which they have no jurisdiction to try summarily, to convert the charge into one under a municipal by-law which they have jurisdiction to try summarily, and to so try it on the original information. R. v. Dungey (1901), 5 Can. Cr. Cas. 38.

*Adulterated foods and drugs.*]—Other provisions regarding the adulteration of foods and drugs and the sale or exposure for sale of the adulterated article are contained in the Adulteration Act, R.S.C. 1886, ch. 107, and amendments thereto.

Section 23 of that Act, as amended by sec. 9 of chapter 26 of the Canada statutes of 1890, and by sec. 5 of chapter 24 of the statutes of 1898, is as follows:—

(23) 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 of 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 sub-section 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 sub-section shall, upon his sworn declaration that he purchased the article in good faith, and as provided for in the said sub-section, 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.

Section 28 of the same Act as amended 1890, ch. 26, sec. 11, and 1898, ch. 24, sec. 8, making the following special provision as to the costs of analysis and for the taxation of a counsel fee in prosecutions thereunder:—

(28) Any expenses incurred in procuring and analyzing any food, drug or agricultural fertilizer, in pursuance of this Act, 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 this Act, be deemed a portion of the costs of the proceedings against him, and shall be paid by him accordingly; and in all

other cases such expenses shall be paid as part of the expenses of the officer, or by the person who procured the sample, as the case may be.

2. Such expenses of prosecution shall also include a reasonable counsel fee, in the discretion of the judge; and in the case of a private prosecutor, if the prosecution is dismissed as being instituted without reasonable and probable cause, the costs of such defence shall be taxed against such prosecutor.

Nothing in the Adulteration Act affects the power of proceeding by indictment or takes away any other remedy against any offender under it. Can. Stats. 1898, ch. 24, sec. 9.

**195. Common bawdy-house defined.**—A common bawdy-house is a house, room, set of rooms or place of any kind kept for purposes of prostitution.

*Bawdy-houses.*]—The keeping of a bawdy-house is a nuisance at common law, on the ground both of its corrupting public morals and its endangering the public peace by reason of dissolute persons resorting thereto. 1 Russell on Crimes, 5th ed., 427; Hawkins Pleas of the Crown, b. 1, ch. 74, sec. 1. Sec. 198 declares it to be an indictable offence punishable with one year's imprisonment.

The vagrancy clauses of the Code (secs. 207 and 208), also deal with this offence by declaring that a keeper of a bawdy-house is a vagrant and may be punished on summary conviction. (Sec. 208 as amended by 57-58 Vict., ch. 57, and 63-64 Vict., ch. 46.)

It is immaterial whether indecent or disorderly conduct is or is not perceptible from the outside. Steph. Crim. Law, 122; R. v. Rice (1866), L.R. 1 C.C.R. 21.

The term "house of ill-fame" is synonymous with "bawdy-house," Century Dict., *verb*, "house." A "brothel" is a place where people of opposite sexes are allowed to resort for illicit intercourse. A house occupied by one woman for the purpose of prostituting herself therein with a number of different men, but not allowing other women to use the premises for a like purpose is not a "brothel," Singleton v. Ellison, [1895] 1 Q.B. 607; 64 L.J.M.C.123; but the use of a single room by a lodger in a house in like manner to a bawdy-house has been held to constitute the keeping of a "bawdy-house." R. v. Pierson (1705), 2 Ld. Raym. 1197, 1 Salk. 382.

In the United States it has been held that a flat-boat floating on a river may be a "house of ill-fame," State v. Mullin, 35 Iowa 199; and that a tent may be a "disorderly house," Killman v. State, 2 Texas Ct. App. 222; or a room in a steamship, Com. v. Bulman, 118 Mass. 456. The word "house" as used in statutes for the suppression of "disorderly houses" is used in a generic sense, and applies to nearly all kinds of buildings, and is not restricted to dwelling houses. State v. Powers, 36 Conn. 77.

The keeping of a bawdy-house is a nuisance indictable at common law, 3 Inst., ch. 98, p. 204, 1 Hawk. P.C., ch. 74 and 75, sec. 6, and the common law punishment was by fine or imprisonment, but without hard labour.

A feme covert may be guilty of the offence as well as if she were a feme sole, for the *keeping* the house does not necessarily import property but may signify that share of government which the wife has in a family as well as the husband. R. v. Williams (1712), 1 Salk. 383.

*(Amendment of 1895.)*

**196. Common gaming-house defined.**—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, or at any mixed game of chance and skill; 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.

*Gaming houses at common law.*]—All common gaming houses are nuisances in the eyes of the law; not only because they are great temptations to idleness, but also because they are apt to draw together great numbers of disorderly persons, which cannot but be very inconvenient to the neighbourhood. 1 Hawkins' Pleas of the Crown, ch. 75, sec. 6.

The principle upon which common gaming houses are punishable as nuisances is that they are detrimental to the public, as they promote cheating and other corrupt practices; and incite to idleness and avaricious ways of gaining property, great numbers whose time might otherwise be employed for the good of the community. Jenks v. Turpin (1884), 13 Q.B.D. 505, 514; Russell on Crimes, 1896, 6th ed. I., 741.

It makes no difference that the use of the house and the gaming therein was limited to the subscribers and members of a club, and that it was not open to *all* persons who might be desirous of using the same; a *common* gaming-house is that which is forbidden—that is, a house in which a large number of persons are invited habitually to congregate for the purpose of gaming. Per Hawkins, J., in Jenks v. Turpin (1884), 13 Q.B.D. 505, 516.

At common law the playing at any game was legal and permissible; 11 Co. Rep. 87; and reference is to be had to the statutes alone to see what games are rendered unlawful. Jenks v. Turpin, supra.

*Evidence.*]—A room resorted to for the purpose of playing the game of poker is not shewn to be kept "for gain" under sec. 196 (*a*) by the mere proof that the proprietor who participated in the game on equal terms with the others, was allowed by the consent of the players, and not as a matter of right nor as a condition on which the playing took place, to take small sums from the stakes on several occasions by way of reimbursement for refreshments provided by him to the players, where such sums are not shewn to exceed the cost or value of the refreshments. R. v. Saunders (1900), 3 Can. Cr. Cas. 495 (Ont.).

But if the "rake-off" be for the benefit of the proprietor, a conviction will be maintained. R. v. Brady (1896), 10 Que. S.C. 539.

The game of "black jack" is a game of chance, and a place kept or used for playing it, although not kept for gain, is a common gaming house under Cr. Code sec. 196 (*b*). R. v. Petrie (1900), 3 Can. Cr. Cas. 439 (B.C.).

The keeping of a house, room or place for playing a game of chance or mixed game of chance and skill in which the chances of the game are in favour of the player who is the dealer or banker therein for the time being, is an indictable offence under secs. 196 and 198, if the position of dealer or banker passes from one player to another by the chances of the game and not by rotation. Ibid.

That a house is "common" does not necessarily mean that it is open to everyone; it may be of limited access. R. v. Ah Pow (1880), 1 B.C.R., pt. 1, p. 147; R. v. Laird (1894), 3 Rev. de Jurisprudence (Que.) 389.

A magistrate might reasonably decide that a room was a common gaming house if it is commonly used or adopted for gaming, frequented by many people promiscuously, especially if by many various persons, by a fortuitous concourse, or without the necessity of any direct or personal invitation from the occupier or other person legally entitled to the sole enjoyment of the room or place, and if thereby a general opportunity of gaming though without any fixed intention or invitation to do so. Per Begbie, C.J., in R. v. Ah Pow (1880), 1 B.C.R., pt. 1, p. 152. Such an establishment will be a common gaming house though a large part of the general public are excluded by keys or watch-words, or in any other manner. Ibid.

*Finding of gaming instruments as evidence.*]—Sec. 702 provides that 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 primâ facie evidence, on the trial of a prosecution under section 198 or section 199, that such house, room or place is used 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. Sec. 702 as amended by the Code Amendment Act 1900.

*Evidence of unlawful gaming.*]—In any prosecution under section 198 for keeping a common gaming house, or under section 199 for playing in a common gaming house, it shall be primâ 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 any unlawful gaming, or with any means or contrivance for concealing, removing or destroying any instruments of gaming. Sec. 703 as amended by the Code Amendment Act 1900.

*Property in Canada or elsewhere.*]—The second sub-section was passed to override the decision in R. v. Wettman (1894), 1 Can. Cr. Cas. 287.

An English statute against bigamy (24 & 25 Vict. (Imp.), ch. 100, sec. 57), using the words "whether the second marriage shall have taken place in England or Ireland *or elsewhere*" was held, in Earl Russell's trial, [1901] A.C. 446, to apply to the marriage of a British subject celebrated beyond the King's dominions.

*Place used for gaming in stocks.*]—See sec. 201 (3).

**197. Common betting-house defined.** — 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 payment or giving by some other person of any money or valuable thing on any such event or contingency; or

(*Amendment of 1895*).

(*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; 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.

*Other place.*]—In construing the words "other place" the doctrine of "ejusdem generis" is applicable, and the meaning of the word "place" must be controlled by the specific words, "house, office, or room." Powell v. Kempton Park, [1897] 2 Q.B. 242, [1899] A.C. 143.

In The Queen v. Humphrey, [1898] 1 Q.B. 875, an archway which was a private thoroughfare leading from a public street into a yard containing dwelling houses, stables and workshops, which the prisoner was accustomed

to resort to for the purpose of betting with persons who came to him there, was held to be a "place" within the meaning of the Betting Act 1853, (16 & 17 Vict. (Imp.), ch. 119) secs. 1, 3. And see Brown v. Patch, [1899] 1 Q.B. 892; Belton v. Busby, [1899] 2 Q.B. 380.

Code sec. 204 (2) validates betting on a racecourse of an incorporated association during the actual progress of a race meeting.

*Evidence.*]—A bank, a telegraph office, and another office were simultaneously opened in a 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, which 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 for whom the receipts were given to place, and who placed bets equivalent to the amounts deposited on horses running in the races, and on their winning the amounts won were paid to the holders of the receipts at the third office by telegraphic instructions from the persons making the bets in the United States:—Held, on the 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 secs. 197-198 of the Code. R. v. Osborne (1896), 27 O.R. 185.

**198.—Keeping 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.

*Disorderly house.*]—The term "disorderly house" in Cr. Code 783 (*f*) has been held to apply only to those cases which fall within this statutory definition. Ex parte John Cook (1895), 3 Can. Cr. Cas. 72 (B.C.).

And a more limited meaning is given in a recent Quebec decision where it was held that the meaning of the words "disorderly house" in secs. 783 (*a*) and 784, is governed by the rule noscitur a sociis, and is therefore restricted to houses of the nature and kind of a house of ill-fame or bawdy-house. R. v. France (1898), 1 Can. Cr. Cas. 321 (Que.).

A house will be none the less a public nuisance because it is found to be disorderly as well as a bawdy-house. It is in law disorderly if it be a bawdy-house. R. v. Munro (1864), 24 U.C.Q.B. 44.

*Describing the offence.*]—The information need only give a concise and legal description of the offence charged, and contain the same certainty as an indictment. The description of the charge must include every ingredient required by the statute to constitute the offence, but, as in an indictment, the statement of the offence may be in the words of the enactment which describes it or declares the transaction to be an indictable offence. R. v. Taylor (1824), 3 B. & C. 502, 612; R. v. France (1898), 1 Can. Cr. Cas. 321 (Que.).

*Procedure.*]—Where there is nothing upon the face of a conviction for keeping a house of ill-fame to shew whether the police magistrate who tried the case acted under the "summary trials" clauses of the Code, by virtue

of which he has an absolute jurisdiction in respect of that offence, or simply as a justice of the peace under the "summary convictions" clauses and of Code secs. 207 and 208, and the conviction is defective in form but is amendable if within the "summary conviction" clauses and not amendable if under the "summary trials" clauses, the court will treat it as a "summary conviction" and correct the same under Code sec. 889, by reducing the term of imprisonment where the sentence is in excess of that authorized by law. R. v. Spooner, (1900), 4 Can. Cr. Cas. 209 (Ont.).

Semble, upon indictment under sec. 198, the offence of keeping a common bawdy-house is punishable in Ontario by a sentence to the "Mercer Reformatory" for any term less than two years under sec. 34 of the Public Prisons Act, R.S.C. ch. 183, which section remains unrepealed by the Code. Ibid.

*Evidence.*]—The owner of a house who leases it to another person knowing and assenting when the lease was made to the purpose of the latter to maintain it as a common bawdy house, thereby does an act for the purpose of aiding the lessee to commit the indictable offence of keeping a disorderly house, and he may be indicted and convicted as a principal under Cr. Code sec. 61 (*b*). R. v. Roy (1900), 3 Can. Cr. Cas. 472 (Que.).

In R. v. Barrett (1862), 32 L.J.M.C. 36, the accused let a house to a weekly tenant who used it as a brothel, but it was not proved that the accused received any additional rent by reason of the nature of the occupation or in any way participated in the direct profits of the immorality carried on there; but he had notice that the house was used for immoral purposes, and he did not give the tenant notice to quit. It was held that he could not be convicted of keeping the house as a disorderly house.

In R. v. Stannard (1863), 33 L.J.M.C. 61, the owner of a house let it in separate apartments on weekly tenancies to several women, who with his knowledge and consent used them for purposes of prostitution. He did not himself live in the house, and received no direct share in the immoral gains of the women, nor had he any control over them except such as might arise indirectly from his power as landlord to terminate any tenancy at the end of a week. It was held that he could not be convicted of keeping the house.

Keeping a house of ill-fame or disorderly house is a cumulative offence, and although the charge is in general terms, evidence may be given of particular facts and of the particular time of such facts. Clark v. Periam (1742), 2 Atk. 339; Roscoe's Crim. Evid., 11th ed., 773. It is not necessary to prove who frequents the house, which in many cases it might be impossible to do, but if unknown persons are proved to have been there, conducting themselves in a disorderly manner, it will maintain an indictment. l'Anson v. Stuart (1787), 1 T.R. 754. A common bawdy-house is defined by sec. 195 of the Code to be a house, room, set of rooms or place of any kind, kept for purposes of prostitution. It is immaterial whether indecent or disorderly conduct is or is not perceptible from the outside. Steph. Crim. Law 122.

It is not necessary that it should be proved that any indecent or disorderly conduct was visible from the exterior of the house. R. v. Rice (1866), L.R. 1 C.C.R. 21.

*Appearing as the keeper.*]—The sub-section as to acting or appearing as the mistress of the house, Cr. Code 198 (2), originated in the English "Disorderly Houses Act, 1751," 25 Geo. 2, ch. 36. By sec. 8 of that statute it was enacted that any person who shall appear, act or behave himself or herself as master or mistress, or as the person having the care, government, or management of any bawdy-house, gaming house, or other disorderly house, shall be deemed and taken to be the keeper thereof, and shall be liable to be prosecuted and punished as such, notwithstanding he or she shall not be in fact the real owner or keeper thereof.

In R. v. Spooner (1900) 4 Can. Crim. Cas. 209, a plea of guilty to the charge of "*appearing* the keeper of a house of ill-fame" was held equiva-

lent to an admission that she kept a house of ill-fame. The words used in the charge did not charge an offence known to the law under that form of words so as to give them any technical meaning, nor do they follow the phraseology of sub-sec. (2) of sec. 198 which enacts that "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 [any common bawdy-house, common gaming-house or common betting house as defined by sees. 195, 196 and 197] shall be *deemed* to be the keeper," etc. It is submitted that the sub-section does not become operative until the fact that the house *is* a disorderly house is proved or admitted. The offence is, by its nature, one to be proved by shewing a series of circumstances, constituting the house a disorderly one, a continued use of the same for purposes of prostitution where the charge is for the keeping of a common bawdy-house. Does the accused admit either such continued keeping of the house for purposes of prostitution or the ill-reputation of the house by admitting that she appears the keeper of a house of ill-fame? The meaning of the words should not be extended beyond their ordinary acceptation, and if there be any ambiguity the construction most favourable to the prisoner should be taken. In common parlance a person may be said to *appear* such keeper if she were unquestionably the keeper of a house which had some of the appearances or indications of being a house of ill-fame, but in point of fact was not. And an isolated act of prostitution carried on in the house with the connivance of the mistress thereof might make such mistress *appear* the keeper of a bawdy-house, although the house was in fact one of good repute. It is submitted that the decision in R. v. Spooner (1900) 4 Can. Crim. Cas. 209, would have been much more satisfactory had the conviction for "keeping" been set aside as not warranted by the plea of guilty to "appearing the keeper" and the commitment set aside as not disclosing any offence known to the law.

*Finding gaming instruments.*]—See sees. 702 and 703.

*Obstruction of officer as evidence.*]—See sec. 703.

**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. ch. 158, sec. 6.

See note to sec. 198, and see sees. 702 and 703.

**200. Obstructing police officer entering a 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 authorized 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 authorized 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. ch. 158, sec. 7.

See note to sec. 196.

**201. Gaming in stocks and merchandise.**—Every one is guilty of an indictable offence and liable to five years' imprisonment, and to a fine of five hundred dollars, who, with 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 authorizes 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 authorizes 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 wherein is carried on the business of making or signing, or procuring to be made or signed, or negotiating 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 Vict., ch. 42, secs. 1 and 3.

*Stock gambling.*]—A broker, who merely acts as such for two parties, one a buyer and the other a seller, without having any pecuniary interest in the transaction beyond his fixed commission, and without any guilty knowledge on his part of the intention of the contracting parties to gamble in stocks

or merchandise, is not liable to prosecution under sec. 201, paragraphs (*a*) and (*b*), of the Criminal Code of Canada, nor as accessory under sec. 61. R. v. Dowd (1899), 4 Can. Cr. Cas. 170 (Que.), per Choquette, Sessions Judge at Montreal.

In re Cronmire, [1898] 2 Q.B. 383, transactions between a stockbroker and his client for differences on the sale and purchase of shares resulted in a balance in favour of the client. The broker agreed to sell certain stock to the client in settlement of the balance due, and forwarded a contract note to the client. The stock not having been delivered, the client claimed to prove against the broker's estate in bankruptcy for damages for non-delivery of the stock; but the Court of Appeal (Smith, Williams and Rigby, L.JJ.), held that, as the balance resulting from the gambling transactions was not recoverable, there was no valid consideration for the promise to deliver the stock, and therefore that the proof must be rejected. The client had deposited money to cover any loss which might arise on the gaming transactions, a balance of which still remained in the broker's hands to the credit of the client, and as to this sum it was held that the client was entitled to prove against the broker's estate, as the money had not been used for the purpose for which it was deposited.

*In re Gieve*, [1899] 1 Q.B. 794, an appeal was taken by a trustee in bankruptcy against the allowance of a proof of claim by a creditor in respect of certain stock and share transactions between himself and the bankrupt, and the question was whether the transactions in question were gambling or wagering transactions, and, as such, void under the Gaming Act, 1845 (8 and 9 Vict. (Imp.), c. 109, s. 18). The bankrupt had carried on business as a dealer in stock and shares, and Moss, the creditor, had had dealings with him on the "cover" or "margin" system. Moss's claim consisted of the differences in the market price of certain stocks sold by the bankrupt to Moss at the day named for delivery, and the price for which the sale was made. The "sold note," read as follows: "I beg to advise having sold you 20 Canadas—Cover, 1%; price, 50¼; plus, ¼th, if the stock is taken up," etc., really a contract of sale of the stock. The words "plus ¼th, if stock is taken up," indicating, in the opinion of the Court of Appeal, that the buyer need not take up the stock unless he chose, but that, if he did, he was to pay the extra ¼th. It was held that the contract was really a bargain for differences, with an option to the buyer to pay ¼th more, when the contract was to be a real one for the purchase and delivery of the stock, and that it was, therefore, a contract "by way of gaming and wagering" within the meaning of the Gaming Act (Eng.), 1845.

*Onus of proof.*]—By s. 704, 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 bona fide intention to acquire or to sell such goods, wares or merchandise, or to deliver or to receive delivery thereof, as the case may be, shall rest upon the person so charged.

**202. Frequenting "bucket-shops."** — 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 negotiating 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 Vict., ch. 42, sec 1.

**203. Gaming in public conveyances.**—Every one is guilty of an indictable offence and liable to one year's imprisonment who—

(*a.*) in a 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

(*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 authorized 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 any incorporated association during the actual progress of a race meeting. R.S.C., c. 159, s. 9.

The object of the Legislature in enacting the latter part of sub-sec. 2 of sec. 204 apparently was to reserve the race courses of incorporated associations to places where bets might be made during the actual progress of race meetings, without the bettors being subject to the penalties of that section. An agreement for the sale of betting and gaming privileges at a race meeting by an incorporated association, who are the lessees of an incorporated association, the owners of the race course, is not illegal. Stratford Turf Association v. Fitch (1897), 28 Ont. R. 579.

(*Amendment of 1895*).

**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.*) 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 effect any right or title to such property acquired by any *bonâ fide* purchaser for valuable consideration, without notice.

5. 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.

(*Amendments of 1900 and 1901*).

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 value exceeding fifty dollars.

*Lottery defined.*]—A lottery is a distribution of prizes by lot or chance without the use of any skill. Archibold Crim. Plead. (1900), 1141; R. v. Harris (1866), 10 Cox C.C. 352; Barclay v. Pearson, [1893] 2 Ch. 154; Stoddard v. Sagar, [1895] 2 Q.B. 474; Hall v. Cox, [1899] 1 Q.B. 198.

*Province cannot authorize.*]—Provincial legislatures have no power to authorize the running of lotteries; and no action can be maintained for the recovery of money under a contract for the operation of a lottery scheme which would contravene the criminal law. Brault v. St. Jean Baptiste Association (1900), 4 Can. Cr. Cas. 284 (S.C. Can.).

Where there are two agreements, both of which are in furtherance of the unlawful scheme, the second being in form a contract of loan but collateral and auxiliary to the first which provides for the operation of the lottery, both agreements are invalid and unenforceable. Ibid.

*Evidence.*]—When the complainant went to the defendant's place of business, and having been told by defendant that in certain spaces on two shelves there were in cans of tea, a gold watch, a diamond ring, or $20 in money, he paid $1 and received a can of tea, which, containing an article of small value, he handed the can back, paid an additional 50 cents and received another can, which also contained an article of small value; he handed this can back also, paid another 50 cents and received another can which also contained an article of small value. It was held that the object really sought for, and for the chance of obtaining which the money was paid, was one of the three prizes named; and that the transaction constituted an offence. R. v. Freeman (1889), 18 Ont. R. 524.

The accused was tried on two charges: (1) that he did unlawfully cause to be advertised and published a certain proposal, scheme, or plan for disposing of a horse, buggy, and harness by lot; (2) that he unlawfully sold, bartered, exchanged, or otherwise disposed of certain lots, cards, or tickets, as a means or device for giving, selling, or disposing of a certain horse, buggy, and harness by lot.

The accused carried on a business under the name of "The Bankrupt Stock Buying Company," selling clothing and other goods; he published an advertisement in a newspaper in Winnipeg, which contained the following:

"Gigantic free gift. During this sale we shall give to each purchaser of $5 and upwards a ticket entitling him to participate in the free gift of a horse, buggy, and harness, value, $300."

"To be given away on December 24th. The holder of the winning ticket, if he shoots a certain turkey at fifty yards in five shots, gets the horse, buggy, and harness."

The accused gave to each purchaser of goods for $5 and upwards a coupon or ticket as follows: "This coupon entitles the holder to participate in the drawing for horse, buggy, and harness given away by The Bankrupt Stock Buying Company. Drawing to take place December 24th, 1900." The accused had upon his premises a horse, buggy, and harness, which he represented to purchasers of goods to be the identical horse, buggy, and harness referred to in the advertisement and coupon. The jury found the accused guilty of both charges. The following question was reserved: "Was the accused, under the circumstances, properly convicted of the offences charged in the indictment." It was held that the conviction should be affirmed; and that it was a question for the jury whether the interposition of the shooting was intended as a real contest, or as a device for covering up a scheme to dispose of the property by lot, and upon the evidence they were justified in finding as they did. R. v. Johnson (1902), 22 C.L.T. 125 (Man.).

The offer of prizes to the nearest guesser of the number of beans contained in a jar exhibited to view is not a lottery, as it is a matter of judgment or skill and not of chance. R. v. Dodds (1884), 4 O.R. 390.

And where a shopkeeper placed in his shop window a jar containing a number of buttons of different sizes, and advertised a prize of a pony and cart which he exhibited in his window to the person who should guess the number nearest to the number of buttons in the jar; stipulating that the successful one should buy a certain amount of his goods; this was held not to be a "mode of chance" for the disposal of property within the meaning of the Lottery Act, as the approximation of the number of buttons depended upon the exercise of judgment, observation and mental effort. R. v. Jamieson (1884), 7 O.R. 149.

The sale of lottery tickets is an offence, whether made for profit or not. R. v. Parker, 9 Man. R. 203.

In the case of a newspaper sold with coupons to be filled up by purchasers with the names of the winning horses in a horse race and the reward of a money prize for the correct guesses, it is a question of fact to be decided whether the money received was paid in consideration of a promise to pay a prize on the event of the race or was only the ordinary price of the newspaper. R. v. Stoddart, 70 L.J.Q.B. 189. And the sale of extra coupons at a fixed price is a fact to be taken into consideration. Ibid. Stoddart v. Sagar, [1895] 2 Q.B. 474, 18 Cox C.C. 165; Caminada v. Hulton, 17 Cox C.C. 307.

An offer of a money prize by a newspaper coupon scheme under which the readers were asked to predict the number of registered births and deaths in a certain district during a certain period, was held not to constitute a lottery. Hall v. Cox, [1899] 1 Q.B. 198.

*Art distributions.*]—This section originally contained an exception under which certain distributions by lot of paintings, drawings and other works of art were legalized where done under the direction of an incorporated society established for the encouragement of art. The operations of several of so-called art societies were conducted so much upon a lottery basis that the evil became a serious one, particularly in Montreal, and the exception in favor of art distributions was therefore repealed by the Code Amendment Act of 1900.

*Crédit Foncier.*]—By a sub-section to the original Code, sec. 205 was not to apply to the Crédit Foncier du Bas-Canada or the Crédit Foncier Franco-Canadien, but such exception was repealed by the Code Amendment Act of 1901 (1 Edw. VII., c. 42).

*Right of search.*]—See sec. 575.

**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.

*At common law.*]—Exposing the naked dead body of a child in or near the highway and within view therefrom is a common law nuisance. R. v. Clark, 15 Cox C.C. 171.

And to leave unburied the corpse of a person for whom the accused was bound to provide Christian burial, was an indictable misdemeanor, if the accused were shewn to have been of ability to provide such burial. R. v. Vann (1851), 2 Den. 325; R. v. Stewart, 12 A. & E. 773; Jenkins v. Tucker (1788), 1 H.Bl. 90.

It is also a common law misdemeanour to remove without authority a corpse from a grave in a church burial ground; R. v. Sharpe, Dears. & B. 160; 7 Cox 214; or to sell a dead body without lawful authority for the purpose of dissection. R. v. Lynn, 1 Leach 497, 1 R.R. 607; R. v. Gilles, R. & R. 366 (*n*); R. v. Cundick, Dowl. & Ry. 13; R. v. Duffin, R. & R. 365.

*Stranger undertaking to bury.*]—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 intent is an indictable offence under this section, although such person was, apart from such undertaking, under no legal obligation in respect of the burial. R. v. Newcomb (1898), 2 Can. Cr. Cas. 255.

*Coroner's right.*]—A coroner has a legal right to direct a disinterment for the purposes of holding an inquest. R. v. Clerk (1702), Holt 167; R. v. Bond (1716), 1 Str. 22; Jervis on Coroners, 6th ed. 37. Any disposition of a corpse to obstruct or prevent a coroner's inquest when one ought to be held is a common law misdemeanour. R. v. Stephenson, 13 Q.B.D. 331; R. v. Price, 12 Q.B.D. 247.

PART XV.

## VAGRANCY

SECTS.



---

**207. Vagrant defined.**—Every one is a loose, idle or disorderly person or vagrant who—

(*Amendment of 1900*).

(*a*.) Not having any visible means of subsistance, 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;

(*a*)—*No visible means of support.*]—By a proviso added to sec. 208 by the Code Amendment Act of 1900, 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 this section, in the county of which he has for the two years immediately preceding been a resident.

A person suspected of being a confidence man had registered at a hotel and on the same day was arrested at a railway station as a suspicious character. On his person were found two cheques one for $700 and another for $900 which were sworn to be such as are used by confidence men, also a mileage ticket nearly used up issued in the name of another person and $8 in cash. He offered no explanation of the cheques or ticket and gave no information about himself. It was held that he could not be properly convicted as a vagrant on the evidence. R. v. Bassett, 10 Ont. Prac. R. 386, per Osler, J. Before a person can be convicted under sub-sec (*a*) as being an idle person who not having visible means of maintaining himself lives without employment, he must have acquired in some degree a character which brings him within it as an idle person, who having no visible means of maintaining himself, i.e., not "paying his way" or being apparently able to do so yet lives without employment. Ibid.

(*b*.) being able to work and thereby or by other means to maintain himself and family wilfully refuses or neglects to do so;

(*b*)—*Failure to maintain the family.*]—In order to constitute a wilful refusal or neglect on the part of a husband to maintain his family, under Cr. Code sec 207 (*b*), it is necessary that he should be under a legal obligation to do so, and his failure to maintain his wife, who had left him without valid cause and refused to return, is not an offence under that section. R. v. Leclair (1898), 2 Can. Cr. Cas. 297; Flannagan v. Overseers (1857) 3 Jurist N.S. 1103; Morris v. Edmonds, 18 Cox C. C. 627.

(*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;

(*d*)—*Begging.*]—It must be shewn that the wandering about and begging is a mode of life with the accused, and the section does not apply where persons with regular occupations temporarily out of employment through a "strike" go about seeking public contributions in aid of a general fund to sustain the strikers and their families. Pointon v. Hill, 12 Q.B.D. 306.

(*e.*) loiters on any street, road, highway, or public place, and obstructs passengers by standing across the footway, or by using insulting language, or in any other way;

(*e*)—*Loitering, etc.*]—A licensed cabman who contrary to a city ordinance loitered on the street near the entrance of a hotel and solicited passengers to hire his cab was held not within this provision where no obstruction of passengers was shewn. Smith v. The Queen, 4 Montreal L. R. 325.

(*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 firearms, 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;

(*f*) *and* (*g*)—*Causing disturbance.*]—It is not sufficient to charge merely that the accused was drunk on a public street without alleging further that he caused a disturbance in such street by being drunk. Ex parte Despatie, 9 Legal News (Montreal) 387; R. v. Daly, 24 C.L.J. 157, 12 Ont. Prac. 411.

"Disturbing the inhabitants" of a town was held by Wilson, C.J., to mean annoying them, as by making a noise which interferes with the thoughts or proceedings of others. R. v. Martin (1886), 12 O.R. 800. It is distinguishable from the term "creating a disturbance," which applies either to raising a clamour, commotion, quarreling or fighting, and refers to conduct of the nature of a breach of the peace. Ibid. The disturbance should be of the nature of a nuisance. Thomson v. Mayor of Croydon, 16 Q.B. 708.

(*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;

(*i*)—*Prostitutes.*]—Sub-section (*i*) taken from the Vagrant Act, 32 & 33 Vict. (Can.) ch. 28, does not, on its true construction, declare that being a prostitute, etc., makes such persons liable to punishment as such, but only those who when found at the places mentioned, under circumstances suggesting impropriety of purpose, on request or demand are unable to give a satisfactory account of themselves. R. v. Arscott (1885), 9 O.R. 541, per Rose, J.; but see Arscott v. Lilley, 11 O.R. 153.

"A common prostitute wandering in the public streets should not be apprehended and taken to a lock-up without knowing what it is for. In the nature of things she should know, if she is taken up, what it is for. She is not to be taken at all, until she has failed to give a satisfactory account of herself. If she is not asked what business she, a common prostitute, has wandering in the streets, or why it is she is there, she may not know whether she is taken up for murder or for robbery, or for what other offence, or whether she is taken up for any offence at all; and she cannot suppose she is taken up for wandering in the streets, though she is a common prostitute, so long as she is conducting herself harmlessly and decently, and just as other people are conducting themselves. The conviction should allege that the woman was asked before she was taken, or at the time of her being taken, to give an account of herself—that is of her wandering in the public streets, she being a common prostitute or night-walker—and that she did not give a satisfactory account of herself." R. v. Leveeque (1870), 30 U.C.Q.B. 509.

(*j*.) is a keeper or inmate of a disorderly house, bawdy-house or house of ill-fame, or house for the resort of prostitutes;

(*j*)—*Houses of ill-fame.*]—Keeping the house does not necessarily import property, but may signify that share of government which the wife has in a family as well as the husband. R. v. Williams, 10 Mod. 63; R. v. Dixon, 10 Mod. 335; R. v. Warren (1888), 16 O.R. 590.

Though the charge is general, yet at the trial evidence may be given of particular facts, and the particular time of doing them. Witnesses who speak simply to a general reputation without being able to point to anything particular, may easily attribute the character of a common bawdy house or a house of ill-fame to a house to which, however irregular may be the life of its inmates, the law does not affix that character. R. v. St. Clair (1900), 3 Can. Cr. Cas. 551 (Ont.).

A conviction for that the accused was on April 21 "and on divers other days and times during the month of April" the keeper of a disorderly house, based upon an information in like terms laid on April 29, is bad, because it may be read as inclusive of an offence committed subsequently to the laying of the information, and including the date of the conviction, as to which the prisoner was not charged on her trial before the convicting magistrate. R. v. Keeping (1901), 4 Can. Cr. Cas. 494 (N.S.).

It was held in R. v. Keeping (1901), 4 Can. Cr. Cas. 494, per Weatherbe, J. (N.S.), that to give jurisdiction to a justice to punish on summary conviction the keeper of a disorderly house under the vagrancy clauses of the Code (secs. 207 and 208), the information must charge that the accused is a loose, idle or disorderly person or vagrant (sec. 208), and that it is not sufficient to charge simply that the person is a keeper of a disorderly house, although that fact constitutes the person a loose, idle or disorderly person or vagrant, by virtue of sec. 207. It may be doubted whether that view is correct, as by sec. 558 (2) an information may be either in the Code form (*C*), or to the like effect.

A conviction should not be made upon a charge of keeping, or being an inmate of, a bawdy house upon evidence of general reputation only, and the prosecution should be required to produce proof of acts or conduct from

which the character of the house may be inferred. R. v. St. Clair (1900), 3 Can. Cr. Cas. 551 (Ont. C.A.).

The conduct and statements of the inmates of an alleged bawdy house at the time of their arrest therein may properly be proved in support of the charge. Ibid.

Where the "keeper" is charged, the punishment may be, (*a*) on summary conviction before a justice, fine of $50 or six months' imprisonment, or both; (*b*) on summary trial under sec. 783, fine $100 or six months' imprisonment, or both (Code sec. 788); (*c*) on trial under indictment, one year's imprisonment (Code sec. 198) or a fine in discretion, or both (Code sec. 958 as amended in 1900).

A charge of "keeping a bawdy house for the resort of prostitutes" charges one offence only although keeping a bawdy house is itself an offence and so by virtue of sub-section (*j*) is the keeping of a house for the resort of prostitutes. R. v. McKenzie, 2 Man. R. 168.

(*k*.) is in the habit of frequenting such houses and does not give a satisfactory account of himself or herself; or

(*k*) —*Frequenters of houses of ill-fame.*]—Persons may be able to give the most satisfactory account of themselves although they may be in the habit of frequenting such houses. Arscott v. Lilley (1886), 11 O.R. 153, 181, 14 A.R. 283; R. v. Levecque, 30 U.C.Q.B. 509. As said by Wilson, C.J., in the former case:—"They may go to preach to, or to admonish the inmates, to visit them in sickness, to acquire statistical information, or for police purposes, or for the discovery of crime or criminals or their apprehension, or the recovery of stolen goods, or for the collection of rent or debts." 11 O.R. p. 181.

A conviction for being an *unlawful* frequenter is not good, it should be for being an *habitual* frequenter. R. v. Clark (1883), 2 O.R. 523.

(*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. ch. 157, sec. 8.

(*l*)—*Supported by prostitution.*]—A woman who is kept by a married man and who surrenders herself to sexual intercourse with him alone, does not come under the purview of sub-section (*l*). R. v. Rehe (1897), 1 Can. Cr. Cas. 63 (Que.).

In Gareau's case, Que. (cited 1 Can. Cr. Cas. 66) a woman had been convicted as a vagrant for having kept for more than three months a disorderly house, for the purposes of prostitution with a man who was not her husband and who paid her; and on a writ of habeas corpus the Court of Queen's Bench at Montreal unanimously held that the resorting to her room by only one man did not constitute it a disorderly house, and that her illicit intercourse with one man alone did not constitute prostitution within the meaning of the paragraph, and the conviction was consequently quashed.

*Supported by gaming or crime.*]—The evidence on a charge of vagrancy under Cr. Code 207 on the ground that the accused had for the most part supported himself by gaming and crime 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. R. v. Riley (1898), 2 Can. Cr. Cas. 128.

If the accused resides for a portion of the year with his parents at their request, they being able and willing to provide for his support, a conviction for vagrancy under Cr. Code 207 (*a*) because "not having had any visible

means of maintaining himself he had lived without employment" should be quashed. Ibid.

Semble, although it may appear that part of the money by which the accused is supported with his parents had been acquired by him by his gaming, etc., prior to the time of the offence charged, and that the accused while so resident with his parents idled away his time in places of public resort, such does not justify a conviction for vagrancy. Ibid.

An accused person was summarily convicted under 32-33 Vict. (Can.), ch. 28, sec. 1, of being "a person, who, having no peaceable profession or calling to maintain himself by, but who does for the most part support himself by crime and then was a vagrant," etc. The evidence shewed that the defendant did not support himself by any peaceable profession or calling and that he consorted with thieves and reputed thieves, but the witnesses did not positively say that he supported himself by crime. It was held that it was not to be inferred that the defendant supported himself by crime; that to sustain the conviction there should have been statements that witnesses believed he got his living by thieving or by aiding and acting with thieves or by such other acts and means as shewed he was pursuing crime. R. v. Organ, 11 Ont. Prac. 497, per Adam Wilson, C.J.

It is not to be assumed that because the accused has no visible occupation and is greatly addicted to gambling that the gambling contributes mainly to his support. R. v. Davidson, 8 Man. R. 325.

*(Amendment of 1894).*

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.

*(Amendments of 1894 and 1900).*

**208. Penalty for vagrancy.**—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.

*(Amendment of 1900).*

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.

*Vagrancy.*]—Vagrancy is not an indictable offence, but loose and idle persons were liable at common law to be apprehended and bound over for their good behaviour, and were liable to summary proceedings before justices of the peace under various early statutes in England. Crankshaw's Crim. Code, 2nd ed., p. 210. Then under the Code, and under the Revised Act respecting Public Morals, R.S.C. 1886, ch. 157 (sec. 8), from which the vagrancy clauses are derived, "inmates" as well as "keepers" of bawdy houses were made subject to summary prosecution as vagrants, and likewise any person who is an habitual frequenter of a bawdy house and who, on being asked by a peace officer to give an account of himself or herself when

found there, fails to give a satisfactory account. R. v. Levesque, 30 U.C. Q.B. 509; R. v. Clark, 2 Ont.R. 523; R. v. Arscott, 9 Ont.R. 541; Arscott v. Lilley, 11 Ont.R. 153.

*Summary trial of bawdy house cases.*]—Although secs. 782 and 783 appear under the general heading given to Part LV., *i.e.* "Summary trial of indictable offences," the inclusion therein of the offences of being an inmate of a bawdy house or being an habitual frequenter of same, must be taken as referring to the vagrancy clauses, secs. 207 and 208, and as providing an alternative procedure for the enforcement of those sections as well under the "summary trials" procedure, Part LV., as under the procedure by "summary convictions by justices" (Part LVIII.), as there are no other sections of the Code dealing with "inmates" and "frequenters."

It is submitted that the judicial officers empowered by sec. 782 to hold summary trials are given absolute jurisdiction to summarily try the offences of being an inmate or habitual frequenter of a bawdy house (sec. 784), whether or not such officers are constituted justices of the peace under their Provincial laws, and that the penalty for such offenders is limited to that imposed by sec. 208. The contrary has, however, been held by Ritchie, J., of the Supreme Court of Nova Scotia, in The King v. Roberts (1901), 4 Can. Cr. Cas. 253.

In that case it was held that the extended jurisdiction by which magistrates and certain other functionaries are empowered to summarily try that and other offences under Part LV. of the Criminal Code, and to impose imprisonment up to six months and a fine not exceeding, with costs, $100, is not restricted as to the offence of being an inmate of a house of ill-fame by the fact that, if the accused had been prosecuted before such magistrate in his capacity of justice of the peace, under the "summary convictions" clauses for the similar offence of being a "vagrant" by reason of being such inmate, the fine could not have exceeded $50 in addition to six months' imprisonment. R. v. Roberts (1901), 4 Can. Cr. Cas. 253 (N.S.).

The offence of keeping a common bawdy-house may be proceeded with by indictment under sec. 198, which authorizes one year's imprisonment therefor; or proceedings may be taken under the "Summary Trials" clauses, secs. 783 and 784, the latter section giving to the magistrate under Part LV. an absolute jurisdiction in respect of that offence, independently of the consent of the accused. Such magistrate proceeding under sec. 784 may impose imprisonment with or without hard labour for any term not exceeding six months or may impose a fine not exceeding with the costs in the case, $100, or to both fine and imprisonment not exceeding such sum and term; and such fine may be levied by warrant of distress or the person convicted may be condemned, in addition to any other imprisonment on the same conviction, to be committed for a further term not exceeding six months unless such fine is sooner paid. Sec. 788. These provisions are in addition to the special powers given by sec. 785 to police and stipendiary magistrates of cities and incorporated towns, and to recorders exercising judicial functions, authorizing them to try any offence for which in Ontario the accused might be tried by a Court of General Sessions and to impose the same punishment as might be imposed by that court, but where the magistrate has jurisdiction only by virtue of sec. 785 no person shall be summarily tried thereunder without his consent. Sec. 785 (3), added by 63-64 Vict., ch. 46, and in force from January 1, 1901. The effect of sec. 785 appears to be that the magistrate having authority under it may, without the consent of the accused, try the offence of keeping a bawdy-house but is then restricted to the penalty provided by sec. 788; but if the trial be with the consent of the accused, the latter preferring to consent rather than defend a like charge by indictment before a court and jury, sec. 788 will not then apply and the punishment may be as onerous as could be imposed on indictment under sec. 198. In the Province of Ontario the

powers conferred by sec. 785 may also be exercised by a police or stipendiary magistrate " in any county district or provisional county in such province. Sec. 785 (1).

*Summary conviction.*]—This section only applies to authorize six months' imprisonment when imposed as the substantive punishment on summary conviction for keeping a bawdy-house, and not as a means of enforcing payment of a fine. R. v. Stafford, 1 Can. Cr. Cas. 239 (N.S.).

If a fine be imposed for an offence under this section either as the sole punishment or with the addition of imprisonment for a term not exceeding six months, the justice may by his conviction after adjudging payment of the fine order and adjudge that in default of payment thereof the defendant be imprisoned for any period not exceeding three months unless the fine and the expenses of conveying the defendant to gaol under the commitment for such default are sooner paid. Sec. 872 (*b*).

Instead of directing imprisonment on default of payment of the fine forthwith or within a limited time, the justice may, by his conviction, order and adjudge that on such default, the penalty shall be levied by distress and, if sufficient distress cannot be found, that the defendant be imprisoned for any period not exceeding three months unless the penalty *and* the expenses of the distress *and* of conveying the defendant to gaol are sooner paid. Sec. 872 (*a*).

If the justice making a summary conviction adjudges a pecuniary penalty and a distress to realize same, and in default of sufficient distress that the defendant be imprisoned, the costs of the distress and of conveying the defendant to gaol are not in the discretion of the justice, but must be included in the formal conviction. R. v. Vantassel No. 1 (1894), 5 Can. Cr. Cas. 128.

The formal conviction may provide under sec. 872 (*a*) for the payment of the costs both of the distress and of conveying to gaol, although the minute of conviction does not include the costs of distress but merely directs imprisonment unless the penalty and costs and the costs of conveying to gaol are sooner paid. Ibid.

And the omission of a provision for the costs of distress and conveying to gaol from the formal conviction will invalidate the conviction. R. v. Vantassel (No. 2) (1894), 5 Can. Cr. Cas. 133.

*Excluding public from court room.*]—At the trial of any person charged with an offence under paragraphs (*i*), (*j*) and (*k*), of sec. 207, 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. Sec. 550A.

*Search warrants for vagrants.*]—Section 576 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.

*Commitment to house of industry, etc.*]—Sub-section 4 of sec. 8 of the Revised Act respecting Public Morals R.S.C. 1886, c. 157, remains in force. (Code sec. 981 and schedule 2). It is as follows:—" 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, workhouse or reformatory prison."

# TITLE V.

## OFFENCES AGAINST THE PERSON AND REPUTATION.

### PART XVI.

### DUTIES TENDING TO THE PRESERVATION OF LIFE.

SECT.



---

**209. Duty to provide the necessaries of life.**—Every one who has charge of any other person unable, by reason 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 to supply necessaries.*]—A person, who has the necessary means to procure medical aid for a child in his care or charge, who is, to the knowledge of such person, in a dangerous state of health, and for whom medical aid and medicine were such essential things, that reasonably careful persons would have provided them for children in their care, is bound to do so, and if the jury find that the death of the child was caused or accelerated by such want of medical aid, such person is guilty of manslaughter. It makes no difference that such person believes that to call in medical aid would be wrong, as being contrary to the teaching of the Bible, or as shewing want of faith. R. v. Senior, [1899] 1 Q.B. 283.

In a recent British Columbia case the prisoner, an elder of the sect known as Zionites, was indicted for aiding and abetting and counselling in his actions one John Rogers, who neglected to provide two of his young children under six years of age with medical attendance and remedies when sick with diphtheria. Both children died. The finding at the trial was that the prisoner knew that the children had diphtheria and that he knew that it was a dangerous and contagious disease. It was also found that the ordinary remedies would have prolonged their lives and in all probability would have resulted in their complete recovery, and the prisoner was convicted and sentenced to three months' imprisonment. On a case reserved it was held that medical attendance and remedies are necessaries within the meaning of Code secs. 209 and 210 and also at common law, and that anyone legally liable to provide such is criminally responsible for neglect to do so. R. v. Brooks (1902), 22 C.L.T. 105 (B.C.), per Walkem, Irving and Martin, JJ. Conscientious belief that it is against the teachings of the Bible and therefore wrong to have recourse to medical attendance and remedies is no excuse. Ibid.

Although it is shewn that proper medical aid might have saved or prolonged the child's life and that it would have increased the chances of recovery but that it might have been of no avail, a conviction for manslaughter is not sustainable where there is no positive evidence that the death was caused or accelerated by the neglect to provide medical aid. R. v. Morby, 8 Q.B.D. 571.

If a person having the care and custody of another who is helpless, neglects to supply him with the necessaries of life, and thereby causes or accelerates his death, he was guilty of a criminal offence even before the statute. R. v. Nasmith (1877), 42 U.C.Q.B. 242. But if a person over the age of sixteen (see sec. 211) and having the exercise of free will, chooses to stay in a service where bad food and lodging are provided and death is thereby caused, the master is not criminally liable. R. v. Charlotte Smith, 10 Cox 94.

If the neglect was premeditated and there has been a deliberate omission to supply food to the helpless person in the custody or charge of the accused and death results from the omission, it is murder. R. v. Condé, 10 Cox C.C. 547; R. v. Bubb, 4 Cox C.C. 457; R. v. Self, 1 Leach 137; but if by gross neglect and without deliberate intent, the offence is only manslaughter. R. v. Instan, [1893] 1 Q.B. 450; R. v. Senior, [1899] 1 Q.B. 283.

If a grown-up person chooses to undertake the charge of a human creature, helpless either from infancy, simplicity, lunacy or other infirmity, he is bound to execute that charge without wicked negligence; and if a person who has chosen to take charge of a helpless creature lets it die by wicked negligence that person is guilty of manslaughter. R. v. Nicholls, 13 Cox C.C. 75. In such a case mere negligence will not establish the offence of manslaughter; there must be wicked negligence, that is, negligence so great as to satisfy a jury that the prisoner had a wicked mind in the sense that he was reckless and careless whether the creature died or not. Ibid, per Brett, J.

If the death of an apprentice labouring under disease is caused by want of care of and harsh treatment by the master who has charge of him the master is guilty of murder. R. v. Squire, 3 Russ. Cr. 6th ed. 13.

The master is not bound to provide medicine and attendance on his servant while such servant remains under his roof as part of the family. Winnall v. Adney, 3 B. & P. 247; unless in the case of an apprentice. R. v. Stokes, 8 C. & P. 153.

A young unmarried woman being about to be confined returned to the house of her mother and stepfather. There she was taken in labour during her stepfather's absence, and the mother did not take ordinary care to procure the assistance of a midwife though she could have got one had she

wished to do so. In consequence of such want of assistance the daughter died in her confinement. There was no evidence that the mother had any means of paying for the midwife's services. It was held under these circumstances that there was no legal duty on the part of the mother to call in a midwife and consequently there was no such breach of duty as to render her liable to be convicted of manslaughter. R. v. Shepherd, L. & C. 147, 31 L.J.M.C. 102.

The children of any old, blind, lame, infirm, or other person not able to work, shall, if of sufficient ability, at their own charge, relieve and maintain such parent. 43 Eliz. ch. 2. The Civil Code of Quebec, article 166, enacts that: "Children are bound to maintain their father, mother, and other ascendants, who are in want."

*Necessaries for wife or child.*]—See sec. 210.

*Servants or apprentices under sixteen years.*]—See sec. 211.

*Permanently injured.*]—See note to sec. 210.

*Punishment.*]—For murder, see sec. 231; manslaughter sec. 236; other cases of neglect under sec. 209, three years' imprisonment, sec. 215.

**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.

(*Amendment of 1900*).

3. In this section the word "guardian" has the same meaning as, under section 186 A, it has in sections 183 and 186.

*Head of a family.*]—A person who engages the services of a child under sixteen years, placed out with him by his legal guardian under a contract for the child's services for a fixed period, whereby the party with whom he is placed engages to furnish the child with board, lodging, clothing, and necessaries, is not as to such child a "guardian or head of a family" so as to become criminally responsible as such, under sec. 210, for omitting to provide "necessaries" to such child while a member of his household. The relationship in such case is that of master and servant, and comes within the provisions of sec. 211, under which the master is criminally responsible only in respect of a failure to provide "necessary food, clothing, or lodging." R. v. Coventry, 3 Can. Cr. Cas. 541. Section 211 of the Code does not impose a criminal responsibility upon the master to provide the servant with medical attendance or medicine, and, *semble*, per Rouleau, J., medical aid is not within the term "necessaries" under sec. 210. Ibid; but see note to sec. 209.

*Proof of age.*]—In order to prove the age of a boy, girl, child or young person for the purpose of this and the next section the following shall be sufficient prima facié 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. Sec. 710A.

*Without lawful excuse.*]—It must be shewn that the parent or guardian was in the actual possession of means to provide for the child. R. v. Saunders, 7 C. & P. 277; R. v. Edwards, 8 C. & P. 611; R. v. Chandler, Dears. 453; and see R. v. Robinson (1897), 1 Can. Cr. Cas. 28. The mere fact that he might have obtained such means by application to a relief officer is not sufficient. R. v. Chandler, Dears. 453; R. v. Rugg, 12 Cox C.C. 16.

It must also be shewn that the child was unable to provide for himself. R. v. Friend, R. &. R. 20.

*Permanently injured.*]—It is purely a question of fact whether the acts proved are such that the health of the person is likely to be permanently injured by reason thereof; and the words "permanently injured," as here used, have no technical meaning. R. v. Bowman (1898), 3 Can. Cr. Cas. 410 (N.S.).

On a case reserved upon a conviction for failing to supply necessaries to a wife whereby her health is likely to be permanently injured, the conviction should be affirmed, if there is some evidence from which an inference may be drawn that such injury was likely to result from the non-supplying of necessaries. R. v. McIntyre (1898), 3 Can. Cr. Cas. 413 (N.S.).

Where a child's toes were so badly frozen, through the neglect of the person in whose charge the child was, that they had to be amputated, it was held in the Territories that the court should not without expert evidence upon the effect of the loss of the toes infer that the child's health had thereby been or was likely to be "permanently injured," or that his life had thereby been endangered. R. v. Coventry, 3 Can. Cr. Cas. 541 (N.W.T.).

*Non-support of wife.*]—It is necessary to prove that the defendant is the husband of the prosecutrix, that the wife was in need of food, clothing or lodging, and that the husband omitted to provide the same. R. v. Nasmith (1877), 42 U.C.Q.B. 242. Under the former law it was necessary to shew that the accused wilfully and without lawful excuse refused or neglected to provide (32-33 Vict., ch. 20, sec. 25), and under it an ability to perform was necessary to constitute a neglect. R. v. Ryland, L.R. 1 C.C.R. 99. And it seems to be still necessary for the prosecution to give evidence of his ability in order to shew that the omission was without lawful excuse.

Evidence is admissible, as tending to shew a lawful excuse, of an agreement between husband and wife at time of marriage that she should be supported as before the marriage and not by him until he could earn sufficient means for the maintenance of both. Such evidence is admissible although the contract alone may not furnish an answer to the charge. R. v. Robinson (1897), 1 Can. Cr. Cas. 28 (Ont.).

The prisoner may have become possessed of ample means since his marriage, and the offence being a public one cannot be met by a mere agreement between the husband and wife. Ibid, per Street, J.

A present inability to support his wife may be proved by the accused by way of defence. Ibid.

The defendant may be convicted notwithstanding that his wife has in consequence of the neglect to supply her with necessaries left him, taking with her a small sum of money belonging to him. R. v. Pennock (1898), 18 C.L.T. 79.

Where the complainant in a charge of non-support of wife had been previously married, but had always lived apart from her first husband, and swore to having heard two years before the second marriage that her husband was dying in a foreign country, and that about a year after her second marriage she again heard that her husband was dead, such was held to be evidence to go to the jury to prove that her first husband had died before her marriage to the defendant. R. v. Holmes (1898), 2 Can. Cr. Cas. 131.

In R. v. Bissell (1883), 1 O.R. 514, previous to the Canada Evidence Act, 1893, it was held that the evidence of a wife is inadmissible in the prosecution of her husband for refusal to support her under 32-33 Vict., ch. 20, sec. 25. Under sec. 4 of the Canada Evidence Act the wife of the person charged with any offence under the Code is a competent witness, with the exception that she is incompetent as to the disclosure of any communication made to her by her husband during their marriage.

**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.

*Master and servant.*]—This and the preceding section originated in 32-33 Viet. (Can.), ch. 20, sec. 25, adapted from the Imperial Statute 24 & 25 Viet., ch. 100, s. 26. Under 32-33 Viet., the gist of the offence was the wilfully and without lawful excuse refusing or neglecting to provide. R. v. Nasmith (1877), 42 U.C.Q.B. 242. The words of the Code constitute the mere omission an offence, if without lawful excuse.

This section does not impose a criminal responsibility upon the master to provide the servant with medical attendance or medicine, and, semble, per Rouleau, J., medical aid is not within the term "necessaries" under Cr. Code 210. R. v. Coventry (1898), 3 Can. Cr. Cases 541.

The court should not, without expert evidence upon the effect of the loss of a child's toes resulting from exposure to cold, and their consequent amputation, infer that the child's health had thereby been or was likely to be "permanently injured," or that his life has thereby been endangered. Ibid.

An indictment did not lie against a master at common law for not providing sufficient food and sustenance for a servant, whereby the servant became sick and emaciated, unless it alleged that the servant was of tender years and under the dominion and control of the master. R. v. Friend, Russ. & Ry. 20; R. v. Ridley, 2 Camp. 650. The reason of the restriction is, that if the servant be not of tender years, he may if not provided with proper nourishment remonstrate, and, if necessary, leave the service. R. v. Nasmith (1877), 42 U.C.Q.B. 242, 245. The present section does not appear to have changed the law in that respect except in fixing the age limit at sixteen.

*Without lawful excuse.*]—On a charge against a master for neglecting to supply food to his apprentice it must be shewn that the master was in the actual possession of means to provide for him. R. v. Saunders, 7 C. & P. 277; R. v. Edwards, 8 C. & P. 611; R. v. Chandler, Dears. 453, 6 Cox, C.C. 519. The mere fact that he might have obtained such means by application to a relief officer is not sufficient. R. v. Chandler, Dears, 453; R. v. Rugg, 12 Cox C.C. 16.

*Proof of age.*]—See note to last preceding section.

**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.

*Surgical or medical treatment.*]—A medical man must, at his peril, use proper skill and caution in administering a poisonous drug. R. v. Macleod, 12 Cox C.C. 534.

If a party having a competent degree of skill and knowledge, whether a licensed physician or not, makes an accidental mistake in his treatment of a patient and the patient's death results from the mistake, such party is not thereby guilty of manslaughter; but if, where proper medical assistance can be had, a person totally ignorant of the science of medicine takes on himself to administer a violent and dangerous remedy to one labouring under disease, and death ensues in consequence of that dangerous remedy having been so administered, then he is guilty of manslaughter. R. v. Webb, 2 Lewin 196, 1 M. & Rob, 405.

It may be left to the jury to say first, whether death was occasioned or accelerated by the medicines administered, and if they find that it was, then the jury may be instructed that the prisoner is guilty of manslaughter if they think that in so administering the medicine he acted with a criminal intention or from very gross negligence. Ibid; R. v. Chamberlain, 10 Cox C.C. 486.

Evidence cannot be gone into, on either side, of former cases treated by the prisoner, but the opinion of experts may be given as to the treatment which the evidence shews was administered in the case in question. R. v. Whitehead, 3 C. & K. 202; Archbold Cr. Plead. (1900), 755.

On an indictment against a medical man for manslaughter by administering poison by mistake for some other drug, it is not sufficient for the prosecution to shew merely that the prisoner, who dispensed his own drugs, supplied a mixture which contained a large quantity of poison; the prosecution must also shew that this happened through the gross negligence of the prisoner. R. v. Spencer, 10 Cox C.C. 525.

A woman practising "Christian science" and not called in as a medical attendant was held not guilty of manslaughter where the only treatment by her was to sit silently by the patient, a child ill of diphtheria, although the child's health might have been saved or prolonged had proper medical aid been called in. R. v. Beer, 32 C.L.J. 416. But the aiding and abetting the person charged with the duty of providing necessaries is punishable in like manner as the principal offence. Secs. 61, 209, 210. R. v. Brooks (1902), 22 Can. L.T. 105 (B.C.).

**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.

*Criminal liability of corporation.*]—A corporation is not subject to indictment upon a charge of any crime the essence of which is either personal criminal intent or such a degree of negligence as amounts to a wilful incurring of the risk of causing injury to others. R. v. Great West Laundry Co. (1900), 3 Can. Cr. Cas. 514 (Man.).

Secs. 213 and 220, as to want of care in the maintenance of dangerous things, do not extend the criminal responsibility of corporations beyond what it was at common law. Ibid.

Although a corporation cannot be guilty of manslaughter, it may be indicted, under Cr. Code sec. 252, 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. R. v. Union Colliery Co. (1900), 3 Can. Cr. Cas. 523 (B.C.) affirmed, 4 Can. Cr. Cas. 400, 31 Can. S.C.R. 81.

Under sec. 213 a corporation may be indicted for omitting, without lawful excuse, to perform the duty of avoiding danger to human life from anything in its charge or under its control. The fact that the consequence of the omission to perform such duty might have justified an indictment for manslaughter in the case of an individual is not a ground for quashing the indictment. Union Colliery Co. v. R. (1900), 4 Can. Cr. Cas. 400 (S.C. Can.).

As the Criminal Code provides no punishment for the offence as against a corporation, the common law punishment of a fine may be imposed on a corporation indicted under it. Ibid.

Where deceased was run over by a railroad car and died from his injuries a few hours afterwards, the statement of the deceased, made immediately after he was run over in answer to a question as to how it happened, was held admissible. Armstrong v. Canada Atlantic (1901), 2 O.L.R. 219; Thompson v. Trevanion (1693), Skin. 402; Aveson v. Kinnaird (1805), 6 East 188, at p. 193; Rex v. Foster (1834), 6 C. & P. 325.

*Evidence.*]—See note to sec. 191.

**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.

*Negligent omission by medical practitioner.*]—A person acting as a medical man is not criminally responsible for the death of a patient occasioned by his treatment, unless his conduct is characterized either by gross ignorance of his art, or by gross inattention to his patient's safety. R. v. St. John Long, 4 C. & P. 398; Hunter v. Ogden, 31 Q.B. 132.

*Dangerous medical treatment.*]—See sec. 212.

*Bodily injury.*]—By sec. 252 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.

*(Amendment of 1893).*

**215. Neglecting duty to provide necessaries.**—Every one is guilty of an indictable offence and liable to three years' imprisonment 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.

*Form of indictment.*]—An indictment under the former law 32-33 Vict., ch. 20, sec. 25, was held sufficient where it was in the following form:—"for that he (the defendant) on the (date) at the city of Montreal, then being the husband of one B.D., his wife, and then being legally liable to provide for the said B.D. as his wife as aforesaid necessary food and clothing and lodging, unlawfully, wilfully and without lawful excuse did neglect and refuse to provide the same against the form, etc." R. v. Smith (1879), Ramsay's Cases (Que.) 190. The indictment in that case was held to be sufficient as being in the words of the statute, without an allegation of capacity of providing and without alleging that the neglect or refusal was of a nature to endanger her life or to permanently injure her health. Ibid.

See also notes to secs. 209, 211, ante.

**216.—Abandoning children under two years of age.**—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. ch. 162, sec. 20.

*Evidence* ]—A woman who was living apart from her husband, and who had the actual custody of their child under two years of age brought the child to the door of the father's house telling him she had done so. He knowingly allowed it to remain lying outside his door for four hours in the night time and it was then removed by a constable. It was held that, although the father had not the actual custody and possession of the child, yet as he was bound by law to provide for it, his allowing it to remain where he did was an abandonment and exposure of the child by him whereby its life was endangered. R. v. White (1871), L.R. 1 C.C.R. 311, 40 L.J. M.C. 134.

And where the mother of a bastard child five weeks old put the child in a hamper and shipped the hamper as a goods parcel by railway a distance of four miles to the child's putative father who had told her, prior to the

child's birth, that if she sent it to him he would keep it, and the hamper was addressed for immediate delivery and was in fact delivered within an hour and a quarter from the time the mother left it, and the child died three weeks afterwards from causes not attributable to such conduct of the mother, yet it was held that she was properly convicted of abandoning and exposing the child whereby its life was endangered. R. v. Falkingham (1870), L.R. 1 C.C.R. 222, 39 L.J.M.C. 47.

*Proof of age.*]—See note to sec. 210.

**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. ch. 62, sec. 19.

A verdict for common assault is maintainable upon an indictment under this section. R. v. Bissonnette (1879), Ramsay's Cases (Que.) 190.

*Neglect to supply necessary food, etc.*]—See sec. 211.

PART XVII.

## HOMICIDE.

SECT.



---

**218. Homicide Defined.**—Homicide is the killing of a human being by another, directly or indirectly, by any means whatsoever.

*Homicide, excusable or justifiable.*]—Homicide, when not amounting to murder or manslaughter, is divided by Russell into two classes:—(1) Excusable; (2) Justifiable. 3 Russell Cr., 6th ed., 205.

Sec. 220, infra, divides the subject of homicide into:—(1) culpable homicide, which is sub-divided into two classes: (a) murder, (b) manslaughter; (2) homicide not culpable. The same section defines what is "culpable" homicide, and declares that homicide which is not culpable is not an offence. Excusable homicide is said to be of two sorts: Either per infortunium, by misadventure; or se et sua defendendo, upon a principle of self-defence.

The term excusable homicide imports some fault in the party by whom it has been committed; but of a nature so trivial that the law excuses such homicide from the guilt of felony, though in strictness it deems it to be deserving of some degree of punishment. It appears to be the better opinion that the punishment inflicted for this offence was never greater than a forfeiture of the goods and chattels of the delinquent or a portion of them. 3 Russell Cr., 6th ed., 205, 4 Bl. Com. 188. Then the practice arose of granting a pardon and writ of restitution as a matter of right in such cases upon payment of the expenses of suing them out; and to prevent this expense it became usual for judges to permit or direct a general verdict of acquittal where the death had notoriously happened by misadventure or in self defence. 4 Bl. Com. 188, 1 East P.C., ch. 5, sec. 8, Fost. 288.

By sec. 6 of the Offences against the Person Act, R.S.C. (1886), ch. 162 (repealed by the Code), it was provided that "no punishment or forfeiture shall be incurred by any person who kills another by misfortune or in his own defence, or in any other manner without felony." This was taken from 32-33 Vict. (Can.), ch. 20, sec. 7, a re-enactment of sec. 7 of the Imperial statute, 24-25 Vict., ch. 100. It was probably thought unnecessary to repeat that enactment in the Code, as sub-sec. (3) of sec. 220 declares that "homicide which is not culpable is not an offence."

*Homicide by misadventure.*]—Homicide by misadventure is where one doing a lawful act, without any intention of bodily harm, and using proper precaution to prevent danger, unfortunately happens to kill another person. 1 East P.C. 5, p. 221, and sec. 36, pp. 260, 261, Fost. 258, 1 Hawk. P.C., ch. 29, sec. 1. The act must be lawful; for if it be unlawful, the homicide will amount to murder or manslaughter, and it must not be done with intention of great bodily harm, for then the legality of the act, considered abstractedly, would be no more than a mere cloak or pretence, and consequently would avail nothing. The act must also be done in a proper manner and with due caution to prevent danger. 1 East P.C., ch. 5, sec. 36, p. 261, 3 Russell 206.

Thus, if people following their common occupations, use due caution to prevent danger, and nevertheless happen, unfortunately to kill any one, such killing will be homicide by misadventure. 1 Hale 472, 475, 1 Hawk. P.C. ch. 629, secs. 2 and 4. Thus, where a person, driving a cart or other carriage, happens to drive over another and kill him, if the accident happened in such a manner that no want of due care could be imputed to the driver, it will be accidental death, and the driver will be excused. Fost 263, 1 Hale 476. In a case where a person was riding a horse, and the horse, being whipped by some other person, sprang out of the road, and ran over a child and killed it, this was held to be misadventure only in the rider, though manslaughter in the person who whipped the horse. 1 Hawk. P.C., ch. 29, sec. 3.

Where parents, masters, and other persons having authority in foro domestico, give correction to those under their care, and such correction exceeds the bounds of due moderation, so that death ensues, the offence will be either murder or manslaughter, according to the circumstances; but if the correction be reasonable and moderate, and by the struggling of the party corrected, or by some other misfortune, death ensue, the killing will be only misadventure. 1 Hale 454, 473, 474, 4 Blac. Com. 182.

*Homicide in self-defence.*]—If the slayer has not begun to fight, or, having begun, endeavors to decline any further struggle and afterwards being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defence. 4 Bl. Com. 184.

If one comes to beat another or to take his goods as a trespasser, though the owner may justify a battery for the purpose of making him desist, yet if he kill him it will be manslaughter. 1 Hale P.C. 485, 1 East P.C. 272, 277; R. v. Bourne (1831), 5 C. & P. 120.

It is not essential that an actual felony should be about to be committed in order to justify the killing; if the circumstances are such as that after all reasonable caution the party suspects that the felony is about to be immediately committed, he will be justified in making the resistance. R. v. Levet, Cro. Cas. 538, Foster 299; See also secs. 45, 46 and 47.

**219. When a child becomes a human being.**—A child becomes a human being within the meaning of this Act when it has completely 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 a child is homicide when it dies in consequence of injuries received before, during or after birth.

*Killing unborn child.*]—A living child in its mother's womb or a child in the act of birth, even though such child may have breathed, is not a

"human being," and the killing of such child before it is born is not homicide. R. v. Enoch, 5 C. & P. 539; R. v. Wright, 9 C. & P. 754; R. v. Sellis, 7 C. & P. 850; Burb. Cr. Dig. 209.

But by sec. 271 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. And by sub-sec. (2) of the same section 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.

**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.

Code secs. 213 and 220 do not extend the criminal responsibility of corporations beyond what it was at common law. R. v. Great West Laundry Co. (1900), 3 Can. Cr. Cas. 514 (Man.).

**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.

Perjury or subornation of perjury committed in order to procure the conviction of a person for any crime punishable by death is a crime punishable with imprisonment for life. Sec. 146 (2).

**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.

If the death takes place after the expiration of a year and a day from the time the deceased was wounded, the law presumes that his death had proceeded from some other cause. 1 Hawk., ch. 23, sec. 90; 1 East P.C. 343.

The prisoner was convicted of manslaughter in killing his wife, who died on November 10, 1881. The immediate cause of her death was acute inflammation of the liver, which the medical testimony proved might be occasioned by a blow or a fall against a hard substance. About three weeks before her death the prisoner had knocked his wife down with a bottle; she fell against a door and remained on the floor insensible for some time; she was confined to her bed soon afterwards and never recovered. Evidence was given of frequent acts of violence committed by the prisoner upon his wife within a year of her death, by knocking her down and kicking her in the side. On questions reserved, whether the evidence was properly received of assaults and violence committed by the prisoner upon the deceased prior to the date of death or prior to the occasion on which he had knocked her down with the bottle, and whether there was any evidence to leave to the jury to sustain the charge, it was held by the Supreme Court of Canada, affirming the judgment of the Supreme Court of New Brunswick, that the evidence was properly received and that there was evidence to submit to the jury that the disease which caused her death was produced by the injuries inflicted by the prisoner. Theal v. The Queen, 7 Can. S.C.R. 397.

**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.

To wilfully frighten a child or sick person as a result of which such child or sick person dies is culpable homicide. See. 220.

**224. Acceleration of death.**—Every one who, by an 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.

A., a practising physician who kept a hospital for the sick, on three successive days forced the person of B. a patient then under his control in such hospital, she being in a condition of health that rendered sexual intercourse dangerous even with her consent. B. died on the sixth day after the last occasion on which she had been ravished and her death was hastened if not caused thereby. It was held that there was sufficient evidence to justify A.'s surrender under the Ashburton treaty for extradition on a charge of murder. Re Weir, 14 Ont. R. 389.

A. inflicts bodily injury on B. who at the time is so ill that she could not possibly have lived more than six weeks if she had not been struck. In consequence B. dies earlier than she otherwise would. A. is guilty of culpable homicide. R. v. Fletcher, 1 Russ. Cr. 703.

**225. Causing death which 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. Causing injury the treatment of which causes death.**—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.

*Bodily injury resulting in death.*]– In R. v. Holland, 2 Moo. and Rob. 351, A. had assaulted B. and injured B.'s finger. B. was advised by a surgeon to allow it to be amputated but refused to do so, and lockjaw resulted causing B.'s death. It was held that these facts constituted culpable homicide. But quære whether this would be so under this section, as it could hardly be said that an injury to the finger was "of itself of a dangerous nature," i.e., dangerous to life. Cf. R. v. Coventry (1898), 3 Can. Cr. Cas. 541.

Where in a duel 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 guilty of culpable homicide. R. v. Pym, 1 Cox C.C. 339.

PART XVIII.

## MURDER, MANSLAUGHTER, ETC.

SECT.



---

**227. What is 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 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.

*Murder at common law.*]—The common law definition of murder is—the killing any person under the King's peace, with malice prepense or aforethought, either express or implied by law. 3 Inst. 47, 51; 1 Hawk. P.C. c. 31, s. 3; Fost. 256.

Malice may be either (1) express, or (2) implied by law. Express malice is when one person kills another with a sedate deliberate mind and formed design; such formed design being evidenced by external circumstances discovering the inward intention, as lying in wait, antecedent menaces, former grudges, and concerted schemes to do the party some bodily harm. 1 Hale 451.

Malice is implied by law from any deliberate cruel act committed by one person against another, however sudden, 1 East P.C. 215; 3 Russell Crim. (1896) 2. And it is a general rule that all homicide is presumed to be malicious until the contrary appears from circumstances of alleviation, excuse or justification. R. v. Greenacre (1837), 8 C. & P. 35.

And where one is killed in consequence of such wilful act as shews the person by whom it is committed to be an enemy of all mankind, the law will infer a general malice from such depraved inclination to mischief. 1 Hale 474. If a person driving a cart or other carriage happen to kill and it appear that he saw or had timely notice of the mischief likely to ensue and yet drove on, it will be murder. 1 Hale 475; Fost. 263.

Where several persons resolve generally to resist all opposers in the commission of any breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays, they must, when they engage in such bold disturbances of the public peace, at their peril abide the event of their actions; and therefore if in doing any of these acts they happen to kill a man they are all guilty of murder. 1 Hawk. P.C. c. 31, s. 51. But, in order to make the killing by any, murder in all those who are confederated together for an unlawful purpose merely on account of the unlawful act done or in contemplation, it must happen during the actual strife or endeavour or at least within such a reasonable time afterwards as may leave it probable that no fresh provocation intervened. 3 Russ. Cr., 6th ed. 125. The fact must appear to have been committed strictly in prosecution of the purpose for which the party was assembled, and therefore if divers persons be engaged in an unlawful act, and one of them with malice prepense against one of his companions, finding an opportunity, kill him, the rest are not concerned in the guilt of that act, because it had no connection with the crime in contemplation. 1 Hawk. P.C. c. 31, s. 52; Jackson's Case, 9 St. Tr. (Harg.) 715.

*Provocation reducing offence to manslaughter.*]—See sec. 229 and note to same.

*Corpus delicti.*]—Corpus delicti in murder, is defined, as having two components, death as the result and the criminal agency of another as the means, and it is only where there is direct proof of one that the other can be established by circumstantial evidence. This ruling is an affirmance of the holding of Lord Hale (2 P.C. 290) that a conviction of murder or manslaughter cannot be had unless the fact be proved to be done or at least the body found dead. Where one is proven by direct evidence the other may be by circumstances, and in determining a question of fact upon a criminal trial from circumstantial evidence, the facts proved must not only be consistent with and point to the guilt of the prisoner, but must be inconsistent with his innocence.

*Finding the body.*]—It has been considered a rule that no person should be convicted of murder unless the body of the deceased has been found, and a very great judge says, "I would never convict any person of murder or manslaughter unless the fact were proved to be done, or at least the body be found dead." 2 Hale 290. Lord Hale only laid this down as a caution, not as a rule in every case. Per Maule, J., in R. v. Burton (1854), Dears.

C.C. 282. But this rule, it seems, must be taken with some qualifications; and circumstances may be sufficiently strong to shew the fact of the murder, though the body has never been found. 3 Russell Cr., 6th ed., 158. Thus, where the prisoner, a mariner, was indicted for the murder of his captain at sea, and a witness stated that the prisoner had proposed to kill the captain, and that the witness being afterwards alarmed in the night by a violent noise, went upon deck, and there observed the prisoner take the captain up and throw him overboard into the sea, and that he was not seen or heard of afterwards, and that near the place on the deck where the captain was seen a billet of wood was found, and that the deck and part of the prisoner's dress were stained with blood, the court, though they admitted the general rule of law, left it to the jury to say, upon the evidence, whether the deceased was not killed before his body was cast into the sea; and the jury being of that opinion, the prisoner was convicted, and the conviction being unanimously approved of by the judges, was afterwards executed. R. v. Hindmarsh (1792), 2 Leach 569.

And where the mate of a ship was seen to seize the captain from behind and throw him into the sea, and the captain fell, striking a boat, and leaving marks of blood upon it, but was never seen again, Archibald, J., allowed the case to go to the jury, and the prisoner was convicted of manslaughter. R. v. Armstrong (1875), 13 Cox C.C. 184.

But where upon an indictment against the prisoner for the murder of her bastard child, it appears that she was seen with the child in her arms on the road from the place where she had been at service to the place where her father lived about six in the evening, and between eight and nine she arrived at her father's without the child, and the body of a child was found in a tide-river, near which she must have passed in her road to her father's, but the body could not be identified as that of the child of the prisoner, and the evidence rather tended to shew that it was not the body of such child, it was held that she was entitled to be acquitted. The evidence rendered it probable that the child found was not the child of the prisoner, and with respect to the child, which was really her child, the prisoner could not by law be called upon either to account for it, or to say where it was, unless there were evidence to shew that her child was actually dead. R. v. Hopkins (1838), 8 C. & P. 591, Lord Abinger, C.B.; R. v. Cheverton (1862), 2 F. & F. 833, Erle, C.J.

*Post-mortem examination.*]—The medical practitioner should examine all the important organs for marks of natural disease and note down any unusual pathological appearances or abnormal deviations although they may at the time appear to have no bearing on the cause of death.

Mr. Clark Bell, in his 12th Amer. edition of Taylor's Medical Jurisprudence, 1897, page 23, says: "In medico-legal cases involving questions of life and death, the examination of the body cannot be too thorough and exhaustive; the omission of any one organ is a radical and sometimes a fatal defect. This was well illustrated in 1872 by two leading cases in the United States—that of Mrs. E. G. Wharton, charged with poisoning General Ketchum, and that of Dr. Paul Schoeppe, charged with poisoning Miss Steinnecke. In neither case was the post mortem sufficiently complete."

The body is inspected not merely to shew that a person has died as a result of the criminal act, but to prove that he has *not* died from any natural cause. Medical practitioners commonly give their attention exclusively to the first point, while lawyers, defending accused parties, very properly direct a most searching examination to the last mentioned point, i.e., the healthy or unhealthy state of those organs which are essential to life. If the cause of death is obscure after the general examination of the body, there is good reason for inspecting the condition of the spinal marrow. In certain obscure cases it may become necessary to institute a microscopic examination, especially of the brain and heart. Taylor's Medical Jurisprudence, 1897, 12th Am. Ed. 23.

In a trial for murder by committing an abortion resulting in the woman'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. It was held, that such last mentioned evidence was properly submitted to the jury. R. v. Garrow (1896), 1 Can. Cr. Cas. 246 (B.C.).

*Proving cause of death.*]—A question has sometimes been raised whether a prisoner can be convicted of murder where it is impossible for any evidence to be given of the cause of death, in consequence of the state in which the body was found, but it would seem that it is a question for the jury, taking all the circumstances into consideration, whether the death was caused by violence or not, and whether that violence was the act of the prisoner. Per Kennedy, J. R. v. Macrae, Northampton Winter Assizes, 1892, cited 3 Russ. Cr., 6th ed., 160.

On a trial for murder, in order to prove the state of the health of the deceased prior to the day of his death, a witness was asked in what state of health the deceased seemed to be when he last saw him, and he began to state a conversation which had then taken place between the deceased and himself on this subject; and Alderson, B., held that what the deceased said to the witness was reasonable evidence to prove his state of health at the time. R. v. Johnson (1847), 2 C. & K. 354.

*Dying declaration as evidence.*]—The principle upon which dying declarations are admitted as evidence is stated by Eyre, C.B., in the case of R. v. Woodcock, 1 Leach, C.C., 502, as follows:

"The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful consideration to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice."

A dying declaration is only admissible in criminal cases, and then only in cases of murder or manslaughter, and only where the death is the subject of the charge, and the circumstances of the death the subject of the declaration. R. v. Mead, 2 B. & C. 605. But the dying declaration of a person was admitted in a case in which the prisoner was being tried, not for murdering the declarant, but another person, by the administration of poison, but in the perpetration of that act he had also inadvertently poisoned the declarant. In that case the court held that the same act caused the death of one as the other, and that, it being all one transaction, the evidence was admissible. R. v. Baker, 2 M. & Rob. 53.

Where the deceased person stated at the time of being wounded that he could not live much longer and that he was bound to die, such was held sufficient evidence of a belief of impending death so as to make his dying declaration admissible testimony. State v. Ashworth (1898), 23 Sou. Rep. 270.

The fact of a person having received extreme unction according to the rites of the Roman Catholic Church is some evidence that she thought herself to be in a dying state. Carver v. U.S., 1897, 17 S.C.R. (U.S.), 228; Minton's case, cited in R. v. Howell, 1 Denison Crown Cases 1; and so also is the rejection by a dying man belonging to the Roman Catholic faith, of an offer to bring him a priest, some evidence to shew that he did not think himself in articulo mortis. R. v. Howell, supra.

Such declarations being necessarily ex parte, the prisoner is entitled to the benefit of any advantage he may have lost by the want of an oppor-

tunity for cross-examination. R. v. Ashton, 2 Lewin Crown Cas. 147. So it has recently been held by the Supreme Court of the United States that it is error to refuse to permit the defendant to prove by witnesses that the deceased made statements to them in apparent contradiction of her dying declaration, and tending to shew that defendant did not shoot her intentionally. Whether these statements were admissible as dying declarations or not is immaterial, since they were admissible as tending to impeach the declaration of the deceased, which had already been admitted. Carver v. U.S., 1897, 17 Sup. Ct. Rep. 228. A dying declaration by no means imports absolute verity. The history of criminal trials is replete with instances where witnesses, even in the agonies of death, have, through malice, misapprehension, or weakness of mind, made declarations that were inconsistent with the actual facts; and it would be a great hardship to the defendant, who is deprived of the benefit of a cross-examination, to hold that he could not explain them. Dying declarations are a marked exception to the general rule that hearsay testimony is not admissible, and are received from the necessities of the case, and to prevent an entire failure of justice, as it frequently happens that no other witnesses to the homicide are present. They may, however, be inadmissible by reason of the extreme youth of the declarant (R. v. Pike, 3 Car. & P. 598), or by reason of any other fact which would make him incompetent as an ordinary witness. They are only received when the court is satisfied that the witness was fully aware of the fact that his recovery was impossible, and in this particular the requirement of the law is very stringent. They may be contradicted in the same manner as other testimony, and may be discredited by proof that the character of the deceased was bad, or that he did not believe in a future state of reward or punishment. Carver v. U.S., supra; State v. Elliott, 45 Iowa, 486; Com. v. Cooper, 5 Allen, 495; Goodall v. State, 1 Or. 333; Tracy v. People, 97 Ill. 101; Hill v. State, 64 Miss. 431.

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 is admissible in evidence. R. v. Davidson (1898) 1 Can. Cr. Cas. 351 (N.S.).

In deciding the preliminary question as to whether the deceased was under a sense of impending death, so as to allow evidence of his dying declaration to be admitted, the trial judge must have regard to the whole of the surrounding circumstances including the nature and extent of the gun charge and the immediate result of the wound. Ibid.

A dying declaration is not admissible if there existed in the mind of the party making it a hope of recovery or a hope of escape from almost immediate death; but if there is a firm, settled expectation by deceased of impending death and no hope of recovery remaining in his mind, the declaration is admissible, although such belief was the result of panic and not well founded. The fact, that a person making a dying declaration subsequently entertains a hope of recovery, is irrelevant, except in so far as it may be evidence of his state of mind at the time of the declaration. R. v. Davidson (1898), 1 Can. Cr. Cas. 351 (N.S.); R. v. Hubbard, 14 Cox 565.

The rule as to the admissibility of dying declarations in evidence is thus stated in Taylor on Evidence, 6th ed., vol 1, p. 643: "It is not, however, necessary that the declarant should have *stated* that he was *speaking under a sense of impending death*, providing it satisfactorily appears, in any mode, that the declarations were really made under that sanction; as, for instance, if the fact can be reasonably inferred from the evident danger of the declarant, or from the opinions of the medical or other attendants stated to him, or from his conduct, such as settling his affairs, taking leave of his relations and friends, giving directions respecting his funeral, receiving extreme unction or the like. In short, all the circumstances of the case may be resorted to, in order to ascertain the state of the declarant's mind.

. . . . On the other hand, a firm belief that death is impending—by which is meant, not as was once thought, that it will almost immediately follow, but that it will happen shortly in consequence of the injury sustained—will suffice to render the statement evidence, though the sufferer may chance to linger on for some days, or even for two or three weeks. . . . In general, it is no objection to their admissibility that they" (the answers) were made in answer to leading questions, or obtained by earnest solicitations." Cited by Hagarty, C.J., in R. v. Smith (1873), 23 U.C.C.P. 312.

It is essential to the *admissibility* of these declarations, and it is a preliminary fact to be proved by the party offering them in evidence, that they were *made under a sense of impending death*; but it is not necessary that they should be stated at the time to be so made; it is enough if it satisfactorily appears, in any mode, that they were made under that sanction, whether it be expressly proved by the express language of the declarant, or be inferred from his evident danger, or the opinion of the medical or other attendants, stated to him, or from his conduct, or other circumstances of the case; all of which are resorted to in order to ascertain the state of the declarant's mind. Greenleaf on Evidence, 12th ed., vol. 1, p. 183, sec. 158. R. v. Smith (1873), 23 U.C.C.P. 312.

The court must be satisfied that whatever statement is admitted in evidence must be shewn by credible testimony to have been made in full belief of approaching death, with an abandonment of all hope of life. R. v. Sparham (1875), 25 U.C.C.P. 143, 154.

Prisoners G. and S. were indicted with the murder of B., the charge being that, the deceased being with child by the prisoner G., the prisoner S. had, at the request of G., attempted by the use of an instrument, to procure abortion, and had thereby caused the death of deceased. It was admitted that there was not sufficient evidence to connect the prisoners, or either of them, with the acts which caused the death of the deceased, unless it was the dying declaration of the deceased. Two declarations were made by the deceased, one upon the Thursday, the 24th, before her death on the 28th, and the other upon the Saturday, the 26th, of the same week. The statement made on the 24th commenced: "I am very ill: I have no hope whatever of recovery; I expect to die. She then narrated the facts, and then added: "If I die in this sickness, I believe it will have been caused by the operation performed on me by S. at the instigation of G. I make these statements in all truth, with the fear of God before my eyes, for I firmly believe that I am dying." On the 26th she was again examined, and the previous statement read over to her; she confirmed its truth in every respect, and added that she felt she was in the presence of God, and had no hope of recovery of any kind at the time; and, her attention being called to the expression "If I die," she said, "I had no doubt whatever that I was dying, and felt that I was dying, and did not by the form of the expression mean to doubt in any way that I was dying." It was held that both statements were admissible; that the mere use of the words, "If I die" would not alone defeat the emphatic declaration of abandonment of all hope on the same occasion; and that the second declaration was receivable in order to explain the first. R. v. Sparham (1875), 25 U.C.C.P. 143.

An objection that part of the statement was made in answer to a leading question is not sustainable. R. v. Smith (1873), 23 U.C.C.P. 312.

*Proof of Motive.*]—In every charge of murder where the act of killing is proved against the prisoner "the law presumeth the fact to have been founded in malice until the contrary appeareth." (Foster's Crown Law 255). At common law mere words or provoking actions or gestures expressing contempt or reproach, unaccompanied with an assault upon the person, did not reduce the killing from murder to manslaughter, though if immediately upon such provocation the party provoked had given the other a box on the ear, or had struck him with a stick, or other weapon *not likely to kill*, and had

unfortunately and contrary to his expectation killed him, it would only be manslaughter. R. v. McDowell (1865), 25 U.C.Q.B. 108; but see sec. 229 and note thereto.

To prove the alleged motive of securing life insurance moneys, in a trial for murder, evidence is properly admissible, as a part of the res gestæ of all applications for insurance made practically at the same time and forming parts of one transaction, although some of the applications were refused and no insurance effected thereupon. R. v. Hammond (1898), 1 Can. Cr. Cas. 373 (Ont.). But evidence of an attempt made some time previously by the accused to insure another person for the benefit of the accused is not admissible. R. v. Hendershott (1895), 26 Ont. R. 678.

All questions as to motive, intent, heat of blood, etc., must be left to the jury, and should not be dealt with as propositions of law. R. v. McDowell (1865), 25 U.C.Q.B. 108; R. v. Eagle, 2 F. & F. 827.

A trial would not appear to be fair if the prisoner, when defending himself for murder, is also called on for a contingent defence against charges for several alleged assaults in the course of several weeks, some of which may be open to contradiction, others to justification and others to mitigation. Per Erle, J., in R. v. Bird (1851), 5 Cox 1, 2 Den. Cr. Cas. 94; R. v. Ganes (1872), 22 U.C.C.P. 185-189.

In the case of a sudden quarrel, where the parties immediately fight, there may be circumstances indicating malice in the party killing, which killing will then be murder. R. v. McDowell (1865), 25 U.C.Q.B. 108.

*Flight as evidence.*]—The flight of the accused is competent evidence against him as having a tendency to establish his guilt. Wharton on Homicide, sec. 710; Hickory v. United States, 160 U.S. 408.

*Relevancy of other criminal acts.*]—In the case of Makin v. New South Wales (1894), A.C. 57, the prisoners had been convicted of the wilful murder of an infant child received from its mother by the prisoners for adoption and whose body had been found buried in the garden of a house occupied by him, and it was held by the Judicial Committee of the Privy Council that evidence that several other infants had been received from their mothers by the prisoners on like representations and on like terms, and that bodies of infants had been found buried in a similar manner in the gardens of several houses occupied by the prisoners, was relevant to the issue which had been tried by the jury, and was therefore admissible. The Geering Case (18 L.J.N.S.M.C. 215) which was approved of by the Judicial Committee, was one of arsenical poisoning, and Pollock, C.B., admitted evidence to shew that two sons of the prisoner, 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 with all of them being the same. It is noteworthy, however, that in the latter case the administration to all of the parties appears to have been contemporaneous and with preparations of food made in quantities for all of the four persons and distributed to them on their leaving the house to go to their work.

In R. v. Heeson (1878), 14 Cox C.C. 40, Lush, J., approved of and followed the decision in the Geering case and admitted evidence of both previous and subsequent deaths occurring under like circumstances and from similar symptoms, and held that where it was proved that a motive for the murder charged might exist from the fact of the prisoner having insured the life of the deceased, evidence might also be given upon the same indictment to shew an equal motive for the deaths of the others because of their having been similarly insured at the instance of the prisoner.

In Makin v. Attorney-General for New South Wales, [1894] A.C. 65, the law was expounded as follows: "It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused had been guilty of criminal acts other than those covered by the indictment, for the

purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

In Reg. v. Geering, 18 L.J. (M.C.) 215, the accused was charged with the murder of her husband by administering arsenic to him, and the Crown offered in evidence post mortem analysis of the contents of the stomach, etc., of the husband and two sons who had subsequently died, and a medical analysis of the vomit of another son, and also offered evidence that these four persons lived with the prisoner during their lives, and formed part of her family, and that she generally made tea for them and cooked their victuals. This evidence was objected to and received, not because it proved that the sons had been murdered by the prisoner, but merely because it proved that the death of the sons proceeded from the same cause as that of the husband, namely, arsenic, and because it had a tendency to prove that the death of the husband, whether felonious or not, was occasioned by arsenic.

In the recent case of R. v. Sternaman in Ontario, evidence was held admissible on a charge of murder by poisoning to shew the administration of the same kind of poison by the prisoner to another person, as proving intent. Evidence of similar symptoms of arsenical poisoning attending the death of prisoner's former husband following administration to him of food prepared by the prisoner is evidence to shew intent as regards a charge of arsenical poisoning of a second husband on evidence of arsenical poison of the latter and of similar preparation of food by the prisoner and her attendance on her husband during his illness. R. v. Sternaman (1898), 1 Can. Cr. Cas. 1 (Ont.).

Evidence of other facts are admissible where those facts tend to prove the point in issue, as where the intent of the prisoner forms part of the matter in issue, and such other facts tend to establish the intent of the prisoner in committing the act in question; so the deliberate menaces or threats of a prisoner made at a former time are admissible, where they tend to prove the intent of the party and the prisoner's malice against the deceased. It is quite proper on the count for murder to give evidence of the prisoner's previous assaults upon and threats against the deceased to shew the animus of the prisoner. Theal v. R. (1882), 7 Can. S.C. 397, 406.

*Credibility of witnesses.*]—On a trial for murder, the Crown having made out a prima facie case by circumstantial evidence, the prisoner's daughter, a girl of fourteen, was called on his behalf, and swore that she herself killed the deceased, without the prisoner's knowledge, and under circumstances detailed, which would probably reduce her guilt to manslaughter. Held, that the judge was not bound to tell the jury that they must believe this witness in the absence of testimony to shew her unworthy of credit, but that he was right in leaving the credibility of her story to them; and, if from her manner he derived the impression that she was under some undue influence, it was not improper to call their attention to it in his charge. R. v. Jones (1868), U.C.Q.B. 416.

*Medical expert testimony.*]—In the course of a trial for murder by shooting a witness was called at the trial to give evidence as a medical expert, and in answer to the Crown prosecutor, he said "there are indicia in medical science from which it can be said at what distance small shot were fired at the body. I have studied this—not personal experience, but from books." He was not cross-examined as to the grounds of this statement, and no medical witnesses were called by the prisoner to confute it. The witness

then stated the distance from the murdered man at which the shot must have been fired in the case before the court, and on what he based his opinion as to it, giving the result of his examination of the body. Held by the majority of the Supreme Court of Canada, Ritchie, C.J., and Taschereau and Gwynne, JJ. (Strong and Fournier, JJ., dissenting), that by his preliminary statement the witness had established his capacity to speak as a medical expert, and it not having been shewn by cross-examination, or other testimony, that there were no such indicia as stated, his evidence as to the distance at which the shot was fired was properly received. R. v. Preeper (1888), 15 Can. S.C.R. 401.

The prisoner's witness having stated that death was caused by two blows from a stick of certain dimensions, it was held that a medical witness previously examined by the Crown was properly recalled to state that in his opinion the injuries found on the body could not have been so occasioned. R. v. Jones, 28 U.C.Q.B. 416.

The theory of the defence in an indictment for murder, was that the death was caused by the communication of smallpox virus by Dr. M., who attended the deceased, and one of the witnesses for the defence explained how the contagion could be guarded against. Dr. M. had not in his examination in chief or cross-examination been asked anything on this subject; it was held that he was properly allowed to be called in reply, to state that precautions had been taken by him to guard against the infection. R. v. Sparham and Greaves, 25 U.C.C.P. 143.

*Evidence generally.*]—On a trial for murder the death of the deceased was shewn to have been caused by his being stabbed by a sharp instrument. It was proved that the prisoner struck the deceased, but neither a knife nor other instrument was seen in his hand. For the prisoner evidence was offered that on the day preceding the homicide the prisoner had a knife which could not have inflicted the wound of which deceased died; and that on that day the prisoner parted with it to a person who held it until after the crime was committed. This evidence was rejected as being too remote, and because it would not shew that it was impossible for the prisoner to have had a weapon that might have caused the wounds of which deceased died. R. v. Herod (1878), 29 U.C.C.P. 428.

Prisoner being indicted for the murder of H., the principal witness for the Crown stated that the crime was committed on a day stated, and that prisoner and one S. (who had been previously tried and acquitted) threw H. over the parapet of the bridge into the river Don. Counsel for the prisoner then proposed to prove by one D. that S. was at his place, fifty miles off, on that evening, but the judge rejected the evidence, saying that S. might be called, and if contradicted might be confirmed by other testimony. S. was called, and swore that he was not present at the time, but he not being contradicted, D. was not examined. Draper, C.J., who tried the case, reserved the point for the consideration of the court whether the evidence of D. might not be found to have been legally admissible. The court held that the presence of S. was a fact material to the enquiry, and that D. should have been admitted when tendered, and a new trial was ordered. Robinson, C.J., observing, "It appears to me that any fact so closely connected with the alleged offence as to be in fact part of what was transacted or said to be transacted at the very moment, cannot be treated as irrelevant in investigating the truth of the charge." . . . "It is sufficient, I think, to make the evidence that was offered admissible, that it applied to the very fact to be determined, namely, by whom and how the deceased person came to his death. R. v. Brown (1861), 21 U.C.Q.B. 338.

On the indictment of a prisoner for murder, a witness swore that he heard shots fired, that half an hour afterwards deceased came to his house and asked witness to take him in for he was shot, that witness did so, and deceased died some hours afterwards; it was held that evidence of state-

ments made by deceased after being taken into the house (not provable as dying declarations) were inadmissible, as not forming part of the res gestæ, being made after all action on the part of the wrong-doer had ceased through the completion of the principal act, and after all pursuit or danger had ceased. R. v. McMahon (1889), 18 Ont. R. 502, following R. v. Bedingfield, 14 Cox 341, and R. v. Goddard, 15 Cox 7.

Where the charge depends upon circumstantial evidence, the latter must not only be consistent with the prisoner's guilt but inconsistent with any other rational conclusion. R. v. Hodge (1838), 2 Lewin 227.

*Punishment.*]—By sec. 231 it is enacted that every one who commits murder is guilty of an indictable offence and shall on conviction thereof be sentenced to death.

(*d*)—*Act necessarily endangering life.*]—If a man does an illegal act although its immediate purpose may not be to take life, yet if it be such that life is necessarily endangered by it and the doer knows or believes that life is likely to be sacrificed by it, it is murder. London Times, April 28, 1868, per Cockburn, C.J., cited Burbidge Cr. Dig. 218, and see 11 Cox C.C. 146; R. v. Allen, 17 L.T.N.S. 223, Burb. Cr. Dig. 522-529.

*Aiders and abettors.*]—In order to make an abettor to a murder or manslaughter principal in the felony he must be present aiding and abetting the fact committed. The presence, however, need not always be an actual standing by within sight or hearing of the fact; for there may be a constructive presence, as when one commits a murder and another keeps watch or guard at some convenient distance. 1 Hale 615, 4 Blac. Com. 34. But a person may be present, and, if not aiding and abetting, be neither principal nor accessory. As, if A. happen to be present at a murder and take no part in it, nor endeavour to prevent it, or to apprehend the murderer, this strange behaviour, though highly criminal, will not of itself render him either principal or accessory. Fost. 350, 1 Hale 439, 3 Russ. Cr. 141.

If several persons are present at the death of a man they may be guilty of different degrees of homicide, as one of murder and another of manslaughter; for if there be no malice in the party striking, but malice in an abettor, it will be murder in the latter, though only manslaughter in the former. 1 East P.C., ch. 5, sec. 121, p. 350. So if A. assault B. of malice and they fight, and A.'s servant come in aid of his master, and B. be killed, A. is guilty of murder; but the servant, if he knew not of A.'s malice, is guilty of manslaughter only. 1 Hale 446. Several persons conspired to kill Dr. Ellis, and they set upon him accordingly, when Salisbury, who was a servant to one of them, seeing the affray and fighting on both sides, joined with his master, but knew nothing of his master's design. A servant of Dr. Ellis, who supported his master, was killed. The court told the jury that malice against Dr. Ellis would make it murder in all those whom that malice affected, as the malice against Dr. Ellis would imply malice against all who opposed the design against Dr. Ellis; but, as to Salisbury, if he had no malice, but took part suddenly with those who had, without knowing of the design against Dr. Ellis, it was only manslaughter in him. The jury found Salisbury guilty of manslaughter and three others of murder, and the three were executed. R. v. Salisbury, Plowd. 97.

It has been decided that if the person charged as principal be acquitted, a conviction of another charged in the indictment as present aiding and abetting him in the murder, is good; for (by Holt, C.J.), "though the indictment be against the prisoner for aiding, assisting and abetting A., who was acquitted, yet the indictment and trial of this prisoner is well enough, for all are principals, and it is not material who actually did the murder." R. v. Wallis (1703), Salk. 334; R. v. Taylor (1785), 1 Leach 360, 1 East P.C., ch. 5, sec. 121, p. 351. And though anciently the person who

gave the fatal stroke was considered as the principal, and those who were present aiding and assisting, only as accessories; yet it has long been settled that all who are present aiding and assisting are equally principals with him who gave the stroke whereof the party died, though they are all called principals in the second degree. 1 Hale 437, Plow. Com. 100a. So that if A. be indicted for murder or manslaughter, and C. and D. for being present and assisting A., and A. appears not, but C. and D. appear, they shall be arraigned, and if convicted, shall receive judgment, though A. neither appear nor be outlawed. 1 Hale 437, Plow. Com. 97, 100, Gythin's case. And if A. be indicted as having given the mortal stroke, and B. and C. as present, aiding and assisting, and upon the evidence it appears that B. gave the stroke, and A. and C. were only aiding and assisting, it maintains the indictment, and judgment shall be given them all, for it is only a circumstantial variance, and in law it is the stroke of all that were present aiding and abetting. 1 Hale 438, Plow. Com. 98a, 9 Co. 67b; R. v. Mackally, 1 East P.C., ch. 5, sec. 121, p. 350; Turner's case, 1 Lewin 177, Parke B.; R. v. Phelps (1841), C. & Mar. 180, 3 Russ. Cr., 6th ed., 142.

*Accessory after the fact.*]—Where a person, knowing a murder to have been committed by the offender, receives, comforts or assists him, such person is an accessory after the fact; but this doctrine is subject to this exception, that 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. See. 63.

**228. Other examples.**—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 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, rape, forcible abduction, robbery, burglary, arson.

See note to sec. 227.

**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.

*Provocation.*—Manslaughter is principally distinguishable from murder in this, that though the act which occasions the death is unlawful, or likely to be attended with bodily mischief, yet the malice either express or implied, which is the very essence of murder, is presumed to be wanting in manslaughter, the act being rather imputed to the infirmity of human nature. 1 East's Pleas of the Crown, 218; Roscoe's Criminal Evidence, 12th ed., 620. Murder is unlawful homicide with malice aforethought; manslaughter is unlawful homicide without malice aforethought. R. v. Doherty (1887), 16 Cox C.C. 306.

Whenever death ensues from sudden transport of passion or heat of blood, if upon reasonable provocation and without malice, or upon sudden combat, it will be manslaughter; if there be no such provocation, or if the blood has had reasonable time to cool, or if there be evidence of express malice, it will be murder. 2 East's Pleas of the Crown, 232; Foster 313; Roscoe's Cr. Evid. 620. Where the provocation is sought by the prisoner it cannot furnish any defence against the charge of murder. 1 East P.C. 239. The provocation which is allowed to extenuate in the case of homicide must be something which a man is conscious of, which he feels and resents at the instant the fact which he would extenuate is committed. Russell on Crimes III. 38; Foster 315. As a general rule, no provocation of words will reduce the crime of murder to that of manslaughter. Foster's Crown Law, 290. But under special circumstances there may be such a provocation of words as will have that effect. Russell on Crimes (1896) III. 38. And Blackburn, J., in summing up to the jury in R. v. Rothwell (1871), 12 Cox C.C. 145, said that what they would have to consider was, whether the words which were spoken just previous to the blows amounted to such a provocation as would, in an ordinary man, not in a man of violent or passionate disposition, provoke him in such a way as to justify the prisoner in striking as he did the person who used the words.

Where, however, there are no blows there must be a provocation at least as great as blows; for instance, a man who discovers his wife in the act of adultery and thereupon kills the adulterer is only guilty of manslaughter. Blackburn, J., in R. v. Rothwell (1871), 12 Cox C.C. 145, 147. All the circumstances of the case must lead to the conclusion that the act done, though intentional of death or great bodily harm, was not the result of a cool, deliberate judgment and previous malignity of heart, but solely imputable to human infirmity. 1 East P.C. 238; Russell on Crimes III. 38. In the United States it has been held that words may give character to acts of menace and so may make an act, otherwise without meaning, an act of provocation which will reduce the subsequent killing to manslaughter. Watson v. State, 82 Ala. 10; State v. Keene, 50 Mo. 357; Pridgen v. State, 31 Tex. 420.

If there be a provocation by blows which would not of itself render the killing manslaughter, but it be accompanied by such provocation by means of words and gestures as would be calculated to produce a degree of exasperation equal to that which would be produced by a violent blow, it may be regarded as reducing the crime to that of manslaughter. R. v. Sherwood (1844), 1 C. & K. 556; R. v. Smith (1865), 3 F. & F. 1066.

If on any sudden provocation of a slight nature, one person beat another in a cruel and unusual manner so that he dies, it is murder by express malice, though the person so beating the other did not intend to kill him. 4 Black. Com. 199, Halloway's Case, Cro. Car. 131. Slight provocations have been considered in some cases as extenuating the guilt of homicide, upon the ground that the conduct of the party killing upon such provocations might fairly be attributed to an intention to chastise, rather than to a cruel and implacable malice; but in such cases it must appear that the punishment was not administered with brutal violence, nor greatly disproportionate to the offence, and the instrument must not be such as, from its nature, was likely to endanger life. Foster's Crown Law 291; Russell on Crimes III. 47.

In R. v. McDowell (1865), 25 U.C.Q.B. 108, the rule was stated as follows by the Court of Queen's Bench of Upper Canada (Draper, C.J., Hagarty, J., and Morrison, J.):—

"Mere words or provoking actions or gestures expressing contempt or reproach, unaccompanied with an assault upon the person, will not reduce the killing from murder to manslaughter, though if immediately upon such provocation the party provoked had given the other a box on the ear or had struck him with a stick or other weapon not likely to kill, and had unfortunately and contrary to his expectation killed him, it would only be manslaughter." 25 U.C.Q.B. at p. 112.

But in the case of a sudden quarrel, where the parties immediately fight, there may be circumstances indicating malice in the party killing, which killing will then be murder.

All questions as to motive, intent, heat of blood, etc., must be left to the jury and should not be dealt with as propositions of law. R. v. McDowell (1865), 25 U.C.Q.B. 108, 115.

If the circumstances of the case shew that the blow causing the death was given in the heat of passion arising on a sudden provocation and before the passion had time to cool, the inference of malice is rebutted. R. v. Eagle (1862), 2 F &. F. 827. As it may be matter of law that a blow is not sufficient to excuse homicide, so it may be matter of law that a blow is not sufficient to reduce the defence to manslaughter; or it may be matter of law that it may be so, supposing the jury find as a matter of fact that it did produce a passion which, as a matter of law, it was legally sufficient to provoke. 2 F. & F. note (*b*) pp. 831, 832.

Although, by sub-sec. (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. R. v. Brennan (1896), 4 Can. Cr. Cas. 41, 27 Ont. R. 659.

Where the facts shewn were that the prisoner had called at the house of the deceased and, on being forcibly ejected by the latter, drew a revolver and shot him, the jury have to consider whether the deceased before laying hands on the prisoner ordered him to leave the house, and gave him time to leave, and whether, if such were done, the violence used by the deceased in ejecting the prisoner was greater than was necessary for that purpose. It is misdirection for the trial judge in such a case to charge that the deceased had a legal right to eject the prisoner as he did, and that therefore there was no provocation to reduce the crime from murder to manslaughter, and such a direction is the withdrawal from the jury of the questions of fact involved in the determination of the question of legal right, and entitled the prisoner to a new trial. Ibid.

A previous conviction or acquittal on an indictment for murder is a bar to a second indictment for the same homicide charging it as manslaughter. Sec. 633 (2).

**230. Manslaughter.**—Culpable homicide, not amounting to murder, is manslaughter.

*Classes of Homicide.*]—Blackstone says: "Homicide is of three kinds: *justifiable*, *excusable*, and *felonious*. The first has no share of guilt at all; the second, very little; but the third is the highest crime against the law of nature that man is capable of committing." And he divides justifiable homicide as follows: "1. Such as is owing to some unavoidable *necessity*, without any will, intention, or desire, and without any inadvertance or negligence, in the party killing; and therefore without any shadow of blame. As, for instance, by virtue of such an office as obliges one, in the execution of public justice, to put a malefactor to death, who had forfeited his life by the laws and verdict of his country. But the law must *require* it, otherwise it is not justifiable; therefore wantonly to kill the greatest of malefactors, a felon or a traitor, attainted or outlawed, deliberately, uncompelled, and extrajudicially, is murder. . . . 2. Homicide committed for the advancement of *public justice*," in cases where the act is not commanded, but permitted. And here he mentions, by way of illustration, homicides committed in the prevention of a felony; in the arrest of persons guilty, or accused, of crime; in preventing escapes, or retaking the criminal; in the suppression of breaches of the peace: 4 Black. Com. 178, 179.

Excusable homicide is divided by Blackstone as follows: "1. Homicide *per infortunium* or *misadventure*, where a man, doing a lawful act, without any intention of hurt, unfortunately kills another; as where a man is at work with a hatchet, and the head thereof flies off and kills a stander-by; or where a person qualified to keep a gun, is shooting at a mark, and undesignedly kills a man; for the act is lawful, and the effect is merely accidental. So where a parent is moderately correcting his child, a master his apprentice or scholar, or an officer punishing a criminal, and happens to occasion his death, it 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. To whip another's horse, whereby he runs over a child and kills him, is held to be accidental in the rider, for he had done nothing unlawful; but manslaughter in the person who whipped him, for the act was a trespass, and at best a piece of idleness, of inevitably dangerous consequence. And, in general, if death ensues in consequence of an idle, dangerous, and unlawful sport,

the slayer is guilty of manslaughter, and not misadventure only: 4 Black. Com. 182, 183.

The second species of excusable homicide, mentioned by Blackstone, is "homicide in self-defence, or *se defendendo*" (*see* Code sections 45-47). He says: "The self-defence which we are now speaking of, is that whereby a man may protect himself from an assault or the like, in the course of a sudden broil or quarrel, by killing him who assaults him. And this is what the law expresses by the word *chance-medley*, or (as some rather choose to write it) *chaud-medley*, the former of which in its etymology signifies a *casual* affray, the latter an affray in the *heat* of blood or passion; both of them of pretty much the same import; but the former is in common speech too often erroneously applied to any manner of homicide or misadventure; whereas it appears by the statute 24 Hen. 8, ch. 5, and our ancient books, that it is properly applied to such killing as happens in self-defence upon a sudden rencounter": 4 Black. Com. 183, 184.

*Manslaughter.*]—Homicide under a mistaken Indian belief or superstition that the object shot at was not a human being but an evil spirit which had assumed human form and would attack human beings, is manslaughter. R. v. Machekequonabe (1897), 2 Can. Cr. Cas. 138.

A corporation cannot be guilty of manslaughter. R. v. Union Colliery Co. (1900), 3 Can. Cr. Cas. 523 (B.C.), affirmed 4 Can. Cr. Cas. 400 (S.C. Can.). Code secs. 213 and 220, as to want of care in the maintenance of dangerous things, do not extend the criminal responsibility of corporations beyond what it was at common law. R. v. Great West Laundry Co. (1900), 3 Can Crim Cas. 514. (Man.).

The managing director of a railway company is not liable to indictment for manslaughter by reason of the omission to do something which the company was not bound to do by its charter, though he had personally promised to do it. Ex. p. Brydges (1874), 18 L.C. Jur. 141.

*Pleading previous conviction for assault, etc.*]—The rule at common law is that where a person has been convicted for an offence by a court of competent jurisdiction, the conviction is a bar to all further criminal proceedings for the same offence; the principle is that no man shall be placed in peril of legal penalties more than once on the same accusation. R. v. Miles (1890), 17 Cox C.C. 9.

It is a well-established principle that a series of charges shall not be preferred, and, whether a party accused of a minor offence is acquitted or convicted, he shall not be charged again on the same facts in a more aggravated form. R. v. Elrington (1861), 1 Best & Smith 688, 696 (Cockburn, C.J., and Blackburn, J.).

It was held by the Court for Crown Cases Reserved in R. v. Morris (1867), L.R. 1 C.C.R. 90, that a conviction for assault and the imprisonment consequent thereon are not either at common law or under 24-25 Vict., c. 100, s. 45 (Code sec. 866), a bar to an indictment for manslaughter of the person assaulted, should he subsequently die from the effects of the assault; (per Martin, B., and Byles and Shee, JJ.,; Kelly, C.B., dissenting).

In the last-mentioned case, Martin, B., considered the word "cause" in the statute corresponding to s. 866 of the Code, as used synonymously with the words "accusation" or "charge"; while Byles, J., said that the word "cause" may undoubtedly mean "act," but it is ambiguous, and it may also and, perhaps, with greater propriety be held to mean "cause for the accusation"; and in that view the cause for the indictment for manslaughter comprehended more than the cause in the summons before the magistrates, "for it comprehends the death of the party assaulted." L.R. 1 C.C.R. 95.

In a more recent case, at the Durham Assizes, November 23, 1895, the opposite view was taken by Grantham, J., the presiding judge. R. v. Hilton (1895), 59 J.P. (Eng.), 778. In that case it appeared that the defendant Hilton was indicted for the manslaughter of one Robert Jackson. The alleged assault which caused the death of Jackson occurred on the 12th of October. On the 21st of October cross-summonses for assault were heard by the justices and both cases were dismissed. At that time the deceased man's injuries were not considered serious, but on the 2nd of November he died from the effects of a clot of bood on the brain. Hilton was thereupon charged with manslaughter. Counsel for the prisoner produced a certificate of dismissal of the charge of assault by the justices under 24 & 25 Vict., c. 100, s. 45, and raised the plea that the prisoner had already been acquitted of the charge of assault and could not be tried again. The learned judge accepted this view, and the prisoner was discharged.

*Verdict for assault not permissible.*]—On an indictment for murder or manslaughter if the prisoner is guilty of an assaut which has conduced to the death, he cannot in respect of that assault be convicted of assault merely; and if the assault proved did not conduce to the death, it is distinct from and independent thereof and is therefore not included in the crime charged, and is dehors the indictment; and therefore no verdict of assault can be rendered upon an indictment for homicide in respect of such an assault. R. v. Ganes (1872), 22 U.C.C.P. 185, following R. v. Bird (1851), 5 Cox 1, and R. v. Dingman (1863), 22 U.C.Q.B. 283.

**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.

**Code Form FF.**]—The following form of stating the offence is provided by Code form FF (*a*):—"A. murdered B. at ——, on ——."

*Evidence.*]—See note to sec. 227.

*Previous conviction or acquittal.*]—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 a murder. Sec. 633 (2).

*Verdict of Manslaughter.*]—On an indictment 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. Sec. 713 (2).

*Verdict of concealment of birth on charge of child murder.*]—If any person tried for the murder of any child is acquitted thereof the jury by whose verdict such person is acquitted 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. And see sec. 240.

**232. Attempts to commit 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.

*Indictment.*]—An indictment multifarious in that it combines a charge of a failure to provide necessaries for a child under sixteen under secs. 210 and 215 with a charge of an attempt to murder the child and to which indictment the prisoners pleaded, is sufficient upon which to base a conviction thereon 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 secs. 210 and 215. R. v. Lapierre (1897), 1 Can. Cr. Cas. 413 (Que.).

*Bail.*]—The court will not bail a prisoner accused under this section if the evidence be positive and strong against the prisoner. Ex parte Cheevers (1880), Ramsay's Cases 180.

*With intent to commit murder.*]—Where the charge is in respect of the administering of poison, evidence of administering at different times may be given to shew the intent. R. v. Mogg (1830), 4 C. & P. 364; and see note to sec. 227.

(*a.*)—"*Administers*" *any poison, etc.*]—Where a servant in preparing breakfast for her mistress put arsenic into the coffee, and afterwards told her mistress that she had prepared the coffee for her, and the mistress drank the coffee, it was held that this was an "administering" within the corresponding English statute, 7 Wm. IV. and 1 Vict., ch. 85, sec. 2, re-enacted 24-25 Vict., ch. 100, sec. 11. R. v. Harley (1830), 4 C. & P. 369. And it has been held that a poisonous berry given with intent to kill is "administered" although by reason of being given entire in the pod which will not dissolve in the stomach no injurious effects followed. R. v. Cluderay (1849), 1 Den. C.C. 514, 4 Cox C.C. 84.

Where the accused with intent to murder gave poison to A. to administer as a medicine to B., but A. neglecting to give it to B., it was by chance given to B. by a child, this was held an administering by the accused. R. v. Michael (1840), 2 Mood. C.C. 120, 9 C. & P. 356. But it is doubtful whether

a conviction can be supported under this section, if the poison be delivered by mistake to and taken by another person than that for whom it was intended. R. v. Ryan (1839), 2 M. & Rob. 213; but see R. v. Lewis (1833), 6 C. & P. 161.

If, however, the poison was intended to reach a certain individual but through a mistake in identity on the part of the accused himself, that individual was not in fact the person against whom his animus existed, it would appear that a conviction would be supported. R. v. Hunt (1825), 1 Mood. C.C. 93; R. v. Stopford (1870), 11 Cox C.C. 643; R. v. Smith (1856), Dears. 559.

*Wounds.*]—To constitute a wound the continuity of the skin must be broken. R. v. Wood (1830), 1 Mood. C.C. 278. There must be a division not merely of the cuticle or upper skin but of the whole skin. R. v. McLaughlin (1838), 8 C. & P. 635; R. v. Becket (1836), 1 M. & Rob. 526; or of the internal skin, ex. gr., of the lip or cheek. R. v. Smith (1837), 8 C. & P. 173; R. v. Warman (1846), 1 Den. 183.

A wound from a kick with a shoe is within the statute. R. v. Briggs (1831), 1 Mood. C.C. 318. If in self-defence the prosecutor force a part of his body against an instrument in the defendant's hands and so cut or wound himself, the wounding is not within this section. R. v. Becket (1836), 1 M. & Rob. 526.

(*b.*)—*Grievous bodily harm.*]—If the bodily injury be such as seriously to interfere with health or comfort that is sufficient, and it is not necessary that it should be either permanent or dangerous. R. v. Cox (1818), R. & R. 362; R. v. Ashman (1858), 1 F. & F. 88; see also sec. 252.

Upon a charge of causing grievous bodily harm to a child under defendant's care with intent to bring about the child's death, evidence of acts of cruelty by defendants to *another* child also in defendants' care are irrelevant to the case and inadmissible. R. v. Lapierre (1897), 1 Can. Cr. Cas. 413 (Que.).

(*c.*)—*Shooting with intent.*]—If a wound was caused, it seems that a count for wounding with intent to do grievous bodily harm must be added to enable the jury to convict of unlawful wounding should they find the accused not guilty of the more serious crime but are convinced that the lesser offence has been committed. Archbold Cr. Plead. (1900), 785.

Where the accused was charged with wounding T. with intent to murder him, and it appeared in evidence that the defendant intended 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 him to be M., the conviction was upheld. R. v. Smith (1856), Dears. 559, 25 L.J.M.C. 29; R. v. Stopford (1870), 11 Cox C.C. 643.

(*c.*)—*Attempts to discharge loaded arms.*]—If a person intending to shoot another puts his finger on the trigger of a loaded firearm, but is prevented from pulling the trigger, it is nevertheless an attempt to discharge loaded arms under this section. R. v. Duckworth, [1892] 2 Q.B. 83, 17 Cox C.C. 495; R. v. Brown (1883), 10 Q.B.D. 381; R. v. St. George (1840), 9 C. & P. 483, overruled.

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. Sec. 3 (*o*).

(*h.*)—*By any other means attempts to commit murder.*]—Where a woman jumped out of a window to avoid the violence of her husband, it was held that to constitute this offence it must be proved that he intended by his conduct to make her jump out. R. v. Donovan (1850), 4 Cox C.C. 401.

The sending or placing of infernal machines with intent to murder is within this sub-section. R. v. Mountford (1835), Mood. C.C. 441, 3 Russ. Cr., 6th ed., 280 (*n*). Attempts to commit suicide are, however, not included. R. v. Burgess (1862), 9 Cox C.C. 302, L. & C. 258, 32 L.J.M.C. 55; but come under sec. 238 of the Code.

**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.

Threats verbally made to burn the complainant's buildings are not indictable under the Criminal Code, and give rise only to proceedings to force the offender to give security to keep the peace. Ex parte Welsh (1898), 2 Can. Cr. Cas. 35.

**234. Conspiracy to 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 His Majesty or not, or is within His 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.

*Counselling murder.*]—This offence may be committed by the publication of a newspaper article exulting in the assassination of a foreign monarch and commending it as an example to revolutionists throughout the world; and the counselling need not be directed to any particular person. R. v. Most (1881), 7 Q.B.D. 244; 14 Cox C.C. 583.

To solicit and incite a person to commit a felony was a misdemeanor at common law. Arch. Crim. Plead. (1900), 1224.

Where the indictment is for soliciting another to commit murder it is unnecessary to negative the commission of the murder which, if committed, would render the accused guilty of the principal offence as an accessory before the fact (sec. 61), for it cannot be intended that the principal offence has been committed where it is not charged. 1 Stark. Cr. Plead., 2nd ed., 148; R. v. Higgins (1801), 2 East 5.

**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.

The accused must be proved to have done some act to assist the murderer personally; R. v. Chapple (1840), 9 C. & P. 355; or by employing another person to harbour or relieve him. R. v. Greenacre (1837) 8 C. & P. 35; R. v. Butterfield (1843), 1 Cox C.C. 39; R. v. Lee (1834), 6 C. & P. 536; R. v. Jarvis (1837), 2 M. & Rob. 40. See also note to sec. 63.

**236. Punishment of manslaughter.**—Every one who commits manslaughter is guilty of an indictable offence, and liable to imprisonment for life. R.S.C., c. 162, s. 5.

There is no power under code sec. 639 or otherwise to impose a fine or any other punishment, in lieu of imprisonment, for the offence of manslaughter, and there is consequently no judgment or sentence applicable to a conviction of a corporation for that offence. R. v. Great West Laundry Co. (1900), 3 Can. Cr. Cas. 514. (Man.).

A previous conviction or acquittal on an indictment for manslaughter is a bar to a second indictment for the same homicide charging it as murder. Sec. 633 (2).

**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.

If two persons mutually agree to commit suicide together, and accordingly take poison or attempt to drown themselves together, but only one of them dies, the survivor is guilty of murder. R. v. Dyson (1823), R. & R. 523; R. v. Alison (1838) 8 C. & P. 418; R. v. Jessop (1877), 16 Cox C.C. 204; R. v. Stormonth (1897), 61 J. P. 729.

**238. Attempt to commit suicide.**—Every one who attempts to commit suicide is guilty of an indictable offence and liable to two years' imprisonment.

*Attempted suicide.*]—This offence was a misdemeanor at common law. R. v. Burgess (1862), L. & C. 258; 9 Cox C.C. 302, 32 L.J.M.C. 55.

Mere intention to commit the offence does not constitute an attempt; same act immediately connected with the principal offence must be proved to have been done by the accused. R. v. Eagleton (1855) Dears. 515, 538, 24 L.J.M.C. 158; R. v. Roberts (1855) Dears. 539, 25 L.J.M.C. 17; R. v. Cheeseman (1862), L. & C. 140, 9 Cox, C.C. 100.

**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 shal 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

It has been held that a woman cannot be convicted of manslaughter on evidence that, knowing she was near the time of delivery, she wilfully abstained from taking the necessary precautions to preserve the life of her child after its birth, in consequence of which neglect it died. R. v. Knights (1860), 2 F. & F. 46; but see R. v. Handley (1874), 13 Cox C.C. 79, where Brett, J., held that if the woman, without intending the death of the child, determines to be alone at the birth for the purpose of temporary concealment, and the child afterwards dies by reason of her wicked negligence, she is guilty of manslaughter. Cf. R. v. Middleship (1851), 5 Cox C.C. 275.

**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.

Concealment of birth was dealt with by sec. 61 of 32-33 Viet., c. 20. Although the mere denial of the birth will not support a conviction: R. v. Turner (1839), 8 C. & P. 755, it is a factor in proof of the offence. R. v. Piché (1879), 30 U.C.C.P. 409. What is a secret disposition must depend on the circumstances of each particular case. The most complete exposure of the body might be a concealment, ex gr. if placed in a secluded place where the body would not be likely to be found. R. v. Brown (1870), L.R. 1 C.C. 244.

"*Child.*"]—A foetus which has not reached the period at which it might have been born alive is not a "child." R. v. Berriman (1854), 6 Cox C.C. 388; but see R. v. Colmer (1864), 9 Cox C.C. 506.

*Evidence.*]—The former statutes, R.S.C. 1886, ch. 162, sec. 49 and 24-25 Viet., ch. 100, sec. 60, required that there should be a "secret disposition" of the dead body. A disposal in any manner with the intent here specified is sufficient under the Code.

Under the former law it was held to be a "secret disposition" where the woman placed the dead body of the child of which she had been delivered between a trunk and the wall of a room in which she lived alone, and on being charged with having had a child she at first denied it, but being pressed she pointed out where the body was. R. v. Piché, 30 U.C.C.P. 409.

A final disposition of the body of the child is not essential, and it is an offence if it be hid in a place from which a further removal was contemplated. R. v. Goldthorpe (1841), 2 Moo. C.C. 244; R. v. Perry (1855), Dears. 471.

Where the only evidence was that the woman had been delivered of a child the body of which was taken away by two other persons, but the prisoner did not know where it was put, it was held insufficient. R. v. Bate (1871), 11 Cox C.C. 686.

There must be an identification of the body found as being that of the child of which she is alleged to have been delivered. R. v. Williams (1871), 11 Cox C.C. 684.

It must also be proved that the body concealed was that of a child dead at the time of the disposal or concealment. R. v. Bell (1874), Irish R. 8 C.L. 541; R. v. May (1867), 16 L.T. Rep. 362; 10 Cox. C.C. 448.

The mere denial of the birth is not sufficient proof of intent to conceal. R. v. Turner (1839), 8 C. & P. 755. It must be shewn that the accused did some act of disposal of the body after the child was dead. Ibid.

The fact that the mother had previously allowed the birth to be known to some persons is not conclusive evidence negativing concealment. R. v. Douglas (1836), 1 Mood. C.C. 480; R. v. Cornwall (1817), R. & R. 336.

*Confession as evidence.*]—A. being questioned by a police constable about the concealment of a birth gave an answer which caused the officer to say to her, "It might be better for you to tell the truth and not a lie"; and it was held that a further statement made by her to the officer was inadmissible in evidence, as not being free and voluntary. She was taken into custody on the same day, placed with two accomplices, and charged with concealment of birth. All three then made statements. It was held that those made by the accomplices could not be deemed to be affected by the previous inducement to A. and were therefore admissible against themselves, although that made by A. was inadmissible. When before the magistrate for the preliminary inquiry the three prisoners received the formal caution (sec. 591) from the magistrate as to anything they wished to say in regard to the charge, and A. then made a statement which was taken down in writing and attached to the deposition, and this latter statement was admissible in evidence against her. R. v. Bate (1871), 11 Cox C.C. 686.

PART XIX.

## BODILY INJURIES, AND ACTS AND OMISSIONS CAUSING DANGER TO THE PERSON.

SECT.



---

**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., 162, s. 13.

*Assault.*]—Upon an indictment charging a shooting at a person with a felonious intent, if the prisoner be acquitted of the felony, a verdict for common assault may be rendered. Re Cronan (1874), 24 U.C.C.P. 106.

*Indictment.*]—If the indictment charges that the accused did "inflict" grievous bodily harm, it sufficiently charges the "causing" of grievous bodily harm. R. v. Bray (1883), 15 Cox C.C. 197.

The instrument or means by which the injury was inflicted need not be stated in the indictment, and if stated need not be proved as laid. R. v. Briggs (1831), 1 Moo. C.C. 318.

*Evidence of intent.*]—The intent may be inferred from the act committed. R. v. Le Dante, 2 Geldert & Oxley (N.S.) 401.

A person who fires a loaded pistol into a group of persons, not aiming at any one in particular, but intending generally to do grievous bodily harm, and who hits one of them, may be convicted on an indictment charging him with shooting at the person he has hit with intent to do grievous bodily harm to that person. R. v. Fretwell (1864), L. & C. 443, 9 Cox C.C. 471.

*Intent against one person; wounding another.*]—The statutory form FF., sub-sec. (*f*), shews that this section includes as an offence the causing of actual bodily harm to a person although done with intent to cause such harm to another; and also that where the intent is to prevent a lawful apprehension the person about to be apprehended is not necessarily the person charged with the wounding or other offence under this section.

Not only will an indictment charging the accused with wounding A. with intent to do him grievous bodily injury be supported by evidence that he intended to do grievous bodily harm to the man he wounded, and who, in fact was A., although the accused did not think that he was A., but somebody else, R. v. Stopford (1870), 11 Cox C.C. 643; but it will be sufficient under this section that the defendant wounded, etc., any person with intent to maim, etc., a third person. R. v. Latimer (1886), 17 Q.B.D. 359, 16 Cox 707; Archbold Cr. Plead. (1900), 806. It will be observed that there is a possible distinction in this respect between secs. 232 and 241, for in the former the words "any person" do not follow the words "with intent to commit murder," and it may consequently be inferred that the intent to murder must be directed against the very person wounded, etc. See note to sec. 232.

*Maim, disfigure or disable.*]—To maim is to injure any part of a man's body which may render him, in fighting, less able to defend himself or to annoy his enemy. 1 Hawk., ch. 44, sec. 1; R. v. Sullivan (1841), C. & Mar. 209. To disfigure is to do some external injury which may detract from his personal appearance. To disable is to do something which creates a permanent disability and not merely a temporary injury. Archbold Cr. Plead. (1900), 807; R. v. Boyce (1824), 1 Mood. C.C. 29.

*Grievous bodily harm.*]—An injury seriously interfering with health or comfort, although neither permanent or endangering life, is sufficient. R. v. Ashman (1858), 1 F. & F. 88; R. v. Cox (1818), R. & R. 362.

*Intent to prevent lawful apprehension.*]—It must be shewn that the arrest would have been lawful. As to when an arrest is justified, see sec. 22 et seq. and sec. 552.

*Wounds.*]—A wounding may be "either with or without any weapon or instrument;" sec. 242; but the skin must be broken. R. v. Wood (1830), 1 Mood. C.C. 278; R. v. Briggs (1831), 1 Mood. C.C. 318; R. v. Withers (1831), 1 Mood. C.C. 294; R. v. Sheard (1837), 7 C. & P. 846.

*Attempt to discharge loaded arms.*]—See note to sec. 232.

*Verdict.*]—A charge of wounding or causing grievous bodily harm with intent is inclusive of the offence of common assault and a verdict for the latter offence may be returned by virtue of sec. 713. R. v. Laskey, 1 P. & B. (N.B.) 194; R. v. Taylor (1869), L.R. 1 C.C.R. 194. And likewise, if the jury are not convinced as to the intent, they may find the accused guilty of unlawfully wounding if wounding be charged, or of unlawfully inflicting grievous bodily harm if that be charged, in which case the punishment is under sec. 242. R. v. Waudby, [1895] 2 Q.B. 482.

**242. Wounding or grievous bodily harm.**—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.

*Wounding.*]—See notes to secs. 232 and 241.

*Powers of justices.*]—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. R. v. Lee (1897), 2 Can. Cr. Cas. 233, per McDougall, Co. J.; Miller v. Lea (1898), 2 Can. Cr. Cas. 282.

A conviction recorded by justices in such a case upon a plea of guilty to the charge as reduced, is not a bar to an indictment for unlawfully wounding, based upon the same state of facts, and does not support a plea of autrefois convict. Ibid.

*Verdict.*]—Upon an indictment for assaulting, beating, wounding and inflicting grievous bodily harm, the prisoner may be convicted of a common assault. Sec. 713. R. v. Oliver (1860), Bell C.C. 287; R. v. Yeadon (1862), L. & C. 81; and a verdict for common assault was held good where the indictment charged only the infliction of grievous bodily harm. R. v. Canwell, 20 L.T. 402, 11 Cox C.C. 263, and see R. v. Taylor, 11 Cox C.C. 261.

**243. Wounding public officer.**—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who wilfully—

(*a.*) shoots at any vessel belonging to His 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.*]—This term is inclusive of 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. Sec. 3 (*w.*).

*Describing the offence.*]—To justify a sentence of more than three years' imprisonment for assault and wounding a public officer, the charge must allege that the offence was committed while the officer was engaged in the execution of his duty. R. v. Dupont (1900), 4 Can. Cr. Cas. 566 (Que.).

A mere description of the assaulted party in the information as an acting detective does not justify a sentence of seven years on a plea of guilty, nor does it imply that the assault took place while the officer was engaged in the execution of his duty. Ibid.

**244. Attempt to strangle, etc.**—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.

See note to sec. 232.

**245. Administering poison so as to endanger life.**—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.

"*Administering.*"]—See note to sec. 232.

*Any poison or other destructive or noxious thing.*]—Some drugs are noxious only when taken in large quantities; and it is doubtful whether the administering of a drug in so small a quantity as to be incapable of doing harm although a larger quantity of the drug would be a poisonous dose, is administering a "poison." R. v. Hennah (1877), 13 Cox C.C. 547; R. v. Cramp (1880), 5 Q.B.D. 307. In the latter case it is suggested that where the drug administered is a recognized "poison" it may be that the offence is complete although the quantity administered is too small to be noxious.

**246. Administering poison with intent to injure.**—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.

If any grievous bodily harm is in fact inflicted, the offence comes under sec. 245. Tulley v. Corrie (1867), 10 Cox C.C. 640.

*Any poison or other destructive or noxious thing.*]—See note to sec. 245.

*Intent to injure, aggrieve or annoy.*]—Where the defendant administered cantharides to a woman and the jury found that it was administered with the intent to excite her sexual passion and desire, in order that the defendant might have connection with her, this was held to be an administering with intent to "injure, aggrieve and annoy" her. R. v. Wilkins (1861), L. & C. 89, 9 Cox C.C. 20, 31 L.J.M.C. 72.

**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.

*Explosive substance.*]—This expression 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. Sec. 3 (i).

*Dangerous storing of explosives.*]—Keeping naphtha in a populous place in such quantities as to cause terror or danger is a common law nuisance as being an act injurious to public safety. R. v. Lister (1857), D. & B. 209. And so is keeping gunpowder or other explosives in dangerous proximity to streets or houses. R. v. Taylor (1742), 2 Str. 1167; 1 Russ. Cr. 6th ed., 734 (*u*). And where defendants were charged with having unlawfully knowing and willingly deposited in a room in a lodging or boarding house in the city of Halifax near to certain streets or thoroughfares and in close proximity to divers dwelling houses excessive quantities of dynamite by reason whereof the inhabitants were in great danger, it was held that the indictment was not bad for failure to allege either carelessness or that the quantities were so great that care would not produce safety. R. v. Holmes, 5 R. & G. (N.S.) 498.

**248. Attempting 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;

(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.

*Throwing corrosive fluid.*]—Unless the contrary be proved the intention will be evidenced by the act; R. v. Rhenwick Williams (1790), 1 Leach 533; and the question of intent is for the jury. R. v. Saunders, 14 Cox C.C. 180.

Throwing oil of vitrol in a person's face has been held not to be a "wounding." R. v. Murrow (1835), Mood. C.C. 456.

*Destructive matter.*]—Under a similar English statute 7 Wm. IV. and 1 Viet., c. 85, sec. 5, boiling water was held to be "destructive matter." R. v. Crawford (1845), 1 Den. 100, 2 C. & K. 129. In that case the prisoner was indicted for maliciously throwing boiling water upon her husband. Under the influence of jealousy she had boiled a quart of water and while he was asleep she poured it over his face and into one of his ears and ran away boasting that she had boiled him in his sleep. The injury deprived the man of sight for some time and affected his hearing. A conviction was affirmed on a case reserved.

Negligent blasting of stone in a quarry and thereby projecting large pieces of stone so as to endanger the safety of persons in houses and on the highways adjoining the quarry, was indictable at common law as a misdemeanor. R. v. Mutters (1864), L. & C. 491.

**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 trespasser 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, c. 24.

A similar provision in the English statute 7 & 8 Geo. IV. ch. 18, was held not to be applicable to the setting of dog-spears on a man's own land with no intention to harm human beings and without having brought about such a result. Jordin v. Crump (1841), 8 M. & W. 782.

If death is caused by unlawfully setting a spring gun the person setting it is guilty of manslaughter. R. v. Heaton (1896), 60 J.P. 508.

**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 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.

**Form FF.**—An example of stating one of the offences mentioned in this section is given as follows in Code Form FF: —"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.)*

The corresponding English Act, 24-25 Vict., ch. 97, secs. 35-37, has been held to apply to both public and private railways; O'Gorman v. Sweet (1890), 54 J.P. 663; and to railways not yet opened for regular traffic, but in use for the conveyance of workmen and materials. R. v. Bradford (1860), Bell C.C. 268.

An acquittal under this section will not bar an indictment under sec. 251. R. v. Gilmore (1882), 15 Cox C.C. 85.

**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.

Other offences relating to the operation of railways are contained in "The Railway Act" (Can.) 1888, ch. 29; The Railway Amendment Act (Can.), ch. 37, sec. 4, and Code secs. 489-491, 521.

*Omission or neglect of duty.*]—There must be a duty to do the thing omitted to be done; a promise, not constituting a contract, made by a railway manager to do something which the company were under no legal obligation to do does not constitute a "duty" under this section. Ex parte Brydges, 18 L.C. Jur. 141.

**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.

Although a corporation cannot be guilty of manslaughter, it may be indicted under this section 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. A fine is the punishment which must be substituted under Cr. Code sec. 639 in the case of a corporation, in lieu of the imprisonment mentioned in Cr. Code sec. 252, and the amount is in the discretion of the court (Cr. Code sec. 934). The expression "grievous bodily injury" includes injuries immediately resulting in death, and as a corporation is not amenable to a charge of manslaughter, the death is as to it a circumstance in aggravation of the crime, and does not enlarge the nature of the offence. R. v. Union Colliery Co. (1900), 3 Can. Crim. Cas. 523 (B.C.); affirmed by the Supreme Court of Canada sub. nom., Union Colliery v. The Queen (1900), 4 Can. Cr. Cas. 400.

**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 neglect, does or causes to be done any bodily harm to any person. R.S.C., c. 162, s. 28.

*Any carriage or vehicle.*]—The same expression appears in the Offences against the Person Act, 1861, 24-25 Vict. (Imp.), ch. 100, sec. 35, and under it it has been decided that bicycles are included. R. v. Parker (1895), 59 J.P. 793, per Hawkins, J.

*Wilful misconduct.*]—An act is "wilfully" done if the defendant intentionally did it knowing that bodily harm to some person is likely to result. R. v. Holroyd (1841), 2 M. & Rob. 339; or with a reckless disregard of the natural consequences of the act. R. v. Monaghan (1870), 11 Cox C.C. 608. Compare sec. 481, defining the term "wilful" as used in Part XXXVII.

*(Amendment of 1893.)*

**254. Preventing the saving of the life of any person shipwrecked.**—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.

*Shipwrecked person.*]—This term includes any person belonging to, on board of or having quitted any vessel wrecked, stranded or in distress at any place in Canada. See sec. 3 (*x*).

**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 exposed 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.

*(Amendment of 1893.)*

**256. Sending unseaworthy ships to sea.**—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, as amended by 56 V., c. 32.

No person shall be prosecuted for any offence under this section without the consent of the Minister of Marine and Fisheries. Sec. 546 as amended, 56 Viet. (Can.), ch. 32.

Sec. 457 of the Merchant Shipping Act, 1894 (Imp.), 57-58 Viet., ch. 60, also provides as follows:—"If any person sends or attempts to send, or is party to sending or attempting to send a British ship to sea in such unseaworthy state that the life of any person is likely to be thereby endangered, he shall in respect of each offence be guilty of a misdemeanor unless he proves that he used all reasonable means to insure her being sent to sea in a seaworthy state, or that her going to sea in such unseaworthy state was, under the circumstances, reasonable and justifiable, and for the purpose of giving such proof he may give evidence in the same manner as any other witness." But a prosecution under that section of the Merchant Shipping Act in a British possession can only be brought by or with the consent of the governor thereof, i.e., in Canada, the Governor-General. Ibid. sec. 457 (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 unseaworty 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.

No person shall be prosecuted for any offence under this or the preceding section without the consent of the Minister of Marine and Fisheries. Sec. 546 as amended, 56 Viet. (Can.), ch. 32.

The Merchant Shipping Act, 1894 (Imp.), 57-58 Viet., ch. 60, sec. 457, makes the following additional provision:—"If the master of a British ship knowingly takes the same to sea in such unseaworthy state that the life of any person is likely to be thereby endangered, he shall in respect of each offence be guilty of a misdemeanor unless he proves that her going to sea in such unseaworthy state was, under the circumstances, reasonable and justifiable, and for the purpose of giving such proof he may give evidence in the same manner as any other witness." A prosecution under that section cannot, however, be brought in Canada without the consent of the Governor-General. Ibid, sec. 457 (3).

PART XX.

## ASSAULTS.

SECT.



**258. Assault defined.**—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.

To discharge a pistol loaded with powder and wadding at a person within such a distance as that the party might have been hit, is an assault. R. v. Cronan (1874), 24 U.C.C.P. 106.

A conviction for unlawfully assaulting V. by standing in front of the horses and carriage driven by the said V. in a hostile manner, and *thereby* forcibly detaining him, the said V. in the public highway against his will, was held bad, in stating the detention as a conclusion and not as part of the charge. R. v. McElligott (1883), 3 O.P. 535. It will not be inferred as a matter of law that standing in front of the horses was a forcible intention, there being no statement that the detention was by any other means than mere passive resistance. Ibid.

An indictment for rape includes the lesser charge of assault, and a verdict thereon of guilty of common assault is properly followed by a conviction although the information was laid more than six months after the offence was committed. R. v. Edwards (1898), 2 Can. Cr. Cas. 96.

*Effect of consent in cases of assault.*]—No one may consent to any act which is either intended to cause or is likely to cause death or any grievous bodily harm. It is unlawful for a man either to kill or maim himself, and he cannot lawfully consent to be killed or maimed by another person. And so duelling is against the law, and, if two persons deliberately agree to fight a duel and one kill the other, he is guilty of murder. Prize-fighting also is illegal, although no more deadly weapons be used than the naked fists of the combatants; for here the object of each is to do to the other as

much harm as can be done with the hands, so long as he keeps within the rules under which they fight, and to subdue the other until from injury or exhaustion he is unable to fight any more. In the case of Reg. v. Coney (1882), 30 W.R. 678, 8 Q.B.D. 534, which was argued before the whole of the Queen's Bench Division, all the judges were agreed that a prize-fight is illegal, and that the consent of the parties to fight could not make it legal. Stephen, J., said: "When one person is indicted for inflicting personal injury upon another, the consent of the person who sustains the injury is no defence to the person who inflicts the injury, if the injury is of such a nature or is inflicted under such circumstances that its infliction is injurious to the public as well as to the person injured. But the injuries given and received in prize-fights are injurious to the public, both because it is against the public interest that the lives and the health of the combatants should be endangered by blows and because prize-fights are disorderly exhibitions, mischievous on many obvious grounds. Therefore, the consent of the parties to the blows which they mutually receive does not prevent those blows from being assaults."

If, whilst playing a game, a player deliberately infringes the rules, and in so doing hurts another, he is guilty of an assault, for the consent of the person injured only extends to acts committed within the rules. East, in his Pleas of the Crown, says: "If two were engaged to play at cudgels, and the one made a blow at the other likely to hurt before he was upon his guard, and without warning, and death ensued, the want of due and friendly warning would make such act amount to manslaughter, but not to murder, because the intent was not malicious." (Sol. Jour.)

And no rules or practice of any game can make that lawful which is unlawful by the law of the land; and the law of the land says you shall not do that which is likely to cause the death of another. R. v. Bradshaw (1878), 14 Cox C.C. 83.

A charge of common assault may in certain cases be completely answered by proof of consent on the part of the person bringing the charge. Thus, if a man strike another with a stick, this is prima facie an offence, although no real harm be done; if, however, the two had agreed to engage in a match of singlesticks, and in the course of the game, and without transgression of its rules and with no intent to inflict harm, the complainant was struck, his consent to run the risk of receiving a blow is a defence to the charge of assault.

**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.

A blow struck in anger or which is intended or is likely to do corporal hurt is a criminal assault, notwithstanding the consent to fight of the person struck. R. v. Buchanan (1898), 1 Can. Cr. Cas. 442 (Man.)

*Evidence.*]—As to the evidence of children under fourteen who do not understand the nature of an oath see sec. 685.

All such relevant acts of the party as may reasonably be considered explanatory of his motives and purposes, even though they may severally constitute distinct felonies, are clearly admissable in evidence. R. v. Chute (1882), 46 U.C.Q.B. 555; Wills on Circumstantial Evid. 47.

If, on an indictment of rape the jury acquit the accused of that offence, but find him guilty of indecent assault, and the other evidence in the case is ample to warrant the verdict, it should stand notwithstanding the improper admission in evidence of statements made by the prosecutrix by way of complaint following the offence, she having then complained of an assault but not of rape. R. v. Graham (1899), 3 Can. Cr. Cas. 22 (Ont.). The accused may, on an indictment for rape, be convicted of assault with intent to commit rape. John v. The Queen, 15 Can. S.C.R. 384.

It was formerly the law that if the girl consented to the indecent assault, the prisoner could not be convicted of that offence, although the girl was under the age up to which consent is immaterial on a charge of carnally knowing, it being held that there could be no assault on a person consenting. R. v. Connolly (1871), 26 U.C.Q.B. 317; R. v. Paquet, 9 Quebec L.R. 361; R. v. Holmes (1871), L.R. 1 C.C.R. 234, 12 Cox C.C. 137. Now, by sec. 261 of the Criminal Code, 1892, it is provided that "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." But there can be still no conviction for *common* assault where there is consent.

If a medical practitioner unnecessarily strip a female patient naked under the pretence that he cannot otherwise judge of her illness, notwithstanding her continued protests and objections, it is an assault if he assisted to take off her clothes. Rex. v. Rosinski (1824), 1 Moody C.C. 19, 1 Lewin C.C. 11. It is to be left to the jury to say whether the prisoner really believed that the stripping could assist him in enabling him to cure her. Ibid.

Apart from statutory provision there can be in law no assault unless it be against consent. R. v. Martin (1839), 9 C. & P. 215; R. v. Guthrie (1870), L.R. 1 C.C.R. 241; 39 L.J.M.C. 95. Mere submission is not always equivalent to consent. A person may submit to an act done from ignorance, or the consent may be obtained by fraud; and in neither case would it be such consent as the law contemplates. R. v. Lock (1872), L.R. 2 C.C.R. 10. Consent means an active will in the mind of the patient to permit the doing of the act complained of; and knowledge of what is to be done is essential to a consent. Ibid.

Where a school teacher was charged with indecent assault upon one of his scholars, and it appeared that he forbade the prosecutrix telling her parents what had happened, and they did not hear of it for two months, it was held that evidence of the conduct of the prisoner towards her subsequent to the assault was properly admissible as tending to shew the indecent quality of the assault, and as being, in effect, a part or continuation of the same. R. v. Chute, 46 U.C.Q.B. 155.

If a schoolmaster takes indecent liberties with a female scholar without her consent, though she does not resist, he is liable to be punished as for an assault. Rex v. Nichol (1807), Russell & Ryan, C.C. 130. In that case the girl's age was thirteen, and she testified that she knew it was wrong in him to act as he did, and for her to permit him, and that on all the occasions when the indecent liberties had been taken it was against her will. The acts complained of did not amount to carnal knowledge, and were not done with violence. The trial judge, Graham, B., said that the prisoner's authority and influence were likely to have put her still more off her guard than she would naturally have been from her age and inexperience; that a fear and awe of the prisoner might check her resistance and lessen her

natural sense of modesty and decency; and that, under such circumstances, less resistance was to be expected than in ordinary cases. The prisoner's intention was to be presumed from the indecencies and acts of lewdness. The jury were directed that "if they believed the girl, and thought that the acts of the prisoner were against her will, though she had not resisted to the utmost, they might find the prisoner guilty; but if they thought those acts were not against her will, they might acquit him." Rex v. Nichol (1807), Russell & Ry. C.C. 130.

In a prosecution on separate counts for common and indecent assault for a similar offence in respect of a girl of thirteen, Williams, J., in summing up, said to the jury: "No one can doubt that the offence, if done at all, was against the will of the prosecutrix, considering her tender age, and therefore, if you believe the evidence, the case is made out in law." R. v. McGavaran (1852), 6 Cox C.C. 64.

The best evidence possible should be given to prove the age of the girl where the age is material. 3 Russell on Crimes, 6th ed., 240. And where the only evidence of age was simply hearsay, it was held insufficient. R. v. Wedge (1832), 5 C. & P. 298; R. v. Hayes, 2 Cox C.C. 226; R. v. Nicholls, 10 Cox C.C. 476.

If, on an indictment for rape the jury acquit the accused of that offence, but find him guilty of indecent assault, the verdict should stand notwithstanding the improper admission in evidence of the complaint of the prosecutrix made at a time when it was not properly admissible, if the other evidence in the case is ample to warrant the verdict of indecent assault. R. v. Graham (1899), 3 Can. Cr. Cas. 22 (Ont.).

*Evidence of young children.*]—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 sec. 259 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. Sec. 685.

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. Sec. 685 (2).

Any witness whose evidence is admitted under sec. 685 is liable to indictment and punishment for perjury in all respects as if he or she had been sworn. Sec. 685 (3).

*Excluding public from court room.*]—At the trial of any person charged with an offence under this and the next section, 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. Sec. 550A.

*Punishment.*]—Under this section everyone found guilty of an indecent assault on a female is liable to two years' imprisonment *and* to be whipped; but the court in many cases, acting under the discretion conferred by the special proviso contained in sec. 932 of the Code, does not inflict the whipping, and imposes only an imprisonment. R. v. Robidoux (1898), 2 Can. Cr. Cas. 19.

*(Amendment of 1893.)*

**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.

Although a minor under fourteen cannot be convicted of sodomy, he may if the act be committed against the will of the other party be punished for an assault under this section. R. v. Hartlen (1898), 2 Can. Cr. Cas. 12.

*Excluding public from court room.*]—See note to last preceding section.

**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.

*Proof of age.*]—In order to prove the age of a boy, girl, child, or young person for the purposes of this section the following shall be 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. Sec. 701A.

See note to sec. 259.

**262. Assaults causing actual bodily harm.**—Every one 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.

The original enactment of Code sec. 262 was 32 & 33 Vict., ch. 20, sec. 47, and Code sec. 783 is a re-enactment of 32 & 33 Vict., ch. 32, sec. 27.

Where a person is charged before a "magistrate" as defined by sec. 782, with the offence of "aggravated assault by unlawfully and maliciously inflicting upon any other person either with or without a weapon or instrument any *grievous* bodily harm," the case may be tried by the magistrate under the Summary Trials Part, if the accused consents. Sec. 783 (*c*), 786.

In a prosecution for an assault occasioning actually bodily harm, it is improper to exclude evidence of statements sworn to by a witness for the prosecution at a preliminary enquiry, the record of the depositions upon which had been lost, as to what was said by the accused at the time of the assault, as such statements of the witness had reference to statements of the accused forming a part of the res gestæ. R. v. Troop (1898), 2 Can. Cr. Cas. 22.

A conviction upon a charge of assault occasioning bodily harm tried summarily by a magistrate with the consent of the accused and the undergoing of the punishment imposed do not constitute a bar to a civil action for

damages for the assault. Sec. 866 applies to bar the civil action, only where the charge is triable summarily under sec. 864 without regard to the consent of the accused, and does not have that effect where the charge is under sec. 262. Nevills v. Ballard (1897), 1 Can. Cr. Cas. 434 (Ont.); Grantillo v. Caporici (1899), 16 Que. S.C. 44.

*(Amendment of 1894.)*

**263. Aggravated assault.**—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.

(*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. R.S.C., c. 162, s. 34.

**Form FF.**—The following example charging an offence under sub-section (*a.*) is given in Code form FF:—"A. with intent to maim, disfigure, disable or do grievous bodily harm to B. did actual bodily harm to B. (*or* D.)."

An example of a charge under sub-section (*c.*) is also given as follows: "A. with intent to resist the lawful apprehension or detainer of A. (*or* C.) did actual bodily harm to B. (*or* D.)."

*Assaulting peace officer.*]—Where a constable was assaulted while attempting to execute a warrant issued by two justices for non-payment of a fine and costs imposed on a person convicted of an offence, and the justice had jurisdiction over the offence, and the warrant was valid on its face, it was held that a conviction for the assault would lie notwithstanding the fact that part of the original conviction by the two justices was erroneous in awarding a punishment which was not authorized. R. v. King (1889), 18 Ont. R. 566. The offence of obstructing a peace officer in the execution of his duty is dealt with by sec. 144. As to the meaning of the term "peace officer" see sec. 3 (*s*).

The fact that the accused did not know that the person assaulted was a peace officer, or that he was acting in the execution of his duty will not

prevent a conviction hereunder. R. v. Forbes (1865), 10 Cox C.C. 362; although it will no doubt be taken into consideration in awarding the punishment.

*Punishment.*]—A fine as well as imprisonment may be imposed on the conviction of the accused, if tried either by a court of criminal jurisdiction or by a "magistrate" under the Summary Trials Procedure (Part LV.). Sec. 958; Ex parte McClements (1895), 32 C.L.J. 39.

*Prior conviction or dismissal on common assault charge.*]—A summary conviction for assault has been held sufficient to bar a subsequent indictment, charging an assault and wounding with intent to murder, where the accused had been summoned before magistrates by the prosecutor of the indictment for the same assault, and had been imprisoned on his making default of payment of the fine imposed by the magistrates. R. v. Stanton (1851), 5 Cox C.C. 324, per Erle, J. It was said by Coltman, J., in R. v. Walker (1843), 2 Moody & Rob. 446, that there is no difference in principle whether a party has been convicted or acquitted; and that on a complaint for a common assault the justices were to determine whether such assault was accompanied with any *felonious intention*, and on that question they are like any other court of competent jurisdiction, and their decision is of the same finality as if the party had been convicted by a jury.

*(Amendment of 1900.)*

**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.

Under the section as it formerly stood, the unlawful and forcible seizure or imprisonment of a person was punishable only where made with the like intent as in the cases of kidnapping provided for in paragraph (*a.*)

*Kidnapping.*]—Kidnapping is an aggravated species of false imprisonment, the latter offence being always included in the former. 2 Bishop Crim. Law 671. It is "the forcible abduction or stealing away of a man, woman or child from their own country and sending them into another." 4 Bl. Com. 219; 1 East P.C. 430. The offence is an indictable one at common law. R. v. Lesley (1860), 29 L.J.M.C. 97.

*Criminal forcible imprisonment.*]—The crime of false imprisonment is a species of aggravated assault. 2 Bishop Cr. Law 668. Although it is not necessary that a man's person should be touched. Bird v. Jones (1845), 7 Q.B. 742. A false imprisonment is any unlawful restraint of a man's liberty whether in a place made use of for purposes of imprisonment generally or in one used only on the particular occasion; or by words and an array of force without bolts or bars in any locality whatever. R. v. Webb, 1 W.Bl. 19; Bird v. Jones (1845), 7 Q.B. 742; The State v. Rollins, 8 N.H. 550; Pike v. Hanson, 9 N.H. 491.

To compel a man to go in a given direction against his will may amount to an imprisonment; but if a man merely obstructs the passage of another in a particular direction whether by threats of personal violence or otherwise, leaving him at liberty to stay where he is or go in any other direction if he pleases, he cannot be said to thereby imprison him. Bird v. Jones (1845), 7 Q.B. 742, per Patteson, J.

Detention of a prisoner after expiry of his sentence is false imprisonment. Migotti v. Colville (1869), 4 C.P.D. 233; Moone v. Rose (1869), L.R. 4 Q.B. 486.

Where a person sends for a constable and gives another person in charge for an indictable offence and the constable tells the party charged that he must go with him, on which the other without further compulsion goes to the police office, this is an imprisonment. Pocock v. Moore (1825), Ry. & M. 421. But where the warrant is used merely as a summons and no arrest is made thereon, and the party voluntarily goes before the magistrate, such seems not to be an imprisonment. Arrowsmith v. LeMesurier (1806), 2 B. & P. 211; Berry v. Adamson (1827), 6 B. & C. 528.

Where a man who had an idiot brother bedridden in his house kept him in a dark room without sufficient warmth or clothing it was held not to be an imprisonment; R. v. Smith (1826), 2 C. & P. 449; but a charge might be laid in such a case under Code secs. 209 and 215 for criminally neglecting to supply necessaries.

*Justification.*]—The seizure and imprisonment may be justified by shewing that there was a lawful arrest and detention under either civil or criminal process or by lawful authority. As to what are matters of justification see Code secs. 15-60.

**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 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.

*Common assault.*]—See sec. 258 for the statutory definition of an "assault" and see also the notes to that section.

*Summary conviction.*]—Section 864 provides for cases in which a summary conviction may be made for a common assault.

By sub-sec. 8 of sec. 842 it is provided that no justice shall hear and determine any case of assault or battery in which any question arises as to the title to any 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. Rent payable under a lease of land is an incorporeal hereditament. Kennedy v. MacDonell (1901), 1 O.L.R. 250 (Armour, C.J.O. and MacMahon, J.).

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 is not to adjudicate thereupon but must deal with the case in all respects in the same manner as if he had no authority finally to hear and determine the same. Sec. 864 (2) as amended 63 & 64 Vict., ch. 46.

PART XXI

## RAPE AND PROCURING ABORTION.

SECT.



---

**266. Rape Defined.**—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.

*Girls under fourteen.*]—When there has been no violence, and the girl is under fourteen and has consented or complied, the offence falls under Art. 269; but when there has been violence, and when the girl has not consented, then, notwithstanding the fact that the girl is under fourteen years of age, the crime is rape, and falls under this section. R. v. Riopel (1898), 2 Can. Cr. Cas. 225, 228.

The words "man" and "woman" in this section are to be taken in a general or generic sense as indicating all males and females of the human race, and not in a restricted sense as distinguished from boys and girls. R. v. Riopel (1898), 2 Can. Cr. Cas. 225.

An indictment for rape lies against one who has ravished a female under the age of fourteen years against her will, notwithstanding the provisions of sec. 269, which enacts that everyone 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. Ibid.

*Carnal knowledge.*]—Carnal knowledge is complete upon penetration to any, even the slightest degree, and even without the emission of seed. Code sec. 4 A, formerly sub-sec. 3 of sec. 266, but transferred by the amendment of 1893 to follow sec. 4.

*Evidence of young children.*]—As to the evidence of children under fourteen who do not understand the nature of an oath. See sec.685.

*Proof of complaint by prosecutrix.*]—In R. v. Lillyman, [1896] 2 Q.B. 167, 60 J.P. 536, it was held by the court (Russell, C.J., Pollock, B., Hawkins, Cave and Wills, JJ.), upon a Crown case reserved, that in cases of indecent assault and rape, and similar charges, not only the fact that the prosecutrix made a complaint soon after the occurrence, but the details of the complaint itself, are admissible in evidence, not as proof of the facts complained of, but to shew that her conduct at the time was consistent with her story in the witness box and as negativing consent. Hawkins, J., in delivering the judgment of the court, said: "The general usage has been to limit the evidence of the complaint to proof that the woman made a complaint of something done to her, and that she mentioned in connection with it the name of a particular person. . . . . After very careful consideration, we have arrived at the conclusion that we are bound by no authority to support the existing usage of limiting evidence of a complaint to the bare fact that a complaint was made, and that reason and good sense are against our doing so. . . . . It has been sometimes urged that to admit the particulars of the complaint would be calculated to prejudice the interests of the accused, and that the jury would be apt to treat the complaint as evidence of the facts complained of. Of course, if it were so left to the jury, they would naturally so treat it. But it never could be legally so left, and we think it is the duty of the judge to *impress upon the jury* that they are not entitled to use the complaint as any evidence whatever of those facts, or for any other purpose than that we have stated. With such a direction, we think the interests of an innocent accused would be better protected than they are under the present usage; for, when the whole statement is laid before the jury, they are less likely to draw wrong inferences, and may sometimes come to the conclusion that what the woman said amounted to no real complaint against the accused."

In R. v. Rush (1896), 60 J.P. 777, the prisoner was indicted for carnally knowing a girl under the age of thirteen years. The day after the commission of the alleged offence the girl's mother questioned her, and the girl, in the absence of the prisoner, made a statement in answer. It was proposed to give the particulars of the statement in evidence on behalf of the prosecution on the authority of R. v. Lillyman, [1896] 2 Q.B. 167, 60 J.P. 536. Mr. Justice Wright, presiding at the Central Criminal Court, said that the lapse of time between the committing of the offence and the making of the statement was important in these cases; that, when counsel proposed to open upon and put in evidence such statements, the judge's attention should first be called to the time that had elapsed between the occurrence and the making of the statement, in order that the judge might be enabled to say whether or not the lapse of time would be an objection to the admissibility of the statement. In Rush's case the statement had not been made immediately after the alleged offence was committed, and the trial judge therefore refused to allow evidence of the particulars of the statement to be given.

Upon the trial of a charge of rape the whole statement made by the woman by way of complaint shortly after the alleged offence, including the name of the party complained against and the other details of the complaint, is admissible in evidence as proof of the consistency of her conduct and as confirmatory of her testimony regarding the offence, but not as independent or substantive evidence to prove the truth of the charge. R. v. Riendeau (1900), 3 Can. Cr. Cas. 293 (Que.).

Whether or not the complaint was made within a time sufficiently short after the commission of the offence as to admit evidence of the particulars of the complaint, is a question to be decided by the court under the circumstances of the particular case; but it is nevertheless the province of the jury to take into consideration the time which intervened, in weighing the probability of its truth. Ibid.

In that case the lapse of seven days between the date of the offence and the time of making complaint thereof was held insufficient under the circumstances to exclude testimony of the particulars of the complaint. But see R. v. Ingey (1900), 64 J.P. 106, noted in 3 Can. Cr. Cas., p. 305.

Upon a charge of rape, statements made by the complainant to a police officer on the day after the offence was alleged to have been committed and in response to his inquiries, the complainant having on the day of the offence complained to others of an assault but not of rape, are not admissible in evidence either as part of the res gestæ or as in corroboration. But if the jury acquit the accused of that offence but find him guilty of indecent assault, the verdict should stand notwithstanding the improper admissions in evidence of statements so made by the complainant after the alleged offence, if the other evidence in the case is ample to warrant the verdict of indecent assault. R. v. Graham (1899), 3 Can. Cr. Cas. 22 (Ont.).

*Evidence generally.*]—The question whether the act of connection was consummated through fear, or merely through solicitation is a question of fact for the jury. R. v. Day (1841), 9 C. & P. 722; R. v. Jones (1861), 4 L.T.N.S. 154; R. v. Cardo (1889), 17 Ont. R. 11.

Proof on behalf of the defence that the injured party or her parents had instituted civil proceedings to recover damages arising from the commission of the alleged rape is properly excluded upon the criminal trial as irrelevant, unless other facts have been disclosed in evidence which tend to shew an intent to thereby wrongfully extort money from the accused. R. v. Riendeau (1900), 3 Can. Cr. Cas. 293 (Que.).

It was formerly considered there was danger in implying force from fraud, and an absence of consent when consent was in fact given though obtained by deception, and that cases might arise, however extreme, when a detected adulteress might to save herself excuse her paramour of a capital felony. R. v. Francis (1852), 13 U.C.Q.B. 116; R. v. Clarke (1854), 6 Cox 412, 18 Jur. 1059; R. v. Jackson, R. & R. 487.

It has been held that, in the case of alleged rape on an idiot or lunatic, the mere proof of connection will not warrant the case being left to the jury; that there must be some evidence that it was without her consent, e.g., that she was incapable, from imbecility, of expressing assent or dissent; and that if she consent from mere animal passion it is not rape. R. v. Connolly (1867), 26 U.C.Q.B. 317.

On a charge of rape evidence is admissible on behalf of the defence to contradict a statement of the complainant, made on her cross-examination, denying that, on an occasion when she met the accused subsequent to the alleged rape, she had refused to put an end to the interview, as requested by her mother, and had struck her mother for the latter's interference. Such evidence is relevant to the charge not only as affecting the credibility of the complainant's testimony generally, but as shewing conduct inconsistent with resistance to the alleged offence. R. v. Riendeau (No. 2), 4 Can. Cr. Cas. 421 (Que.).

The prisoner's statement made at a previous trial through his counsel may be given in evidence by the prosecution if it tends to anticipate a possible defence which might be offered by the prisoner. R. v. Bedere (1891), 21 O.R. 189.

Questions may be put to the complainant tending to elicit the fact that she had previously had connection with other men. R. v. Laliberté (1877), 1 Can. S.C.R. 117.

In that case the prosecutrix, after she had declared she had not previously had connection with a man other than the prisoner, was asked in cross-examination whether she remembered having been in the milk house of G. with two men, D.M. and B.M., one after the other. Held, that the witness may object, or the judge may, in his discretion, tell the witness she is not bound to answer the question. R. v. Laliberté (1877), 1 Can. S.C.R. 117.

The case of R. v. Hodgson (1812), 1 R. & Ryan 211, is the leading case on the subject. The weight of authority and the course of practice by the judges in England is to permit questions of the kind to be asked of a witness on cross-examination in cases of rape. The prosecuting officer is not permitted to raise the objection. The witness may object, or the judge may tell the witness she is not obliged to answer, if he thinks proper, though not bound to do so, and the judge will decide whether the witness is obliged to answer or not, when the point is raised. R. v. Laliberté (1877), 1 Can. S.C. 117, 131. Per Richards, C.J.

In the same case prisoner's counsel afterwards proposed to ask one of the witnesses for the defence, "Did you see the prosecutrix with D.M. and B.M.? if you have, please state on what occasion, and what were they doing?" This question was also disallowed by the judge, and the objection was sustained in the Supreme Court of Canada on the authority of R. v. Cockroft (1870), 11 Cox C.C.C. 410, and R. v. Holmes (1871), L.R. 1 C.C. 234, upon the principle that a witness cannot be contradicted in matters foreign to the issue, which, on the trial of this indictment was, not whether the prosecutrix was unchaste, but whether the prisoner had had connection with her by violence. R. v. Laliberté (1877), 1 Can. S.C.R. 117, 142.

**267. Punishment for rape.**—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.

*Describing the offence.*]—The general mode of describing the offence of rape at common law was that the accused did "feloniously ravish and carnally know," etc, but the words "carnally know" were not considered essential. R. v. Bedere (1891), 21 O.R. 189.

The meaning of the phraseology in an indictment for rape that the prisoner "violently and against her will feloniously did ravish" the prosecutrix is that the woman has been quite overcome by force or terror, accompanied with as much resistance on her part as was possible under the circumstances, and so as to have made the ravisher see and know that she really was resisting to the utmost. R. v. Fick (1866), 16 U.C.C.P. 379.

A prosecution for rape is in fact and in substance a prosecution for any offence of which, on an indictment for rape, the prisoner could have been found guilty; and the maxim "Omne majus continet in se minus" applies. R. v. West, [1898] 1 Q.B. 174; R. v. Edwards (1898) 2 Can. Cr. Cas. 96.

An indictment may now be laid under Cr. Code secs. 626, 713, charging rape and also assault with intent to commit rape. Taschereau's Cr. Code (1893), p. 273.

*Form of indictment.*]—"—— court, to wit:—The jurors of our Lord the King upon their oath present that J. S. on the —— day of —— in the year of our Lord 19—, in and upon A. N., violently and feloniously did make an assault, and her, the said A. N. then violently and against her will feloniously did ravish and carnally know, against the form of the statute in such case made and provided, and against the peace of our Lord the King, his crown and dignity."

*Excluding public from court room.*]—At the trial of any person charged with an offence under this and the next seven sections, 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. Sec. 550A.

**268. Attempt to commit rape.**—Every one is guilty of an indictable offence and liable to seven years' imprisonment who attempts to commit rape.

*Attempt to commit rape.*]—This offence was a misdemeanor at common law. An attempt to commit a crime is an intent to commit such crime by some overt act, and, in cases of rape, necessarily includes an assault. Stephen's Cr. Law, art. 49; Code sec. 64. The question whether an act done with intent to commit the 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. Sec. 64 (2).

*Evidence.*]—If a man has or attempts to have connection with a woman while she is asleep, it is no defence that she did not resist as she is then incapable of resisting. The man can therefore be found guilty of a rape or of an attempt to commit a rape as the case may be. R. v. Mayers (1872), 12 Cox C.C. 311.

*Assault with intent.*]—An assault with intent to commit rape is also a substantive offence under sec. 263, and is the form in which a charge of attempt to commit rape is usually made. R. v. Riley (1887), 16 Cox C.C. 191.

*Excluding public from court room.*]—See note to sec. 267.

*Jurisdiction.*]—By sec. 540 of the Code power to try this offence is taken away from every County Court Judge in the Province of New Brunswick. R. v. Wright (1896), 2 Can. Cr. Cas. 83.

But a County Court in New Brunswick has jurisdiction to try the offence of attempting to have carnal knowledge of a girl under fourteen (Cr. Code 270), although the evidence discloses the offence of attempting to commit rape, as to which said court has no jurisdiction. (Cr. Code 540). Ibid.

**269. Defiling children 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 fourteen years, not being his wife, whether he believes her to be of or above that age or not. 53 V., c. 37, s. 12.

*Jurisdiction.*]—The offence of carnal knowledge of a girl under fourteen years includes the offence of indecent assault, and a trial for the greater offence is a trial also for the lesser offence included therein, and the accused may, although found not guilty of the greater offence, be convicted for such lesser offence, if proved, under the same charge or indictment. R. v. Cameron (1901) 4 Can. Cr. Cas. 385 (Ont.).

A police magistrate trying an accused with his consent summarily, upon the charge of carnal knowledge, has the same power to convict of the lesser offence as a Court of General Sessions would have upon a trial under an indictment. Ibid.

An acquittal by the police magistrate on such summary trial is a bar to a charge upon a fresh information for indecent assault in respect of the same occurrence. Ibid.

An indictment for rape under secs. 266 and 267, lies against one who has ravished a female under the age of fourteen years against her will, notwithstanding this section. R. v. Riopel (1898), 2 Can. Cr. Cas. 225; R. v. Ratcliffe (1882), 15 Cox C.C. 127; R. v. Dicken (1877), 14 Cox C.C. 8.

*Carnally knows.*]—See definition in sec. 4 A.

*Verdict.*]—Sec. 713 authorizes a verdict of indecent assault, the consent of a girl under fourteen not being material to that offence; sec. 261; R. v. Cameron (1901), 4 Can. Cr. Cas. 385 (Ont.); or if the complete commission of the offence under sec. 269 is not proved, but the evidence establishes an attempt to commit the offence, the accused may be convicted of such attempt and punished accordingly. Sec. 711.

*Evidence.*]—Carnal knowledge alone constitutes an offence under this section when the girl is under the age of fourteen and her consent to the act is not a defence. R. v. Brice, 7 Man. R. 627; R. v. Chisholm, 7 Man. R. 613.

*Proof of age.*]—In order to prove the age of a boy, girl, child or young person for the purposes of this and the next section, 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. Sec. 701A.

As to the evidence of children under fourteen who do not understand the nature of an oath, see sec. 685.

*Excluding public from court room.*]—See note to sec. 267.

**270. Attempt to commit such offence.**—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.

*Jurisdiction.*]—A County Court in New Brunswick has jurisdiction to try the offence of attempting to have carnal knowledge of a girl under fourteen (Cr. Code 270), although the evidence discloses the offence of attempting to commit rape, as to which said court has no jurisdiction. (Cr. Code 540.) R. v. Wright (1896), 2 Can. Cr. Cas. 83.

*Proof of age.*]—See note to preceding section.

*Excluding public from court room.*]—See note to sec. 267.

**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.

If the child be born, and die in consequence of injuries received either before or during birth, the offence is homicide. Sec. 219.

*Excluding public from court room.*]—See note to sec. 267.

**272. Procuring 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.

*With intent.*]—Supplying a noxious thing with intent to procure abortion is an offence by the terms of this section, although it subsequently appears that the woman was not pregnant. See R. v. Titley (1880), 14 Cox C.C. 502; R. v. Goodhall (1846), 1 Den. 187.

Where the instrument alleged to have been used was a quill, which might possibly have been used for an innocent purpose, evidence was allowed to be given, in order to prove the intent, that the prisoner had at other times caused miscarriages by similar means. R. v. Dale (1889), 16 Cox C.C. 703, per Charles, J.

*Administers.*]—See note to sec. 232.

*Causes to be taken.*]—Where the prisoner gave the prosecutrix the drug for the purpose of procuring abortion, and the prosecutrix took it for that purpose in the prisoner's absence, it was held that he had "caused it to be taken" within the meaning of a similar English statute. R. v. Wilson (1856), Dears. & B. 127; R. v. Farrow (1857), Dears. & B. 164.

*Drug or other noxious thing.*]—The statute 32-33 Vict. c. 20, s. 59 as well as the later Act, R.S.C. 1886, c. 162, s. 47, used the phrase any poison or other noxious thing. It was laid down under that statute that while poisons are not noxious things when taken as medicine in ordinary treatment, that if taken or administered in undue and immoderate quantities the excess of the article becomes noxious, and it is not essential to support a conviction that the article should be noxious in itself. R. v. Stitt (1879), 30 U.C.C.P. 30, 33.

The thing administered must be either a "drug" or a "noxious thing," and it is not sufficient that the accused supposed it would have the desired effect. R. v. Hollis (1873), 12 Cox C.C. 463; R. v. Isaacs (1862), 9 Cox C.C. 228, 32 L.J.M.C. 52.

If the article administered is not a "drug" and the quantity administered is innoxious but would be noxious had it been taken in large quantities, there is no administration of a noxious thing within the section. R. v. Hennah (1877), 13 Cox C.C. 547.

If the drug administered produces miscarriage it is sufficient evidence that it is noxious although there is no other evidence of its nature. R. v. Hollis (1873), 12 Cox C.C. 463.

Evidence that quantities of oil of juniper considerably less than half an ounce are commonly taken medicinally without any bad results, but that half an ounce produces ill effects and is to a pregnant woman dangerous, was held sufficient from which a jury might infer that the latter quantity was a noxious thing. R. v. Cramp (1880), 5 Q.B.D. 307.

*Excluding public from court room.*]—See note to sec. 267.

**273. Woman procuring her own miscarriage.**—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.

*Excluding public from court room.*]—See note to sec. 267.

See note to sec. 272.

**274. Supplying means of procuring 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.

*Intended to be unlawfully used.*]—Even if the intention so to use the same exists only in the mind of the accused, and is not entertained by the woman whose miscarriage it is intended to procure, there is a complete offence. R. v. Hillman (1863), 9 Cox C.C. 386.

*Drug or other noxious thing.*]—See note to sec. 272.

*Excluding public from court room.*]—See note to sec. 267.

PART XXII.

## OFFENCES AGAINST CONJUGAL AND PARENTAL RIGHTS—BIGAMY—ABDUCTION.

SECT.



---

**275. Bigamy defined.**—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. 37, 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 or her husband was alive at any time during those seven years; or

(*c.*) if he or she has been divorced from the bond of the 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.

*What is a valid marriage.*]—It was held in Regina v. Millis, (1844) 10 Cl. & F. 534; 8 Jur. 717, that at common law, a contract of marriage per verba de presenti, though a contract indissoluble between the parties themselves, did not constitute a complete marriage unless made in the presence and with the intervention of a minister in holy orders. Lord Chief Justice Tindal in his judgment in that case says: "There is found no authority to contravene the general position that at all times, by the common law of England, it was essential to the constitution of a full and complete marriage that there must be some religious ceremony; that both modes of obligation should exist together, the civil and the religious: that besides the civil contract, that is, the contract per verba de presenti which has always remained the same, there has at all time been a religious ceremony also which has not always remained the same but has varied from time to time." This case was carried to the House of Lords. The members of that tribunal were equally divided in opinion, the result being that the judgment of Lord Chief Justice Tindal was upheld. It was afterwards followed by the House of Lords in Beamish v. Beamish (1859), 9 H.L. Cas. 274; 8 Jur. N.S. 770. Regina v. Millis was a bigamy case in which class of cases, strict proof of marriage is required.

There are, however, exceptions to the rule laid down in Regina v. Millis. In Dicey's Conflict of Laws, it is stated at p. 625, that a marriage celebrated in the mode or according to the rules and ceremony held requisite by the law of the country where the marriage takes place, is valid so far as formal requisites are concerned; also at pp. 627-34 that a marriage celebrated in accordance with the requirement of the English common law where the use of local form is impossible, such impossibility arising from the country being one where no local form of marriage, recognized by civilized states exists, or where a marriage takes place in a land occupied by savages; also at p. 754, that a marriage made in a strictly barbarous country between British subjects or between a British subject and a citizen of a civilized country and, as it would seem, even between a British subject and a native of such uncivilized country, will be held valid as regards form, if made in accordance with the requirements of the common law of England; and that it is extremely probable that with regard to such a marriage the common law might now be interpreted as allowing the celebration of a marriage per verba de presenti without the presence of a minister in orders; and that a local form also, if such there be, would seem to be sufficient at

any rate where one of the parties is a native. Connolly v. Woolwich, 11 L.C. Jurist 197.

From this it would appear that it is only in cases where the marriage per verba de presenti takes place in a strictly barbarous country, where a marriage according to the English common law, or perhaps according to local rules and customs cannot be effected, that it would be sufficient. Re Sheran, 4 Terr. L.R. 83, 91.

*Proof of foreign marriage.*]—A marriage celebrated in a foreign country may be proved by any person who was present at it; but circumstances should also be proved from which a jury may presume that it was a valid marriage according to the laws of the country in which it was celebrated or according to the national law of the parties to it, if they do not belong to the state where the marriage is performed. Archbold Cr. Plead. (1900), 1115; Sussex Peerage Case (1844), 6 St. Tr. (N.S.) 79, 11 Cl. & F. 85. And evidence of the second wife that she was married in the foreign country by a priest according to the rites of his church was held sufficient without proof of the foreign marriage law. R. v. Griffin (1879), 14 Cox C.C. 308; but see R. v. Savage (1876), 13 Cox C.C. 178, and R. v. Ray (1890), 20 Ont. R. 212.

On an indictment for bigamy the witness called to prove the first marriage swore that it was solemnized by a justice of the peace in the State of New York, who had power to marry; but this witness was not a lawyer or inhabitant of the United States, and did not shew how the authority of the justice was derived. This evidence was held insufficient. R. v. Smith (1857), 14 U.C.Q.B. 565.

In giving judgment Robinson, C.J., said: "The witness who gave this evidence did not state whether it was by any written law of that country that the authority was given, or whether without any written law marriages by a justice of the peace are or were then held valid in that country. We can as individuals have no doubt that he speaks correctly, for we have heard the authority of justices of the peace to solemnize marriage in the State of New York proved upon various occasions in such a manner as was clearly sufficient according to our law of evidence. But we cannot act in a case of this kind upon the knowledge which we have acquired in other cases. And the question is whether evidence of the foreign law in this respect, given by a person who never at any time for all that appears, was a lawyer, or an inhabitant of the foreign country in question, can be received as sufficient. We are of opinion that it cannot, and that in this case such proof of a valid marriage as the law requires was not given. R. v. Smith (1857), 14 U.C.Q.B. 565.

In order to prove the second marriage, which took place in Michigan, the evidence of the officiating minister, a clergyman of the Methodist Church for twenty-five years, during which time he had solemnized many marriages, that this marriage was solemnized according to the law of the State of Michigan, was held admissible and sufficient. R. v. Brierly (1887), 14 O.R. 525.

(*2*)—*Form of marriage.*]—The defendant is guilty of an offence under this section, although the subsequent marriage would have been void for consanguinity. R. v. Brawn (1843), 1 C. & K. 144. 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 or fictitious marriage, the case is not the less within the statute 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 which makes the form of marriage resorted to specially inapplicable to their individual case. R. v. Allen (1872), L.R. 1 C.C.R. 367, 369, disapproving; R. v. Fanning (1866), 17 Irish C.L.R. 289, 10 Cox C.C. 411.

(*3a.*)—*Bona fide belief of death.*]—Where the prisoner relies upon his first wife's lengthened absence, and his ignorance of her being alive, he must shew inquiries made, and that he had reason to believe her dead, more especially when he has deserted her; and this, notwithstanding that the first wife may have married again. R. v. Smith (1857), 14 U.C.Q.B. 565.

(*3b.*)—*Seven years' absence.*]—If the prisoner and his first wife had lived apart for more than seven years before he married again, mere proof that the first wife was alive at the time of the second marriage is not enough; there must be evidence that the accused was aware that she was alive at some time within the seven years preceding the second marriage. R. v. Fontaine, 15 L.C. Jur. 141; R. v. Curgerwen (1865), L.R. 1 C.C.R. 1, 10 Cox C.C. 152; R. v. Heaton (1863), 3 F. & F. 819.

When the prosecution have proved the two marriages and that the first wife was alive at the time of the second marriage the onus is on the accused to shew that his first wife had been continually absent for seven years before the second marriage. R. v. Willshire (1880), 6 Q.B.D. 366, 14 Cox C.C. 541; R. v. Dwyer, 27 L.C. Jur. 201. And the onus after such proof is then upon the prosecution to shew that he knew that the first wife was alive at some time during those seven years.

(*3c*)—*Validity of divorce.*]—Jurisdiction in matters of divorce depends upon the domicil of the parties at the time of the commencement of the divorce proceedings. If, therefore, the parties have their domicil in a foreign country and are divorced there without collusion or fraud by a court of competent jurisdiction, such a divorce is valid in Canada, and that quite irrespective of the place of marriage; or of the residence or allegiance of the parties; or of their domicil at the time of the marriage; or of the place in which the offence in respect of which the divorce was granted was committed. Dicey's Conflict of Laws, pp. 269, 391, 755; Stevens v. Fisk, Cassels S.C. Dig. 235; 8 Montreal Legal News, 42; and see an able article by W. E. Raney in 34 C.L.J., pp. 546-553. In Stevens v. Fisk, the parties being natives of the United States and domiciled in New York, were married there. Subsequently they removed to Montreal, where the husband took up his permanent residence. The wife some time afterwards returned to New York to her mother, and instituted proceedings for divorce in that State, on the ground of adultery. The husband was served in Montreal, and appeared by attorney, but filed no defence, and a divorce was accordingly granted. The question of the validity of the divorce in Quebec arose in a civil action brought by the former wife against the former husband for an account. If the divorce was valid, the action was maintainable under the laws of Quebec; otherwise it was not. The trial judge held that the divorce was binding and effective. The Court of Queen's Bench, composed of five judges, held by a majority of one that it was not, and that "notwithstanding such decree, according to the laws of the said Province" the plaintiff was still the wife of the defendant. In the Supreme Court Chief Justice Ritchie and Justices Gwynne and Henry agreed with the trial judge, while Mr. Justice Strong (dissenting) thought the Court of Queen's Bench was "perfectly right." Mr. Justice Gwynne based his opinion, as he did in the later case as to the validity of the bigamy sections of the Code, largely upon grounds of public policy, arguing, however, from rather a different point of view. He said: "That upon one side of the line of 45 degrees of latitude the plaintiff and defendant should be held to be unmarried, with all the incidents of their being sole and unmarried, and that upon the other side of the same line they should be held to be man and wife, is a result so inconvenient, injurious and mischievous, and fraught with such confusion and serious consequences, that in my opinion no tribunal not under a peremptory obligation so to hold should do so. Such a decision would, in my opinion, have the effect of doing great violence to that comitas inter gentes which should be assiduously cultivated by all neighbouring nations, especially

by nations whose laws are so similar, and derived from the same fountain of justice and equity, as are those of the State of New York and Canada, and between whom such constant intercourse and such friendly relations exist."

Where both husband and wife are Canadian born, and were married in Canada and continued to reside therein for many years after marriage, long residence abroad is not of itself sufficient to establish a change of domicil. McNamara v. Constantineau, 3 Rev. de Jur. (Que.) 482. A change of domicil must be animo et facto. Ibid.

Residence abroad is not sufficient to effect a change of domicil, even where such domicil is not the domicil of origin but one acquired of choice, unless it is accompanied by an intention to remain abroad and not to return to the former domicil. Bonbright v. Bonbright (1901), 2 O.L.R. 249.

In King v. Foxwell, L.R. 3 Ch.D., p. 318, Jessel, M.R., holds that "a man in order to change his 'domicil of origin' must choose a new domicil by fixing his sole or principal residence in a new country with the intention of residing there for a period not limited as to time."

Divorces granted by a foreign court having jurisdiction only by reason of a so-called matrimonial domicil, or when resort has been had to the jurisdiction of the foreign court merely for the purpose of divorce, will be treated as invalid. Le Messurier v. Le Messurier, [1895] App. Cas. 517; Shaw v. Gould (1868), L.R. 3 H.L. 55; Green v. Green, [1893] Prob. 89; Harvey v. Farnie (1883), 8 App. Cas. 43.

(*4*)—*Leaving Canada with intent.*]—The Parliament of Canada has jurisdiction to constitute the leaving Canada by a British subject resident therein with an intent to perform elsewhere a prohibited act an indictable offence, upon the act itself being performed. Re Bigamy sections of Code (1897), 1 Can. Cr. Cas. 172 (S.C. Can., Strong, C.J., dissenting); R. v. Brierly (1887), 14 Ont. R. 525. But see, contra, R. v. Plowman (1894), 25 Ont. R. 656.

A British subject domiciled in Canada, and only temporarily absent, continues to owe to Her Majesty in relation to her government of Canada an obligation to refrain from the completion, whilst absent without any animus manendi, of a prohibited act, a material part of which is committed by him in Canada. Ibid.

The onus is on the Crown to prove the facts that defendant was at the time of the second marriage a British subject, resident in Canada, and had left Canada with intent to commit the offence. R. v. Pierce (1887), 13 Ont. R. 226.

The Imperial Act, 24-25 Vict., ch. 100, sec. 57, would appear to also include the offence described in sub-sec. 4 of sec. 275, so that if the accused were apprehended or in custody in England or Ireland, he might be there tried and punished for the bigamous marriage in a foreign country, although a British subject resident in Canada, who had left Canada with intent to go through such form of marriage. No question of leaving British territory with or without such intent is involved in the Imperial Act, which is as follows:—(Sec. 57). "Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland, *or elsewhere*, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years with or without hard labour; and any such offence may be dealt with, inquired of, tried, determined and punished in any county or place in England or Ireland, *where the offender shall be apprehended* or be in custody, in the same manner in all respects as if the offence had been *actually committed* in that county or place. Provided that nothing in this section contained shall extend to any second marriage contracted else-

where than in England and Ireland *by any other than a subject* of Her Majesty, or 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, or shall extend to any person who at the time of such second marriage shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction."

*Evidence.*]—It is necessary for the prosecution to prove (1) celebration of the first marriage and identity of the parties; (2) its validity; (3) that it subsisted at the date of the second marriage; (4) celebration of the second marriage. Archbold Cr. Pl. (1900) 1112.

Evidence of a confession by the prisoner of his first marriage is no evidence that that marriage had been lawfully solemnized, and is therefore insufficient to support a conviction. R. v. Ray (1890), 20 Ont. R. 212, following R. v. Savage (1876), 13 Cox 178; R. v. Truman (1795), 1 East P.C. 470; R. v. Flaherty (1847), 2 C. & K. 782; but see, contra, R. v. Newton (1843), 2 M. & Rob. 503, and sub nom. R. v. Simmonsto (1843), 1 C. & K. 164, 1 Cox C.C. 30; R. v. Creamer, 10 Lower Canada R. 404.

The wife or husband, as the case may be, of the person charged is a competent witness, with this exception that no husband is competent to disclose any communication made to him by his wife during their marriage and no wife is competent to disclose any communication made to her by her husband during their marriage. Can. Evid. Act (1893), sec. 4. Before that Act the second wife was a competent witness as soon as the first marriage was proved. 1 Hale 393; 1 Russ. Cr. 6th ed., 715 (*a*).

The offence will be complete though the accused assumed a fictitious name at the second marriage. R. v. Allison (1806), R. & R. 109; R. v. Rea (1872), L.R. 1 C.C.R. 365.

On a trial for bigamy, in proof of a prior marriage, a deed was produced, executed by the prisoner, containing a recital of the prisoner having a wife and child in England, and conveying real property to two trustees to receive and pay over the rents to his wife, but with a power of revocation to the prisoner. B, one of the trustees, proved the execution of the deed, and that at the time of its execution prisoner informed him that he had a wife and child living in England, but that he had never paid over any of the rents to her, nor had he ever written to or heard from such alleged wife. It was held that this was not sufficient evidence to prove the alleged prior marriage. R. v. Duff (1878), 29 U.C.C.P. 255.

Upon trials for bigamy proof is required of a marriage in fact, such as the court can judicially hold to be valid; mere evidence of cohabitation and reputation of being married will not do. R. v. Smith (1857), 14 U.C.Q.B. 565, per Robinson, C.J.

Where the marriage is alleged to have been celebrated according to Jewish law, evidence must be given of a written contract between the parties; Archbold Cr. Plead. (1900), 1114; R. v. Althausen (1893), 17 Cox C.C. 630; and that the witnesses to the marriage were not blood relations of the parties. Nathan v. Woolf (1899), 15 Times L.R. 250.

The fact that the other party to the first marriage is shewn to have been alive at a time prior to the second marriage, may or may not afford a reasonable inference that such party was alive at the date of the second marriage, but it is purely a question of fact for the jury. R. v. Lumley (1869), L.R. 1 C.C.R. 196, 14 Cox C.C. 274.

**276. Punishment of bigamy.**—Every one who commits bigamy is guilty of an indictable offence and liable to seven years' imprisonment.

2. Every one 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.

*Indictment.*]—A count alleging the second marriage "the said A, his former wife, being then alive" was held sufficient without a special averment that he was still married to A. when the offence was committed. Murray v. R. (1845), 7 Q.B. 700; 1 Cox C.C. 202; R. v. Apley (1844), 1 Cox C.C. 71.

**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.

*Corroboration.*]—A person accused of an offence under this section shall not be convicted upon the evidence of one witness unless such witness is corroborated in some material particular by evidence implicating the accused. Sec. 684.

*(Amendment of 1900.)*

**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,

(*a*) who practices, 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 practice 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.

The amendment corrects a clerical error, the present paragraph (*b*) having previously stood as sub-paragraph (iv.) of paragraph (*a*).

*Indian plural marriages.*]—An Indian who according to the customs of his tribe takes two women at the same time as his wives, and cohabits with them, is guilty of an offence under this section. R. v. "Bear's Shin Bone" (1899), 3 Can. Cr. Cas. 329 (N.W.T.).

By the North-West Territories Act (R.S.C. c. 50, s. 11), the laws of England, as of July 15, 1870, in civil aad criminal matters were declared to be in force in the territories *in so far as the same are applicable to the Territories*, and in so far as the same have not been or are not hereafter repealed, altered, varied, modified, or affected by any Act of the Parliament of the United Kingdom applicable to the Territories, or of the Parliament of Canada, or by any Ordinance of the Lieutenant-Governor in Council (49 Viet. (Can.), c. 15, s. 3), or of the Legislative Assembly (60-61 Viet. (Can.), c. 28, s. 4.

In The Queen v. Nan-e-qnis-a Ka (1889), 1 N.W.T. Rep., part 2, page 21, it was unanimously held by the Supreme Court of the Territories (Richardson, Macleod, Rouleau, Wetmore and McGuire, JJ.,) that the laws of England respecting the solemnization of marriage were not applicable to the Territories, quoad the Indians, and that a marriage since the Territories Act between Indians by mutual consent and according to Indian custom is a valid marriage, provided that neither of the parties had a consort living at the time, "at any rate so as to render either one, as a general rule, incompetent and not compellable to give evidence against the other on trial charged with an indictable offence" (1 N.W.T. Rep., pt. 2, p. 25), under the rule of law that a wife is not competent or compellable to testify for or against her husband. In that case the prisoner, an Indian, charged with assault, tendered the evidence of two women, whom he called his wives, and the trial judge admitted the testimony of the woman whom the prisoner had first married, but rejected the testimony of the one last married, and this ruling was affirmed by the full court on a Crown case reserved.

*Conjugal union.*]—The mere fact of cohabitation between a man and a woman, each of whom is married to another, will not sustain a conviction under this section (formerly 53 Vic. (Can.), c. 37, s. 11) to come within the terms of which 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 the term "conjugal union" in the statute has reference to a form of ceremony joining the parties, a marriage of some sort before cohabiting with one another. The Queen v. Labrie (1891), Montreal Law Reports, 7 Q.B. 211, per Dorion, C.J., Cross, J., Baby, J., Bossé, J., and Doherty, J.

In The Queen v. Liston (noted 34 C.L.J. 546) tried at the Toronto Assizes in 1893, Chief Justice Armour held that section 278 of the Code, which is the only section which it could be argued covers adultery, was intended to apply only to Mormons.

*Evidence*]—Sec. 706 provides that in the case of any indictment under sub-sections (*b*), (*c*) and (*d*) of sec. 278 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.

**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 kowingly aids or abets such person in performing such ceremony. R.S.C., c. 161, s. 1.

*Limitation of time*]—No prosecution for this offence shall be commenced after the expiration of two years from its commission. See. 551 (*b*).

**280. Solemnization of marriage contrary to provincial 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 a woman.** 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 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.

*With intent.*]—The intent may be shewn by the declarations or acts of the defendant or from other circumstances from which the intent may be inferred. R. v. Barratt (1840) 9 C. & P. 387.

So far as the question of "persuasion" involves the question of "intent," evidence is admissible of acts done in a foreign jurisdiction as shewing the intent, which is a mental quality not dependent on jurisdiction. Jackson v. Commonwealth (1897), 38 S.W. Rep. 1091.

*Takes away or detains.*]—Manual force may not in all cases be necessary. If the taking away was accomplished under the fear and apprehension of a present immediate threatened injury depriving the woman of freedom of action, it will be an offence although no actual force was used. 1 Burn's Justice 9.

If the woman be taken away in the first instance with her own consent, but afterwards refuse to continue with the offender, and is forcibly detained by him, the offence is complete because if she so refuse she may from that time as properly be said to be "taken" against her will as if she had never given her consent at all, for till the force was put upon her she was in her own power. 1 Burn's Justice 8; 1 Hawk, c. 41, s. 7. So, under the old statute of Hen. 7, which did not contain the words "or detain," detaining a person who originally came with her own consent was considered to be within the statute. R. v. Brown (1674), Ventr. 243.

If the woman be taken away and married with her consent obtained by fraud, the case may be within the statute for she cannot while under the influence of fraud be considered a free agent. R. v. Wakefield (1827), 2 Lewin 279.

**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 co-heiress or presumptive next of kin to anyone 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 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.

(*1a*)—*From motives of lucre.*]—Roscoe (Crim. Evid., 11th ed., p. 255) says in reference to the corresponding section of the English Act, 24-25 Vict., ch. 100:—"The abduction must be from 'motives of lucre' by which, it is supposed, is meant that the prisoner when he carried off the woman had in

view the advancement of his own pecuniary position by using the legal rights of a husband over his wife's property. If this is so, why the intent to carnally know was inserted does not clearly appear, because a man can only carnally know a woman from motives of lucre when his plan is thereby to coerce her into a marriage so that if the statute had expressed the intent to marry only, it would have been enough. It is quite clear that carrying off an heiress from motives of lust only would not be an offence under this part of the statute" (sub-sec. *a*).

There may, however, be exceptional cases where the accused commits the offence for money paid or promised to him by a confederate, and in which, as a part of the conspiracy, the accused is himself to marry the woman.

(*b*)—*Fraudulently allures.*]—It need not be shewn that the accused knew that the woman was an heiress or had such an interest in real or personal estate, etc., as is specified in sub-sec. (*b*). R. v. Kaylor, 1 Dor. Q.B. (Que.) 364.

(*2*)—*Disability to take benefit.*]—It may be doubted whether the Dominion Parliament have the legislative authority to enact the second sub-section, particularly as regards the power purported to be conferred upon a court of competent jurisdiction to make a settlement of the property. The power to legislate as to the "criminal law" is conferred by the British North America Act upon the federal parliament, and the power to legislate as to "property and civil rights" is vested by the same statute in the Provincial legislatures. Quære whether the second sub-section is a matter of criminal law. It has been decided by the Supreme Court of Canada that a statutory provision authorizing a magistrate to adjudge forfeiture to the Crown of money, etc., found in a common gaming house (Code sec. 575) is intra vires and is not an interference with "property and civil rights"; O'Neil v. Attorney-General (1896), 1 Can. Cr. Cas. 303; but this sub-section, adapted from the English statutes, 9 Geo. IV., ch. 31, sec. 19 and 24-25 Vict., ch. 100, sec. 53, is substantially different from Code sec. 575 as well as from sec. 838 as to the restitution of stolen property, which latter would seem to affect the custody of and not the title to goods.

**283. Abduction of girl under sixteen.**—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.

*Evidence.*]—To constitute the crime of abducting a girl out of the possession of and against the will of her father under this section, there must be an actual or constructive possession de facto, in the father at the time of the taking. When the girl who was resident with her father in a foreign country left without his consent and with intent to renounce his protection, and came to Canada, the father's possession ceased, and semble, a possession de jure afterwards established by his following her to the place of flight is not the possession contemplated by the section. R. v. Blythe (1895), 1 Can. Cr. Cas. 263 (B.C.).

If the persuasion to leave and remain away operated wholly in the foreign country, there is no jurisdiction to convict in Canada, as persuasion is a necessary element in such cases of abduction. Ibid.

To take a natural daughter under sixteen years of age away from the custody of her putative father may be an offence under this section. R. v. Cornforth (1742), 2 Str. 1162; R. v. Sweeting (1766), 1 East P.C. 457.

The girl is none the less in the "possession" of her guardian by reason of having left her guardian's house for a particular purpose with his sanction. R. v. Mondelet (1877), Ramsay's Cases (Que.), 179, 21 L.C.Jur. 154.

A., a girl under the age of sixteen, who was, with her father's consent, under the care of B., her uncle, was allowed by B. to dine at the house of C., who was married to B.'s sister. C. took A. for a drive and induced her to remain over night with him at an hotel, where he debauched her. The next day he left her at B.'s. It was held that B. had the lawful care of A., and that she was unlawfully taken out of his possession by C. R. v. Mondelet, 21 L.C.Jur. 154.

A girl employed as a barmaid at some distance from her father's house has been held not to be in his possession. R. v. Henkers (1886), 16 Cox C.C. 257.

It is no defence that the act was committed from no bad motive, or even from philanthropic and religious motives. R. v. Booth (1872), 12 Cox C.C. 231.

The only intent which it is necessary to prove under this section is the intent to deprive the parent or other person of the possession of the child. R. v. Timmins (1860), Bell 276, 30 L.J.M.C. 45. In the case last mentioned, the prisoner induced a girl of between fourteen and fifteen years to leave her father's house and cohabited with her for three days and then told her to go home. The jury found the prisoner guilty, but also found that he did not intend when he took the girl away to keep her away from home permanently, and the conviction was affirmed.

Where the prisoner went in the night to the house of B. and placed a ladder against the window and held it for the daughter of B., a girl of the age of fifteen years, to descend, which she did, and then she eloped with him, this was held to be a "taking" of the girl out of the possession of her father, although she herself proposed to the prisoner that he should bring the ladder and that she would elope with him. R. v. Robins (1844), 1 C. & K. 456.

A man intending to emigrate to America privately persuaded a girl under sixteen to go with him, and on the morning of his departure had secretly told her to put up her things in a bundle and meet him at a certain spot, and she accordingly left her father's house and met the prisoner, and the two travelled up to London together; this was held to be a "taking." R. v. Mankletow (1853), 1 Dears. C.C. 159, 22 L.J.M.C. 115. Jervis, C.J., in delivering judgment, said:—It is unimportant under the section on which this indictment is framed whether the girl consented or not to go away with the man. When the prisoner met the girl at the appointed place there was then a taking of her. The statute was framed for the protection of parents. Ibid; R. v. Booth (1872), 12 Cox C.C. 231.

Where a man induces a girl under sixteen by promises of what he will do for her to leave her father's house and live with him, he may be convicted of this offence, although he is not actually present or assisting her at the time she leaves. R. v. Robb (1864), 4 F. & F. 59. If, however, the going away was entirely voluntary on the girl's part there can be no conviction under this section. Ibid. But as to children under fourteen see sec. 284.

So where a girl left her father without any persuasion, inducement or blandishment held out to her by the defendant, so that she had got fairly away from home and then went to the defendant, it may be his moral duty to return her to her father's custody, yet his not doing so is no infringement of this section, for it does not say he shall restore her, but only that he shall not take her away. R. v. Olifier (1866), 10 Cox C.C. 402.

If the jury believe that the mother having the custody of the girl has countenanced the daughter in a lax course of life, by permitting her to go out at night and to dance at public houses, the case is not within the intent of the statute, but is one where what had occurred, though unknown to her, could not be said to have happened against her will. R. v. Primelt (1858), 1 Foster & F. 50, per Cockburn, C.J.

It may be doubted whether it would be an offence to take away a girl against the consent of her parent, but by the consent of one who has the temporary care of her. Archbold's Cr. Plead. 22nd ed. 858; 1 East P.C. 457.

It is also doubtful whether, if the parent once consent, but afterwards dissent, a subsequent taking away can be said to be against the will of the parent. Calthrop v. Axtel (1686), East P.C. 457, 3 Mod. 168.

Where a girl lived with her father and while on the street the prisoner met her and induced her to go with him to a neighboring town where he seduced her, and then brought her back, not knowing who she was or whether she had a father living, but not believing that she was a girl of the town, it was held that as there was no evidence to shew that the prisoner had reason to know that the girl was under her father's protection, a conviction could not be supported. R. v. Hibbert (1869), L.R. 1 C.C.R. 184, 38 L.J.M.C. 61.

And where the prisoners found the girl in the street by herself and invited her to go with them and one of them kept her in an empty house with him all night and had intercourse with her, and there was no evidence as to the purpose for which the girl had left home, an acquittal was directed upon the ground that the girl was not taken out of the possession of anyone. R. v. Green (1862), 3 F. & F. 274.

This offence is distinct from the offence of seduction and a conviction under this section does not preclude a conviction for seduction. R. v. Smith (1890), 19 O.R. 714; following R. v. Handley (1833), 5 C. & P. 565 and R. v. Vandercombe and Abbott (1796) 2 Leach C.C. 708.

*Proof of age.*]—See sec. 701A.

*(Amendment of 1900.)*

**284. Stealing children.**—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.

3. In this section the word "guardian" has the same meaning as it has in ss. 183 and 186, as interpreted by s. 186A.

*Evidence.*]—It is no excuse that the defendant, being related to the girl's father and frequently invited to the house, made use of no other seduction than the common blandishments of a lover to induce the girl secretly to elope with and marry him, if it appears that it was against the consent of the father. R. v. Twistleton (1668), 1 Lev. 257, 2 Keb. 432. The object of such a law is to prevent children from being seduced from their parents or guardians by flattering or enticing words, promises or gifts, and married in a secret way to their disparagement. Hicks v. Gore, 3 Mod. 84.

The English statute, 24-25 Vict., ch. 100, sec. 56, is more limited in its terms. By it in order to constitute the offence the accused must have "either by force or fraud" led or taken away or decoyed or enticed away or detained any child under the age of fourteen years with intent, etc. It has been held that the offence under that Act may be proved by shewing force or fraud exercised either upon the guardian of the child or upon the child taken or detained, or upon any other person. R. v. Bellis (1893), 62 L.J.M.C. 155, overruling R. v. Barrett (1885), 15 Cox C.C. 658.

And where the prisoner was indicted for that she did feloniously and unlawfully by fraud detain a child under the age of fourteen with intent to deprive the mother of the possession of her, it was held that she was rightly convicted upon evidence that the child had been in the service of the prisoner and was missing and could not be found, and that she gave different accounts of what had become of the child, but implying that she had given her up to some third person although there was no evidence that the child was still in her actual custody, nor indeed any evidence as to where she was. R. v. Johnson (1884), 15 Cox C.C. 481.

*Proof of age.*]—See sec. 701A.

PART XXIII.

## DEFAMATORY LIBEL.

SECT.



---

*(Amendment of 1900.)*

**285. Defamatory libel.**—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.

*Defamatory libel.*]—The first sub-section formerly concluded with the words "designed to insult the person *to* whom it is published," and was amended by the Criminal Code Amendment Act 1900, 63 Vict., ch. 46, by substituting the words "of or concerning" for the word "to."

The writing and publishing of defamatory words of any living person or words calculated or intended to expose him to public hatred, contempt or ridicule, or to damage his reputation, or the exhibition of a picture or effigy defamatory of him is defamatory libel, if such publication or exhibition is

calculated to cause a breach of the peace. Monson v. Tussauds, Ld. [1894] 1 Q.B. 671; Odgers on Libel, 3rd ed., 443.

Any malicious defamation of any person, expressed in print or in writing, or by means of pictures or signs, and tending to provoke him to anger and acts of violence, or to expose him to public hatred, contempt or ridicule, amounts to a libel in the indictable sense of the word; and, since the reason is that such publications create ill blood and manifestly tend to a disturbance of the public peace the degree of discredit is immaterial to the essence of the libel since the law cannot determine the degree of forbearance which the party reflected upon will exert. 2 Starkie on Slander, 210, 211.

*Libels on the dead.*]—The publication of a libel on the character of a dead person is not indictable unless it is intended to injure or provoke living persons. Burb. Cr. Dig. 263. An actual intent to injure or to provoke or annoy living persons of the same family blood or society is essential to the offence, and a mere tendency to provoke, or constructive intention inferred from the fact that the libel was calculated to hurt the feelings of any surviving relations of the deceased is not enough. R. v. Ensor (1877), 3 Times L.R. 366; Burb. Cr. Dig. 263 (*a*). Whether the libel be soon or late after the death of the party, if it be done with malevolent purpose to vilify the memory of the deceased and with a view to injure his posterity then it is done with a design to break the peace and is illegal. R. v. Critchley (1734), 4 T.R. 129 (*a*); R. v. Topham (1791), 4 T.R. 126. But it must be some very unusual publication to justify an indictment for aspersing the character of the dead. R. v. Labouchere (1884), 12 Q.B.D. 320.

*Seditious libels.*]—See secs. 123 and 124.

*Libels on foreign sovereigns.*]—See sec. 125.

*Blasphemous libel.*]—See sec. 170.

*At common law.*]—At common law criminal proceedings for libel did not lie "unless the offence be of such signal enormity that it may reasonably be construed to have a tendency to disturb the peace and harmony of the community." 1 Hawkins P.C., c. 28, sec. 3. In such a case the public are justly placed in the character of an offended prosecutor to vindicate the common right of all, though violated only in the person of an individual. Ibid.

The criminal remedy for libel is in some respects the more extensive remedy; a libel may be indictable though it be not actionable. Odgers on Libel, 3rd ed. (1896), 444; R. v. Topham (1791), 4 T.R. 126; R. v. Gathercole (1838), 2 Lewin C.C. 237; R. v. Darby, 3 Mod. 139.

*Evidence.*]—In criminal libel it is not necessary to shew a publication to some third person other than the person defamed, and it is sufficient to prove a publication to the prosecutor himself, provided the obvious tendency of the words be to provoke the prosecutor and excite him to break the peace. R. v. Wegener (1817), 2 Stark. 245; R. v. Brooke (1856), 7 Cox C.C. 251; R. v. Adams (1888), 22 Q.B.D. 66, 16 Cox C.C. 544; Odgers on Libel, 3rd ed , p. 455.

A manuscript of a libel is deemed prima facie to be published, so far as the writer is concerned, when it has passed out of his possession and control. R. v. Burdett (1820), 4 B. & Ald. 143; R. v. Lovett (1839), 9 C. & P. 462.

The directors of a printing company are not criminally liable for a libel contained in a paper printed by the servants of the company, unless they knew of or saw the libel before its publication, or gave express instructions for its appearance. R. v. Allison (1888), 16 Cox C.C. 559.

Apart from statutory enactments in reference thereto, it was held that the proprietor of a newspaper is answerable criminally for the publication

in it of a libel though he has personally nothing to do with the conducting of the paper and leaves its whole management to others. R. v. Walter (1799), 3 Esp., 21, per Lord Kenyon; R. v. Gutch (1829), 1 Moody & Malkin, 433, 438.

And by sec. 297 of the Code, "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."

On an indictment for a libel published in a newspaper, it appeared that the editor (who was not indicted) before inserting the libel shewed it to the prosecutor, who did not express any wish to suppress the publication, but wrote a reply, which was also inserted. The jury found it to be a malicious libel, and defendants were convicted. The court held that what prosecutor said to the editor, and did, did not hold out any assurance of impunity to the defendants, so as to render the conviction illegal, and a new trial was refused. R. v. McElderry (1860), 19 U.C.Q.B. 168.

*Proof of publication.*] — Notwithstanding a libel may be written with a real intent to publish it, yet if no publication of it ever takes place, there is no crime, for whatever a man's intent may be, if such intent is followed by no overt act to accomplish his purpose, it would be difficult to say that he is deprived of all locus pœnitentiæ, and may be indicted for what he only intended, but never in fact attempted. The writing and composing a libel, without anything further done, may be considered merely as the private registering of a man's own thoughts: and as it is the publication that is the gist of the offence, it seems reasonable, at all events, to require some evidence of an actual attempt to publish before a party can be charged with an intent to do so. 2 Deacon Crim. Law, 809. And see R. v. Paine (1695), 5 Modern 163, 167.

The publication of a libel is not confined to the actual communication of its contents by the publisher to some other person: for though, in common parlance, the word "publication" may be confined in its interpretation to making the contents known to the public, yet its meaning is not so limited in law: wherein some words are used in a peculiar sense, differing in a certain degree from their popular meaning. Thus, in the language of the law, we speak of the publication of a will and of an award, without meaning to denote by that word any communication of the contents of those instruments, and meaning only a declaration by the testator or arbitrator, in the presence of witnesses, that the instrument is his testament or award. So in the case of a libel, the publication of it may be traditione, when it is delivered over to scandalize any party: and the publication of it is nothing more than doing the last act for the accomplishment of the mischief intended by it. For the moment a man delivers a libel from his hands his control over it is gone; he has shot his arrow, and it does not depend upon him, whether it hits the mark or not. There is an end then of the locus pœnitentiæ, his offence is complete, the mischievous contention is consummated, and from that moment he is liable to be called upon to answer for his act. And though the act of publication may be proved by an actual communication of the contents of the libel, as by singing or reading, or an open exposure of it to other persons, yet these are not the only nor the usual modes of proof. The usual mode is by delivery of the libel, either by way of sale, or otherwise: and upon proof of the purchase of a pamphlet in Fleet street, it is not necessary to prove that the purchaser read the pamphlet either in London or elsewhere. Per Best, J., and Abbott, C.J., in Rex v. Burdett (1820), 4 Barn. & Ald. 126, 160; 2 Deacon, Crim. Law, 808.

A person, who, on the application of a stranger, delivers to him the writing which libels a third person, publishes the libellous matter to him, though he may have been sent for the purpose of procuring the work by that third

person. So far as in him lies, he lowers the reputation of the principal in the mind of the agent, which, although that of an agent, is as capable of being affected by the assertions as if he were a stranger. The act is complete by the delivery: and its legal character is not altered, either by the procurement of that person, or by the subsequent handing over of the writing to him. Brunswick v. Harmer, 14 Q.B. 185. But the reading a libel in the presence of another, without any previous knowledge of its being a libel, does not amount to a publication. "Also it hath been holden," says Hawkins, "that he who repeats part of a libel in merriment without malice and with no purpose of defamation, is in no way punishable; but it seemeth that the reasonableness of this opinion may justly be questioned; for jests of this kind are not to be endured and the injury to the reputation of the party grieved is no way lessened by the merriment of him who makes so light of it." 1 Hawkins, P.C., ch. 73, sec. 14. Yet, where a man went to the defendant's house, and requested liberty to see a caricature print, and the defendant thereupon produced it, and pointed out the figures of the persons it ridiculed, Lord Ellenborough ruled that this was not sufficient evidence of a publication. Smith v. Wood, 3 Campbell, 323.

Evidence that the defendant communicated verbally to another the defamatory matter, with a view to its publication, is sufficient to charge him with the publication. In Adams v. Kelly, Ryan & Moody, N.P.C. 157, a witness (at that time a reporter for the Observer newspaper), stated that he had met with the defendant, who communicated to him the slanderous matter set forth in the first count relating to the plaintiff, which the defendant said would make a good case for the newspaper. The reporter desirous of obtaining information for his paper, attended the defendant to an adjoining tavern, and who gave him a more detailed account, for the express purpose of inserting it in the paper with which the reporter was connected. Afterwards, from the particulars communicated by the defendant, the reporter drew up an account which he left at the office of the Observer, to be inserted in that paper. An Observer newspaper was then put into the witness's hands, and he stated that a paragraph in that paper contained exactly the same account which he sent to the editor, with the exception of some slight alterations, not affecting the sense, made by the editor. The counsel for the plaintiff then proposed to read the newspaper.

Abbott, C.J., said: —"This newspaper is proposed to be given in evidence, in order to sustain that count, which charges the defendant with publishing the printed libel set forth in the declaration. The evidence is, that the reporter put something in writing from his conversation with the defendant, and which he gave to the editor. What the reporter published in consequence of what passed with the defendant, may be considered as published by the defendant: but you must shew that what was published is that which was given to the editor by the reporter, which you can only do by producing the paper itself."

There may also be a constructive publication. In Watts v. Fraser, 7 Carrington & Payne, 369, it was held that the printer and editor of a magazine are both liable for a libellous lithographic print which is contained in the work, although the print was not struck off by the printer, provided that the print is referred to in the letter-press of one of the articles.

The mere act of printing is not sufficient evidence of publication. In Watts v. Fraser, 7 Adolphus & Ellis, 223, 233, Lord Denman, C.J., in delivering the opinion said:—"One authority, Baldwin v. Elphinston, 2 Wm. Blackstone, 1037, was cited, where the Court of Exchequer held that printing must prima facie be understood to be a publishing, because the matter must be delivered to a compositor and other workmen; but it does not follow, as of course, from a work being printed, that the party sending it forth employed a compositor or other workmen. We cannot, therefore, act upon that case." If the manuscript of a libel be proved to be in the handwriting of the defendant, and it be also proved to have been printed

and published, this is sufficient evidence to go to a jury that it was published by the defendant, although there be no evidence to shew that the printing and publishing were by his direction. Regina v. Lovett, 9 Carrington & Payne, 462; Lamb's Case, 9 Co. Rep. 59. "For when a libel is produced written by a man's own hand," said Lord Holt, "and the author of it is not known; he is taken in the mainer, and that throws the proof upon him; and if he cannot produce the composer, the verdict will be against him." R. v. Bear (1696), 1 Lord Raymond, 417; 2 Salkeld, 419. But it is not a publication if the author takes a copy of the libel, provided he never publishes the copy. Lamb's Case, 9 Co. Rep. 59.

If the libel is contained in a letter addressed to the prosecutor, this is evidence of a publication sufficient to support an indictment, on the first and general principle of preserving orderly and decent conduct in society, that is, technically speaking, for the preventing breaches of the peace. Therefore the indictment must allege that the intention of sending the letter was to provoke the prosecutor and to excite him to break the peace. R. v. Wegener (1817), 2 Starkie Rep. 245; 1 Hawkins, P.C. ch. 73, sec. 11. And where a letter containing a libel is sent to the wife, it ought to be alleged as sent with intent to disturb the domestic harmony of the parties. Rex v. Wegener, ubi supra, per Abbott, J. In Avery v. the State, 7 Connecticut, 266, the information charged that the defendant sent a letter to the wife of another man, stating that she had acted libidinously with him, and had invited him to an adulterous intercourse and connection with her, and sought opportunities to effect it, and that the defendant wrote the letter and sent it to her with intent to insult and abuse her, and to seduce and debauch her affections from her husband, entice her to commit adultery, and bring her into hatred and contempt. It was held that the sending of such a letter, without other publication, was sufficient to support the information on the general principle that it tended to cause a disturbance of the public peace.

The date of a letter is prima facie evidence that it was written at the place where it was dated. Rex v. Hensey, 1 Burrow, 644; Rex v. Burdett, 4 Barnewall & Alderson, 95; and the post mark is prima facie evidence that the letter was in the office at the time and place therein specified. Fletcher v. Braddyll, 3 Starkie Rep. 64; and if a letter properly directed is sent by the post, it is presumed, from the known course in that department of the public service, that it reached its destination at the regular time and was received by the person to whom it was addressed. Warren v. Warren, 1 C. M. & R., 250; 4 Tyrwhitt, 850; approved in Shipley v. Todhunter, 7 Carrington & Payne, 680, 686.

In an action for libel contained in a pamphlet, a witness stated that she had received a copy from the defendant and that she had read certain portions of it; that she had lent it to a third person, who had afterwards given her a copy back, which she believed to be the same she had lent to him, but that she would not swear that it was the same, yet that she had no reason to doubt it. This was held to be sufficient evidence of publication for the jury. Fryer v. Gathercole, 4 Exchequer Rep. 262.

If a libel is written in one county and sent by post addressed to a person in another county, or its publication in another county be in any way consented to, this is evidence of a publication in the latter county. The Seven Bishops' Case, 13 Howell's State Trials, 331, 332. Thus, if a libellous letter is sent by the post, addressed to a party out of the county in which the venue is laid, but it is first received by him within that county, this is a sufficient publication. Rex. v. Watson, 1 Campbell, 215.

But a general confession that the defendant was the writer of a libel, is no evidence that he published it in any particular county. The Seven Bishops' Case, 12 Howell's State Trials, 183.

**286. Publishing defined.**—Publishing a libel is exhibiting it in public, or causing it to be read or seen, or 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.

**287. Publishing upon invitation.**—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.

*Answer provoked or invited.*]—Every man has a right to defend his character against false aspersion; therefore communications made in fair self-defence are privileged. If a person is attacked in a newspaper he may write to that paper to rebut the charges, and he may at the same time retort upon his assailant where such retort is a necessary part of his defence or fairly arises out of the charges made in the former article. O'Donoghue v. Hussey, Irish R. 5 C.L. 124. An attack made in public requires a public answer. Laughton v. Bishop of Sodor and Man, (1872) L.R. 4 P.C. 495.

Even in rebutting an accusation, the defendant may not state what he knows at the time to be untrue, or intrude unnecessarily into the private life or character of his assailant; the privilege extends only to such retorts as are fairly an answer to the plaintiff's attacks. Odgers on Libel 233; R. v. Veley (1867), 4 F. & F. 1117; Kœnig v. Ritchie, 3 F. & F. 413. There can be no set-off of one libel or misconduct against another. Kelly v. Sherlock, L.R. 1 Q.B. 698.

**288. Publishing in courts of justice.**—No one commits an offence by publishing 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 His Majesty, or of any of the departments of Government, Dominion or provincial.

This section makes it no longer possible for the court to determine the privileges of Parliament in respect of such publications which it was held in Stockdale v. Hansard, 9 A. & E. 1, the court was competent to do. See also Stockdale v. Hansard (1837), 11 A. & E. 297.

**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 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.

*Evidence.*]—Sec. 705 provides that in any criminal proceeding commenced or prosecuted under section two hundred and eighty-nine for printing any extract from, or abstract of, any report published by, or under the authority of, the Senate, House of Commons, or any Legislative Council, Legislative Assembly or House of Assembly, or any paper, votes or proceedings, such report, paper, votes or proceedings may be given in evidence, and it may be shewn that such extract or abstract was published bona fide and without malice, and if such is the opinion of the jury a verdict of not guilty shall be entered for the defendant.

The following sections of the Libel Act, R.S.C. 1886, ch. 163, remain in force, these sections having been excepted from the repeal of that chapter made by Code sec. 981:

(6) Every person against whom any criminal proceedings are commenced or prosecuted in any manner for or on account of or in respect of the publication of any report, paper, votes or proceedings, by such person or by his servant, by or under the authority of any Legislative Council, Legislative Assembly or House of Assembly, may bring before the court in which such proceedings are so commenced or prosecuted, or before any judge of the same, first giving twenty-four hours' notice of his intention so to do, to the prosecutor in such proceedings, or to his attorney or solicitor, a certificate under the hand of the speaker or clerk of any Legislative Council, Legislative Assembly or House of Assembly, as the case may be, stating that the report, paper, votes or proceedings, as the case may be, in respect whereof such criminal proceedings have been commenced or prosecuted, was or were published by such person, or by his servant, by order or under the authority of any Legislative Council, Legislative Assembly or House of Assembly, as the case may be, together with an affidavit verifying such certificate; and such court or judge shall thereupon immediately stay such criminal proceedings, and the same shall be and shall be deemed and taken to be finally put an end to, determined and superseded by virtue hereof.

(7) In case of any criminal proceedings hereafter commenced or prosecuted for or on account or in respect of the publication of any copy of such report, paper, votes or proceedings, the defendant, at any stage of the proceedings, may lay before the court or judge such report, paper, votes or proceedings, and such copy, with an affidavit verifying such report, paper, votes or proceedings, and the correctness of such copy; and the court or judge shall immediately stay such criminal proceedings, and the same shall be and shall be deemed to be finally put an end to, determined and superseded by virtue hereof.

**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 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.

*Fair report of judicial or parliamentary proceedings.*]—This section is in accordance with the law declared in Wason v. Walter (1869), L.R. 4 Q.B. 73, where it was held that the publication in a public newspaper of a faithful report of a debate in either House of Parliament is privileged, so that the publisher is not responsible for defamatory statements made in the course of the debate and reproduced in such faithful report. In the same case Cockburn, C.J., said: "It is now well established that faithful and fair reports of the proceedings of courts of justice, though the character of individuals may incidentally suffer, are privileged, and that for the publication of such reports the publishers are neither criminally nor civilly responsible; the general advantage to the country in having these proceedings made public more than counterbalances the inconvenience to the private persons whose conduct may be the subject of the proceedings.

The section applies even if the judicial proceedings were ex parte. Kimber v. Press Association, [1893] 1 Q.B. 65; R. v. Gray (1865), 10 Cox C.C. 184.

The true criterion of the privilege is not whether the report was or was not 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. Wason v. Walter (1869), L.R. 4 Q.B. 73; Usill v. Hales (1878), 3 C.P.D. 319.

It is only necessary that the effect of the evidence should be fairly stated. Milissich v. Lloyds (1877), 13 Cox C.C. 575. And the judgment may be reported without the evidence. Macdougall v. Knight (1889), 14 App. Cas. 194.

*Publication must be in good faith.*]—A true report of the proceedings in a court of justice sent to a newspaper from a malicious motive may be the foundation for proceedings against the sender. Stevens v. Sampson (1879), L.R. 5 Ex. D. 53; Coleman v. West Hartlepool Co., 8 W.R. 734.

*Contempt of court.*]—Nothing is more incumbent upon courts of justice than to preserve their proceedings from being misrepresented. Nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in a cause, before the cause is actually tried. Per Lord Hardwick, Huggonson's Case, 2 Atk. 469. Any publication, whether by parties or strangers, which concerns a cause pending in court, and has a tendency to prejudice the public concerning its merits, and to corrupt the administration of justice, or which reflects on the tribunal or its proceedings, or on the parties, the jury, the witnesses or the counsel may be visited as a contempt. R. v. Wilkinson, Re Houston (1877), 41 U.C.Q.B. 42, citing Bishop on Criminal Law, 5th ed., vol. 2, sec. 259.

Secs. 290, 292 and 293 refer to libel and not to contempt of court, and there is still power to commit summarily for constructive contempt, ex gr., a newspaper editorial to the effect that one of the parties to a pending suit will lose the case. Stoddart v. Prentice (1898), 5 Can. Cr. Cas. 103, 6 B.C.R. 308.

Contempt of court is a criminal proceeding. Ellis v. The Queen, 22 Can. S.C.R. 7; Re Scaife, 5 B.C.R. 153. It is therefore necessary that the charge should be proved with particularity. Re Scaife, 5 B.C.R. 153.

Where the alleged contempt consisted in the publishing, in a newspaper, comments on a judgment rendered by a Master in Chambers in a cause in which the writer was solicitor for the defendant, but after the proceedings in the cause before the master were ended, it was held by the Supreme Court of Canada that the relator in the cause could not be prejudiced as a suitor by the publication complained of, and as such prejudice was the only ground on which he could institute proceedings for contempt he had no locus standi, and his application should not have been entertained. Re

O'Brien, Regina ex rel. Felitz v. Howland, 16 Can. S.C.R. 197, reversing 11 Ont. R. 633 and 14 Ont. App. 184.

While a criminal information for libel was pending against one W., H. wrote a letter to a newspaper reflecting upon one of the judges who delivered judgment on the application for the information, and stating that W. was "as certain to be convicted as a libeller ever was before his trial." It was held that such letter was clearly a contempt of court. R. v. Wilkinson, Re Houston (1877), 41 U.C.Q.B. 42.

Where the respondent in a controverted election case applied for an order nisi calling on the defendant, his opponent at the election, to shew cause why he should not be committed for contempt of court for publishing articles in his newspaper reflecting on and prejuding the conduct of the respondent and of the returning officer during the currency of the proceedings on the election petition, it was held, although a prima facie case of contempt had been made out, that as it appears on the same material that the respondent had attended and spoken at a meeting held for the purpose of approving of the conduct of the returning officer and presenting him with a gold watch as a mark of such public approval, the applicant was also in fault, and his application was therefore refused. Re Bothwell Election Case, 4 Ont. R. 224.

In New Brunswick the practice has been to issue an attachment against the person publishing the newspaper comment complained of, the award of the attachment not being a final judgment but a method of bringing the party into court where he may be ordered to answer interrogations, and by his answers purge his contempt if he can. If he were unable to then purge his contempt the court would then pronounce sentence. Ellis v. Baird, 16 Can. S.C.R. 147.

An appeal does not lie to the Supreme Court of Canada from a judgment in proceedings for contempt of court unless it comes within the provisions of the Supreme Court Act as to appeals in criminal cases. Ellis v. The Queen, 22 Can. S.C.R. 7; O'Shea v. O'Shea, L.R. 15 P.D. 59.

Any publication, whether by parties or strangers, which concerns a cause pending in court and has a tendency to prejudice the public respecting its merits and to corrupt the administration of justice, or which reflects on the tribunal or its proceedings, or on the parties, the jurors, the witnesses or the counsel, may be visited as a contempt. 2 Bishop's Crimina Law, 2nd ed., sec. 216; Littler v. Thomson, 2 Beav. 129; Re Crawford, 13 Jurist 955.

Where the defendant to a proceeding by way of criminal information, immediately before the trial distributed handbills in the assize town vindicating his own conduct and reflecting on that of the prosecutor, the court found that the motive was to influence the jury in his favour at the trial and granted a criminal information against him in respect thereof. R. v. Jolliffe (1791), 4 T.R. 285. And a criminal information has been granted for publishing an invective against judges and juries in general, the court treating such publication as made with intent to bring into suspicion and contempt the administration of justice. R. v. White (1808), 1 Camp. 359.

An advocate who publishes in a newspaper, letters containing libellous, insulting and contemptuous statements and language concerning one of the justices of the court in reference to the conduct of said justice, while acting in his judicial capacity on an application made to him in chambers for a writ of habeas corpus, is guilty of contempt. R. v. Ramsay, L.R. 3 P.C. 427, 11 L.C. Jurist 152. But the proceedings should be taken before the full court. Ibid.

The court has power summarily to commit for constructive contempt notwithstanding secs. 290, 292 and 293 as to fair reports of court proceedings

and fair comment upon public affairs; but the court will not exercise the power where the offence is of a trifling nature, but only when necessary to prevent interference with the course of justice. Stoddard v. Prentice (1898), 5 Can. Cr.Cas. 103, 6 B.C.R. 308.

A statement in a newspaper editorial to the effect that one of the parties to a pending suit will lose the case, is a contempt of court. Ibid.

Fair and impartial reports of the proceedings in Courts of Justice, although incidentally those proceedings may prejudice individuals, are of so great public interest and public advantage that the publishing of them to the world predominates so much over the inconvenience to individuals as to render the reports highly conducive to the public good; but the conditions on which the privilege can be maintained are, that the report shall be fair, truthful, honest and impartial. Per Cockburn, C.J., in Risk-Allah-Bey v. Whitehurst, 18 L.T.N.S. 615; R. v. Wilkinson (1877), 41 U.C.Q.B. 47, 93.

**291. Fair reports of proceedings 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.

*For the public benefit.*]—See note to sec. 299.

**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.

*Any subject of public interest.*]—It is a question for the judge and not for the jury whether a particular topic was or was not a subject of public interest. Weldon v. Johnson (1884), per Coleridge, C.J., cited in Odgers on Libel, 3rd ed., 46.

The exemption declared by this section is dependent on (1) a belief by the accused that the matter he published was true; (2) such belief being founded on reasonable grounds; (3) the matter being relevant to a subject of public interest; and (4) such subject of public interest being one the public discussion of which is for the public benefit.

The conduct of all public servants, the policy of the Government, our relations with foreign countries, all suggestions of reforms in the existing laws, all bills before Parliament, the adjustment and collection of taxes, and all other matters which touch the public welfare, are clearly matters of public interest, which come within the preceding rule. Odgers on Libel, 42. Every subject has a right to comment on those acts of public men which concern him as a subject of the realm, if he do not make his commentary a cloak for malice and slander. (Per Parke, B., in Parmiter v. Coupland, 6 M. & W. 108). Those who fill "a public position must not be

too thin-skinned in reference to comments made upon them. It would often happen that observations would be made upon public men which they knew from the bottom of their hearts were undeserved and unjust; yet they must bear with them, and submit to be misunderstood for a time, because all knew that the criticism of the press was the best security for the proper discharge of public duties." (Per Cockburn, C.J., in Seymour v. Butterworth, 3 F. & F. 376, 377; and see the dicta of the judges in R. v. Sir R. Carden, 5 Q.B.D. 1.

Evidence given before a Royal Commission is matter publici juris, and everyone has a perfect right to criticise it. Per Wickens, V.-C., in Mulkern v. Ward, L.R. 13 Eq. 622; 41 L.J. Ch. 464; 26 L.T. 831.

All appointments by the Government to any office are matters of public concern. Seymour v. Butterworth, 3 F. & F. 372.

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. Wilson v. Reed and others, 2 F. & F. 149.

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 bona fide discussion by a writer in a public newspaper. Davis v. Duncan, L.R. 9 C.P. 396; 43 L.J.C.P. 185; 22 W.R. 575; 30 L.T. 464.

The public career of any member of Parliament, or of any candidate for Parliament, is of course a matter of public interest in the constituency. But not his private life and history. "However large the privilege of electors may be," said Lord Denman, C.J., "it is extravagant to suppose that it can justify the publication to all the world of facts injurious to a person who happens to stand in the situation of a candidate." Duncombe v. Daniell, 8 C. & P. 222; 2 Jur. 32; 1 W.W. & H. 101.

I apprehend, however, that the electors are entitled to investigate and discuss all matters in the past private life of a candidate which, if true, would prove him morally or intellectually unfit to represent them in Parliament; but not to circulate unfounded charges against him even bona fide. Harwood v. Sir J. Astley, 1 B. & P.N.R. 47; Wisdom v. Brown, 1 Times L.R. 412; Pankhurst v. Hamilton, 3 Times L.R. 500.

The administration of the law, the verdicts of juries, the conduct of suitors and their witnesses, are all matters of lawful comment. See sec. 290.

"That the administration of justice should be made a subject for the exercise of public discussion is a matter of the most essential importance. But, on the other hand, it behoves those who pass judgment, and call upon the public to pass judgment, on those who are suitors to, or witnesses in, courts of justice, not to give reckless vent to harsh and uncharitable views of the conduct of others; but to remember that they are bound to exercise a fair and honest and an impartial judgment upon those whom they hold up to public obloquy." (Per Cockburn, C.J., in Woodgate v. Ridout, 4 F. & F. 223, 4).

"Writers in public papers are of great utility, and do great benefit to the public interests by watching the proceedings of courts of justice, and fairly commenting on them if there is anything that calls for observation; but they should be careful, in discharging that function, that they do not wantonly assail the character of others, or impute criminality to them, and if they do so, and do not bring to the performance of the duty they discharge that due regard for the interests of others which the assumption of so important a censorship necessarily requires, they must take the consequences." Per Cockburn, C.J., in Reg. v. Tanfield, 42 J.P. at p. 424.

The working of all public institutions, such as colleges, hospitals, asylums, homes, is a matter of public interest, especially where such institutions appeal to the public for subscriptions, or are supported by the rates, or are, like our universities, national property. The management of local affairs by the various local authorities, e.g., town councils, school-boards, boards of guardians, boards of health, etc., is a matter of public, though it may not be of universal concern. Odgers on Libel, 46.

**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 on 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.

**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.

**295. Answer 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 to the inquiries made, and also if such publishing does not in manner or extent exceed what is reasonably sufficient for the occasion.

**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.

**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 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.

"*Newspaper.*"]—The word "newspaper" here means 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. Sec. 3, sub-sec. (*p*-1).

*Venue.*]—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. Sec. 640 (2).

**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, although 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.

*Justifying as true, and published for the public benefit.*]—The maxim used to be "the greater the truth the greater the libel," meaning that the injudicious publication of the truth about an individual would be more likely to provoke him to a breach of the peace than if some falsehood were invented about him which he could easily and completely refute. Odgers on Libel, 437. So, on a criminal trial, whether of an indictment or an information, before the statute, 37 Viet. (Can.), ch. 38, secs. 5 and 6, consolidated with the Libel Act, R.S.C. 1886, ch. 163, and now Code sec. 299, no evidence could be received of the truth of the matters charged, not even in mitigation of punishment.

The mere truth is an answer to a civil action, however maliciously and unnecessarily the words were published; but in a criminal case the defendant has to prove not only that his assertions are true but also that it was for the public benefit that they should be published. Odgers on Libel, 438.

To take advantage of this section, it must be pleaded. R. v. Moylan, 19 U.C.Q.B. 521; R. v. Hickson, 3 Montreal Legal News 139; R. v. Laurier, 11 Rev. Legale 184; R. v. Creighton, 19 Ont. R. 339. The section is limited to "defamatory" libels, and does not apply to blasphemous, obscene or seditious words. R. v. Duffy (1848), 7 St. Tr. N.S. 795, 853, 9 Irish C.L. 329, 2 Cox C.C. 45; Ex parte W. O'Brien (1883), 12 L.R. Irish 29, 15 Cox C.C. 180.

The plea of justification must affirm the truth of all the charges, and not merely that some of them are true or that the defendant believed them, or some of them, to be true. R. v. Moylan (1860), 19 U.C.Q.B. 521; R. v. Newman (1853), 1 E. & B. 568.

**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. Punishment of defamatory libel known to be false.**—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., 163, s. 2.

*Knowingly publishing a false defamatory libel.*]—This is a common law offence. R. v. Munslow, [1895] 1 Q.B. 758.

An indictment does not lie for mere defamatory words spoken and not reduced to writing, even if the words be such that an action for damages for slander might be sustained without proof of special damage. R. v. Langley (1703), 6 Mod. 125.

A defamatory libel of his wife by the husband has been held not to be indictable because such a libel is not actionable between the parties. R. v. Lord Mayor of London (1886), 16 Q.B.D. 772.

*Indictment.*]—An indictment charging the publication of a defamatory libel, which does not state that the same was likely to injure the reputation of the libelled person by exposing him to hatred, contempt or ridicule, or was designed to insult him, is bad by reason of the omission of an essential ingredient of the offence. R. v. Cameron (1898), 2 Can. Cr. Cas. 173.

Such an indictment cannot be amended and must be set aside and quashed as the defect is a matter of substance. Ibid.

The law implies malice from the publication but no allegation of malice need be made in the indictment. R. v. Munslow, [1895] 1 Q.B. 758, 762.

*Form of indictment.*]—

"County of ——, to wit:—The jurors for Our Lord the King upon their oath present, that A.B. on the —— day of —— in the year of our Lord 190—, unlawfully did write and publish and cause and procure to be written and published a false, scandalous, malicious and defamatory libel in the form of a letter directed to one J. N. [*or*, if the publication were in any other manner, according to the tenor and effect following], containing divers false, scandalous, malicious, and defamatory matters and things of and concerning the said J.N., and of and concerning [*here* insert such of the subjects of the libel as it may be necessary to refer to by innuendoes in setting out the libel], according to the tenor and effect following, that is to say: [here set out the libel together with such innuendoes as may be necessary to render it intelligible]; he the said A.B. then well-knowing the said defamatory libel to be false against the form of the statute in that case made and provided [*or*, of the Criminal Code, sec. 301,], to the great damage, scandal and disgrace of the said J.N., to the evil example of all others in the like case offending, and against the peace of our Lord the King, his crown and dignity."

*Pleas.*]—At common law the accused could plead only the general issue, "not guilty." Archbold Cr. pl. (1900), 1069; but by sec. 299 of the Code, taken from R.S.C. 1886, c. 163, s. 4, it is now a defence 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.

Pleas in abatement are now abolished. Sec. 656.

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, and not otherwise. Sec. 656.

*Plea of justification.*]—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. Sec. 634 (1). 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. Sec. 634 (2). 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. Sec. 634 (3).

The accused may, in addition to such plea, plead not guilty and such pleas shall be inquired of together. Sec. 634 (4).

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. Sec. 634 (5).

The following form of such a plea of justification added to a plea of not guilty is adapted from form 81 of the English Crown Office Rules, 1886:—

"And now, that is to say on the —— day of —— 190—, before our said Lord the King in the —— (court) at —— comes the said A. B. (the defendant) by —— —— his solicitor [or in his own proper person], and having heard the said indictment read he says that he is not guilty thereof, and hereupon he puts himself upon the country."

"And for a further plea the said A. B. pursuant to the statute in that behalf [*or* to the Criminal Code sec. 299] says that our said Lord the King ought not further to prosecute the said indictment against him because he says that it is true that [*here* allege the truth of every part of the publication charged as a libel set out in the indictment]."

"And the said A. B. further says that before and at the time of the publication in the said indictment mentioned [*here* state facts which rendered the publication of benefit to the public], by reason whereof it was for the public benefit that the said matters so charged in the said indictment should be published, and this he the said A. B. is ready to verify."

"Wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the said indictment above specified."

*Demurrer.*]—An objection to any indictment for any defect apparent on its face must 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 the Code. Sec. 629.

The following form of demurrer is adapted from the English Crown Office Rules, 1886, form No. 80:—

"And the said A.B. in his own proper person cometh into court here, and having heard the said indictment read, saith that the said indictment

and the matters therein contained, in manner and form as the same above are stated and set forth, are not sufficient in law, and that he the said A.B. is not bound by the law of the land to answer the same; and this he is ready to verify; wherefore, for want of a sufficient indictment, in this behalf the said A.B. prays judgment and that by the court he may be dismissed and discharged from the said premises in the said indictment specified."

The joinder in demurrer may be in the following form:—

"And —— ——, who prosecutes for our said Lord the King in this behalf, saith that the said indictment and the matters therein contained in manner and form as the same are above stated and set forth are sufficient in law to compel the said A.B. to answer the same; and the said —— —— who prosecutes as aforesaid is ready to verify and prove the same as the court here shall direct and award; wherefore, inasmuch as the said A.B. hath not answered to the said indictment nor hitherto in any manner denied the same, the said —— —— for our said Lord the King prays judgment, and that the said A.B. may be convicted of the premises in the said indictment specified."

*Verdict.*]—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 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. Sec. 719.

*Costs in libel prosecutions.*]—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. Sec. 833.

In a recent Quebec case the plaintiff had been prosecuted by defendant in a criminal court for defamatory libel and acquitted. No demand was made when the verdict was given for a condemnation of defendant for costs, but plaintiff afterwards sought to recover them by action. After hearing the cause in the Superior Court, the presiding judge discharged the délibéré to enable the plaintiff to have his costs taxed before the judge who presided at the criminal trial, which was done, and the cause was reheard. It was held that plaintiff could claim his costs and disbursements from defendant by an ordinary action, though he had not asked for a condemnation against defendant therefor at the time of the verdict. That the judge who presided at the criminal trial could, even after proceedings in such action, tax such costs and disbursements. Mackay v. Hughes (1901), 19 Que. S.C. 367 (Sup. Ct.).

**302. Punishment of defamatory libel.**—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.

**Form FF.**—The following example of stating an offence under this section is contained in Code Form FF.:—"A. published a defamatory libel on B. in a certain newspaper, called the ——, on the —— day of —— A.D. —, which libel 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)*."

*Indictment, pleas, etc.*]—See note to sec. 301. That section relates to the greater offence of publishing a libel "knowing the same to be false." If the proceeding is under sec. 302 only, the charge of such knowledge by the accused will be omitted from the form of indictment.

*Evidence under 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. Sec. 683.

A commission to take the evidence of witnesses abroad in a libel prosecution is properly ordered at the trial where the evidence relates wholly to a plea of justification just entered of record. R. v. Nicol (1898), 5 Can. Cr. Cas. 31 (B.C.).

An order for a commission to take such evidence should not be made before plea. Ibid.

*Verdict in libel case.*]—See sec. 719.

*Suspension of sentence.*]—Where a convicted person, instead of being sentenced is discharged from custody upon entering into a recognizance with sureties to appear and receive judgment when called on, it is only on motion of the Crown that the recognizance can be estreated, or judgment moved against him. In Ontario, a private prosecutor in a prosecution for defamatory libel has no locus standi to make the application. R. v. Young (1901), 4 Can. Cr. Cas. 580 (Ont.).

Where fourteen years had elapsed since the conviction, and the only breaches of recognizance charged were the publication of several newspaper articles alleged to be defamatory of the prosecutor, the latter should be left to his remedy by action or indictment in respect of any fresh libels, even if he had a locus standi to enforce the recognizance. Ibid.

*Criminal information for libel.*]—A party seeking a criminal information against another must himself be free from blame, or he will not be granted leave to take that method of procedure, and will be left to his recourse by indictment or action. R. v. Edward Whelan (1863), 1 P.E.I. Rep. 223, per Peters, J.; R. v. Lawson, 1 Q.B. 486.

A party who wants a criminal information must place himself entirely in the hands of the court. If it appear that the party has put himself into communication with the publisher of the libel, for the purpose of retorting,

or with the view of obtaining redress, or has in any way himself attempted to procure redress, or take the law into his hands, the remedy by criminal information will be refused. R. v. Wilkinson (1877), 41 U.C.Q.B. 1, 25 (citing Ex parte Beauclerk, 7 Jur. 373).

A person alive to the vindication of his character when assailed and entitled to the remedy of criminal information must apply with reasonable promptitude. The general rule is stated by Lord Mansfield in R. v. Robinson (1765), 1 W.Bl. 542, where he said: "There is no precise number of weeks, months or years; but, if delayed, the delay must be reasonably accounted for. The party complaining must come to the court either during the term next after the cause of complaint arose, or at so early a period in the second term thereafter as to enable the accused, unless prevented by the accumulation of business in the court, or other cause within the second term; and this, regardless of the fact whether an assize intervened or not. R. v. Kelly (1877), 28 U.C.C.P. 35; 41 U.C.Q.B. (1877), 1, 24.

It is of the highest importance that the relator should in all cases lay before the court all the circumstances fully and candidly, in order that the court may deal with the matter. R. v. Wilkinson (1877), 41 U.C.Q.B. 1, 25 (citing R. v. Aunger, 28 L.T.N.S. 634, 8.C. 12 Cox 407).

The granting of a criminal information is discretionary with the court under all circumstances; the application is not to be entertained on light or trivial grounds. In dealing with such an application, the court has always exercised a considerable extent of discretion in seeing whether the rule should be granted, and whether the circumstances are such as to justify the court in granting the rule for a criminal information. R. v. Wilkinson (1877), 41 U.C.Q.B. 1, 29.

There are two things principally to be considered in dealing with such an application: 1. To see whether the person who applies to conduct the prosecution, the relator or the informer, has been himself free from blame, even though it would not justify the defendant in making the accusation; 2. To see whether the offence is of such magnitude that it would be proper for the court to interfere and grant the criminal information. Both these things have to be considered, and the court would not make its process of any value unless they considered them and exercised a good deal of discretion, not merely in saying whether there is legal evidence of the offence having been committed, but also exercising their discretion as men of the world, in judging whether there is reason for a criminal information or not. R. v. Plimsoll (1873), noted in 12 C.L.J. 227; R. v. Wilkinson (1877), 41 U.C.Q.B. 1, 29.

"The court always considers an application for a criminal information as a summary extraordinary remedy depending entirely on their discretion, and therefore not only must the evidence itself be of a serious nature, but the prosecutor must apply promptly or must satisfactorily account for any apparent delay. He must also come into court with clean hands, and be free from blame with reference to the transaction complained of; he must prove his entire innocence of everything imputed to him, and must produce to the court such legal evidence of the offence having been committed by the defendant as would warrant a grand jury in finding a true bill against the defendants." Per Quain, J., in R. v. Plimsoll (1873), 12 Can. Law Jour. p. 228, cited by Hagarty, C.J., in R. v. Kelly (1877), 28 U.C.C.P. 35.

The court confines the granting of criminal informations for libel to the case of persons occupying official or judicial positions, and filling some offices which gives the public an interest in the speedy vindication of their character, or to the case of a charge of a very grave or atrocious nature; leave was therefore refused to the manager of a large railway company to file a criminal information for libel, on the ground that he did not come within the description of persons referred to. Per Armour, J., "I think the practice of granting leave to file criminal informations in this country,

having regard to the social conditions of its inhabitants and the liberties which they enjoy, is, to say the least of it, of very doubtful expediency, and should, in my opinion, be discontinued and, if necessary, abolished by legislative enactment. The very rule adopted in England, that it will only be granted to what I may call 'a superior person' is the strongest reason, to my mind, why in this country it should never be granted at all. Whatever may be deemed desirable in England, I do not think it desirable that in this country there should exist a remedy for the superior person which is denied to the inferior." R. v. Wilson (1878), 43 U.C.Q.B. 583.

Per Cameron, J., "There is no real necessity, so far as I am aware, for any one seeking this remedy. Any person libelled has a right to lay an information before a magistrate charging any one who may have libelled him with the offence, and may then by his oath deny the truth of the slanderous charges or imputations." Ibid. Hagarty, C.J., added that it was not to be understood that the court laid down any absolute rule as to future applications for criminal informations, or that they meant to fetter their discretion in dealing therewith. Ib. reporter's note. R. v. Wilson (1878), 43 U.C.Q.B. 583.

Where the libel charges the person libelled with having, by a previous writing, provoked it, the latter by his affidavit on which he moves for a criminal information is bound to answer such charge, otherwise the affidavit will be held insufficient. R. v. Edward Whelan (1862), 1 P.E.I. Rep. 220, per Peters, J.

In Trinity term, 1876, an application was made for a criminal information for libel in newspapers published on 23rd and 30th March and 25th May. The delay in not applying to the court during Easter Term, or until 30th August, was not satisfactorily accounted for, and the court refused the application, but, in view of the virulent language of the article, without costs. R. v. Kelly (1877), 28 U.C.C.P. 35.

In answer to an application for a criminal information for libel the defendants filed an affidavit stating that they had no personal knowledge of the matter contained in the alleged libels, but received the information from persons whom they trusted to be reliable and trustworthy; that the Globe newspaper was controlled by the applicant, who was an active politician, and had published a number of articles violently attacking one S., who was a candidate for a public office, and the libels in question were published with a view of counteracting the effect of these articles, and believing them to be true, and without malice. This was held to be no ground for the court refusing to the applicant leave to file a criminal information for the reiterated publication in a newspaper of matter not pretended either to be not libellous, or to be true in fact. R. v. Thompson (1874), 24 U.C.C.P. 252.

Quære whether a criminal information is the course to be adopted for wilful and corrupt misconduct of a judge holding an inferior court of record. R. v. Ford (1853), 3 U.C.C.P. 209, 218.

# TITLE VI.

## OFFENCES AGAINST RIGHTS OF PROPERTY AND RIGHTS ARISING OUT OF CONTRACTS, AND OFFENCES CONNECTED WITH TRADE.

### PART XXIV.

### THEFT DEFINED.

SECT.



---

**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 provided) be deemed capable of being stolen.

*At common law.*]—Nothing but personal goods could be the subject of larceny at common law. Archbold Cr. Plead. (1900), 406. Things real or which 'savoured of the realty' were excluded, and title deeds could therefore not be the subject of larceny. 1 Hale 510. Nor could bonds, bills of exchange, etc., they being mere choses in action. 1 Hawk., ch. 33, sec. 35: R. v. Watts (1854), Dears. 326. And there could not be a larceny of a corpse, as it was not the subject of property. R. v. Haynes (1614), 12 Co. Rep. 113. But see Code sec. 206 as to improper interference with a dead human body or human remains.

Water supplied by a water company to a consumer and standing in his pipes, might also be the subject of larceny at common law. Ferens v. O'Brien (1883), 11 Q.B.D. 21.

There could be no larceny of things which adhere to the freehold, such as corn, grass, trees and the like, or lead or other thing attached to a house. Archbold Cr. Plead. (1900), 406. The severance of them was a mere trespass. Ibid. But if the owner or a stranger severed them and another man came and stole them, or if the thief severed them at one time, and after abandoning same came at another time and took them away, it was larceny. R. v. Foley (1889), 17 Cox C.C. 142. But the mere severance by the wrongdoer at one time and the taking away by him at another were not sufficient to constitute larceny unless he had, between the severance and the taking away, intended to abandon his wrongful possession of the article severed. If the wrongdoer did not intend to abandon his possession, but merely left the article concealed on the land after severance, until he could conveniently return and carry it away, then the severance and carrying away were treated as one continuous act although a considerable time may have elapsed between the severance and taking away, and there is no larceny at common law. R. v. Townley (1871), L.R. 1 C.C.R. 315.

**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 inclosure, 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.

*Larceny of animals at common law.*]—Animals feræ naturæ, or wild animals, were not the subject of larceny at common law unless reclaimed, and then only in case they were animals fit for food. 4 Bl. Com. 235, 2 Bishop Cr. Law 683.

Hawks kept for sport were excepted from this limitation, and to steal them was larceny, because, say Hawkins, "of the very high value which was formerly set upon that bird." 1 Hawkins P.C. There could be no larceny of the following at common law, although reclaimed—dogs, cats, ferrets, squirrels, parrots, singing birds. 2 Bishop Cr. Law 684. Or of ferrets, though tame and saleable. R. v. Searing (1818), R. & R. 250.

Birds, bees and silkworms, kept respectively for food, labour or profit, were the subjects of larceny as well as their produce. 2 Russ. Cr., 5th ed., 233.

The taking of tame pigeons from a dovecote might be larceny at common law. R. v. Cheafor (1851), 2 Den. 361. And this section declares that they shall constitute the subjects of theft so long only as they are in a dovecote, or on their owner's land.

**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—

(*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 possesion of his master, the servant so offending shall not, by reason thereof, be guilty of theft. R.S.C., c. 164, s. 63.

*Larceny at common law.*]—Larceny at common law is the wrongful or fraudulent taking and carrying away the personal goods of another from any place with a felonious intent to convert them to the taker's own use and make them permanently his own property without the consent of the owner. 2 East P.C. 553. The intent referred to was one to deprive the owner permanently, and not only temporarily, of his property and without colour of right to excuse the act. R. v. Thurborn (1849), 1 Den. 388, 2 C. & K. 831; R. v. Guernsey (1858), 1 F. & F. 394. Sub-sec. (*a*) supra, extends the common law doctrine so as to include a taking with intent to temporarily deprive the owner.

To constitute larceny there must have been either an actual or constructive "taking" of the goods. And where one of the tenants in common of a personal chattel carried away and disposed of it, this was held not to be larceny at common law. 1 Hale 513. Theft under the Code may be committed by one of several joint owners, tenants in common or partners of or in anything capable of being stolen (sec. 303), against the other persons interested therein (sec. 311); or by the directors of a corporation against the corporation, or by the members of an unincorporated society, if the purposes of the society be lawful, against such society. Sec. 311.

There must not only have been a taking but also an asportation or carrying away; but a bare removal from the place in which the thief found the goods, though he did not make off with them, was a sufficient carrying away. 4 Bl. Com. 231. So where a thief intending to steal 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 his escape with it, this was larceny. R. v. Simpson, Kel. J. 31, 1 Hawk., ch. 33, s. 25. And where the defendant drew a book from the inside pocket of the prosecutor's coat about an inch above the top of the pocket, but whilst the book was still about the person of the prosecutor, the latter suddenly put up his hand, and the defendant then let the book drop and it fell back into the prosecutor's pocket, this was held a sufficient asportation to constitute larceny. R. v. Thompson (1825), 1 Mood. C.C. 78. There must be a severance to constitute an asportation. 2 Russ. Crim., 6th ed., 122. And where the accused could not carry off the purse he laid hold of, intending to steal it, because some keys attached to the strings of the purse got entangled in the owner's pocket and held it fast, it was held that there was no larceny. R. v. Wilkinson (1598), 1 Hale 508. And likewise where the goods were attached by a string to the counter. Anon, 2 East P.C. 556. Sub-sec. 4, supra, makes the offence of theft complete when the offender moves the thing or causes it to move or to be moved or *begins* to cause it to become moveable, with intent to steal it.

The article must also have been of *some* value, but not necessarily of the value of any coin known to the law. R. v. Morris (1839), 9 C. & P. 349; R. v. Edwards (1877), 13 Cox 384.

The abandonment of the term 'larceny' in Canadian jurisprudence on the enactment of the Criminal Code of Canada subsequent to an extradition convention including such offence, does not affect the liability to extradition of a person charged with what was larceny at common law and is by the Criminal Code still an offence in Canada under the name of 'theft' or 'stealing.' Re Gross (1898), 2 Can. Cr. Cas. 67 (Ont.).

*Proof of ownership.*]—To prove a right of property in a representative capacity such as administratrix parol evidence of a son of the person alleged to be administratrix that she was so in fact is insufficient. R. v. Jackson (1869), 19 U.C.C.P. 280.

A prisoner may be indicted for stealing the property of some persons unknown, if facts be proved from which the jury may fairly presume that the goods were stolen, but not if it appear that the owner is really known or might easily have been discovered. 2 Russell Crim., 6th ed., 296.

It is not essential that direct proof of loss be given if the quantity of goods in a warehouse or shop is so great as to prevent the prosecutor knowing whether any part be missing. Presumptive evidence in support of such fact is admissible, as that the prisoner threw down the articles when stopped on coming out of one of the rooms, and said, "I hope you will not be hard with me." R. v. Burton (1854), 23 L.J.M.C. 52; R. v. Wright (1858), 30 L.T. Rep. 292; R. v. Mockford (1868), 11 Cox 16; 32 J.P. 133.

This section, in defining theft, does not limit the offence to the mere stealing of the right of ownership, but extends to the stealing of any special right of property or interest in it. R. v. Tessier (1900), 5 Can. Cr. Cas. 73, 78 (Que.).

*Fraudulent conversion by bailee, etc.*]—Before the Code it had been held that money was property of which a person could be a bailee so as to make him guilty of theft if he appropriated it to his own use; R. v. Massey (1863), 13 U.C.C.P. 484; but the bailment must have been for the re-delivery of the identical money and not merely its equivalent in currency. R. v. Hoare (1859), 1 F. & F. 647; R. v. Garrett (1860), 2 F. & F. 14. See now sec. 308 by which, subject to a proviso as to what shall be deemed an accounting, the fraudulent conversion is now made theft although the party in default was not required to deliver over in specie the identical money.

Defendant held the title of land belonging to A., who lived in the United States. A. exchanged it with H. for other land, and gave an order on defendant to convey to H. When H. presented this order defendant represented that a claim having been made against him for A.'s debts, he had sworn that the farm belonged to himself; and to keep up the appearance of this being true, it was agreed between H. and the defendant that a certain sum should be paid over by H. to defendant on receiving the deed, as for the purchase money, and immediately returned. H. borrowed $700 for the purpose, and they, with H.'s brother and others, went to a solicitor's office, when the deed was drawn, with a consideration expressed of $3,150. The $700 was handed to defendant, and counted over by him as if it were $2,000, and notes given by H. and his brother for the balance of $1,150. Defendant, instead of returning the money and notes, ran away with them. The court held that though, if no public interests were concerned, H. should not be admitted to state that when he gave the defendant the money openly as a payment, and with the intent that it should be so understood by those who were present, he yet was not in fact paying, but only pretending to do so, as the defendant and he both well understood; this kind of estoppel does not apply to prevent the defendant from being brought to justice for his fraudulent and felonious conduct. R. v. Ewing (1862), 21 U.C.Q.B. 523.

Where a minor procured furniture on a hire-purchase agreement, and after having paid four instalments, sold the furniture without the knowledge of the lessor of same, it was held by a majority of the thirteen judges before whom the case finally came for review, that although the hire-purchase contract was not binding on the minor because of his minority, the bailment created a special property in the furniture whilst in his possession and that he was properly convicted of larceny under the English statute 24-25 Vict., ch. 96, sec. 3. R. v. Macdonald (1885), 15 Q.B.D. 323.

On an indictment of the husband for the theft of furniture which his wife had obtained on a hire-purchase contract, made by her, it must be shewn that he knew the terms on which his wife obtained possession of the goods. R. v. Halford, 32 J.P. 421.

*Goods lost and found.*]—If a man finds goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them with intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, it is not theft; but if he takes them with like intent though lost or reasonably supposed to be lost but reasonably believing that the owner can be found, it is theft. R. v. Thurborn (1849), 1 Den. 388, 2 C. & K. 831; R. v. Shea (1856), 7 Cox C.C. 147.

Where property has been left by a passenger in a train it seems always to have been treated as larceny if a servant of the railway company appropriated it instead of taking it to the lost property department of the railway service. R. v. Pierce (1852), 6 Cox C.C. 117.

In R. v. Moore (1860), L. & C. 1, 30 L.J.M.C. 77, a customer dropped his purse containing a bank note in a hairdresser's shop and the hairdresser picked it up. The jury found that at the time he picked it up he did not know nor had he reasonable means of knowing who the owner was: that he afterwards acquired knowledge of who the owner was and then converted the bank note to his own use; that he 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 found. It was held that he was rightly convicted of larceny. It will, of course, be borne in mind that bank notes are not as commonly used as currency in England as they are in Canada, a point very material in ascertaining the prisoner's belief as to the probability of finding an owner. The proper question to be put to the jury is not whether *they* are satisfied that the prisoner could have found the owner, but whether they are satisfied that the prisoner himself believed that he could have found the owner. R. v. Knight (1871), 12 Cox C.C. 102.

The innocent receipt of a chattel coupled with its subsequent fraudulent appropriation was not a larceny at common law; R. v. Ashwell (1885), 16 Q.B.D. 190; but is covered by the statutory definition contained in this section.

It is no longer material whether the fraudulent conversion was concurrent with the taking or occurred subsequently. Sub-sec. 3, supra.

If there is any mark upon the property by which the owner may be traced, and the finder instead of restoring the property converts it to his own use such conversion will amount to larceny. R. v. Pope (1834), 6 C. & P. 346; R. v. Mole (1844), 1 C. & K. 417; R. v. Preston (1851), 2 Den. 353.

In R. v. West (1854), Dears. 402, 24 L.J.M.C. 4, a purse with money in it was left by mistake on the prisoner's stall in a market, and on it being pointed out to her by a stranger, she took possession of it, but denied all knowledge of it when the customer returned to claim it; the jury found that when the prisoner took it she intended to appropriate the purse to her own use, and did not then know the owner. The court in that case drew a distinction between "left" property and "lost" property, and it was therefore unnecessary to ask the jury whether the prisoner, when she took the purse, reasonably believed the owner could be found. The prisoner was not justified in treating the purse as lost, and as she took it with intent to appropriate to her own use a conviction for larceny was supported.

*Presumption from recent possession.*]—Although the mere fact of possession may not suffice to raise a presumption of guilt by reason of lapse of time, it may be considered when combined with other circumstances, such as a misrepresentation by the prisoner as to his occupation, a sale of the

stolen articles at price much below their value. R. v. Starr (1876), 40 U.C.Q.B. 268.

The recent possession of stolen goods is recognized by the law as affording a presumption of guilt, and therefore, in one sense, is a presumption of law, but it is still, in effect, a mere natural presumption; for, although the circumstance may weigh greatly with the jury, it is to operate solely by its natural force, for a jury are not to convict unless they be actually convinced in their consciences of the truth of the fact. 2 Starkie on Evidence 684; R. v. Smith (1825), Ryan & Moody N.P. Cases 295.

The question of what is or is not a recent possession of stolen property is to be considered with reference to the nature of the article stolen; therefore where two ends of woollen cloth in an unfinished state were lost and were found in the possession of the prisoner two months after their being stolen, and were still in an unfinished condition, it was held that their possession by the prisoner was recent enough to raise a presumption against him of having stolen it. Rex v. Partridge (1836), 7 C. & P. 551. Mr. Justice Patteson said in the same case: "If the articles are such as pass from hand to hand readily, two months would be a long time; it is a question for the jury."

In Reg. v. Langmead (1864), 9 Cox C.C. 464, it was held by the Court of Criminal Appeal (Pollock, C.B., Martin, B., Byles, Blackburn and Mellor, JJ.,) that it is a presumption of fact and not an implication of law, from evidence of recent possession of stolen property unaccounted for, whether the offence of stealing or of feloniously receiving has been committed. Blackburn, J., there said: "If a party is in possession of stolen property recently after the stealing, it lies on him to account for his possession, and if he fails to account for it satisfactorily, he is reasonably presumed to have come by it dishonestly; but it depends on the surrounding circumstances whether he is guilty of receiving or stealing. Whenever the circumstances are such as render it more likely that he did not steal the property the presumption is that he received it.

Pollock, C.B., in the same case said: "All that appears is that the prisoner was found very recently in possession of the stolen sheep. That, prima facie, is evidence of stealing rather than of receiving, but in no case can it be said to be exclusively such, unless the party is found so recently in possession of stolen property and under such circumstances as to exclude the probability of receiving--as where a party is stopped coming out of a room with a gold watch which has been taken from the room; but if he has left the room so long as to render it probable that he may have received it from someone else, then it may be evidence either of stealing or of feloniously receiving."

It has been held that the possession of stolen property consisting of an axe, a saw and a mattock three months after it was lost is not such a recent possession as to put it upon the prisoner to shew how he came by it, unless there be evidence of something more than the mere fact of possession at such a distance of time after the loss. R. v. Adams (1829), 3 C. & P. 600; 2 Russell on Crimes (1896), 6th ed. 288.

*Proving the intent.*]—To demand and obtain possession of goods from a debtor for the purpose of holding them as security for a debt actually owing, is not a demand with menaces made with "intent to steal," although such possession is obtained by means of an unjustified threat of the debtor's arrest made by the creditor's agent without any honest belief that the debtor was liable to arrest. R. v. Lyon (1898), 2 Can. Cr. Cas. 242 (Ont.).

Evidence of other similar criminal acts may be relevant in charge of theft if it bears upon the question whether the taking was designed or accidental. R. v. Collyns (1898), 4 Can. Cr. Cas. 572.

Where such evidence is relevant to the issue, it is not necessary for its admission in evidence that it should establish conclusively that the accused had been guilty of such other criminal acts, but it will be received if it *tends* to shew that the accused had been so guilty. Ibid.

Where the prisoner, being the manager of a branch store for the sale of goods supplied by the factory of his employers, arranged with the checker at the factory to load certain goods on a waggon going to the branch store without charging them or keeping the usual check on them which his employers' system required, and had the goods delivered to a customer of his branch without charging the customer, the prisoner stating that for the benefit of his employers he had merely postponed the charging of the goods in order to give the customer a longer credit than was customary and to so retain the customer's trade; these facts will constitute "theft" under the Code if credence is not given to the prisoner's explanation. R. v. Clark (1901), 5 Can. Cr. Cas. 235 (Ont.).

The goods having been taken by the prisoner with knowledge that his doing so was contrary to the employers' rules and regulations and with intent to deprive the owner thereof, the taking was fraudulent and without colour of right within Code sec. 305. Ibid.

*Attempt to steal.*]—Sec. 64 declares that one who, having an intent to commit an offence, does 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. If, with an intent to steal, the accused puts his hand into an empty pocket, he may be convicted of an attempt to steal, although he could not have committed the complete offence of theft. R. v. Ring (1892), 17 Cox C.C. 491; R. v. Brown (1890), 24 Q.B.D. 357; overruling R. v. Collins (1864), L. & C. 471, contra.

*(Amendment of 1900.)*

**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.

The section formerly stopped at the word "detention." The amendment in 1900 added the words "by any peace officer or public officer in his official capacity."

It was said that the section had been taken advantage of to try private rights at the expense of the Crown, and to brand as a criminal a party to a mere civil dispute arising out of a more or less doubtful question of law or fact. It had been decided in R. v. Hollingsworth (N.W.T.), 2 Can. Cr. Cas. 291, that a guest at a hotel, who, without leave, removed his baggage after the same had been placed under "lawful seizure and detention" by the hotelkeeper in respect of the latter's common law lien, was punishable under sec. 306 of the Code, although the guest was permitted to have access to the room where the baggage was kept. The section as it now stands excludes such cases from its operation.

The ordinary and natural meaning of the word "seizure" is a forcible taking possession. Johnston v. Hogg, 52 L.J.Q.B. 343, 10 Q.B.D. 432.

*Punishment.*]—The limit of punishment is seven years' imprisonment, except where the offender has been previously convicted of some of the offences declared by the Code to be "theft," in which case the punishment for this offence may be 10 years imprisonment. Sec. 356.

**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.

See secs. 331, 331A, 332 and 499.

**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 proceeds 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 and 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 moneys 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.

The offence of fraudulent conversion of the proceeds of a valuable security, mentioned in this section, consists of a continuity of acts—the reception of the valuable security, the collection of the proceeds, the conversion of the proceeds, and lastly, the failure to account for the proceeds; and where the beginning of the operation is in one district and the continuation and completion are in another district, the accused may be arrested and proceeded against in either district. R. v. Hogle (1896), 5 Can. Cr. Cas. 53, R.J.Q. 5 Q.B. 59. So where the valuable security in respect of which a charge of fraudulent conversion was laid was received and the terms were agreed to in the district of Iberville, and the person to whom the accused was to account for the proceeds resided in that district, but the accused collected the money in the district of Bedford, proceedings taken in the district of Iberville were held good. Ibid.

Agency has been defined in the case of Pole v. Leask, 33 L. J. Ch. 155 (H.L.), per Lord Cranworth, thus:—"As to the constitution by principal of another to act as his agent. No one can become the agent of any person except by the will of that other person. His will may be manifested in writing or orally, or simply by placing another in a situation in which, according to ordinary rules of law, or perhaps it would be more correct to say according to the ordinary usages of mankind, that other is understood to represent and

act for the person who has so placed him; but in every case it is only by will of the employer that an agency can be created. Another proposition to be kept constantly in view is that the burden of proof is on the person dealing with anyone as an agent through whom he seeks to charge another as principal. He must shew that the agency did exist and that the agent had the authority he assumed to exercise or otherwise that the principal is estopped from disputing it."

*Valuable security.*]– See definition of this term in sec. 3 (*c.c.*).

*On terms requiring him to account.*]—This means the terms on which the accused held the money, etc., and is not restricted to cases in which the terms were imposed by the person from whom the money was received. R. v. Unger (1894), 30 C.L.J. 428; 14 C.L.T. 294; 5 Can. Cr. Cas.

*Punishment.*]—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 provisions of this section. Sec. 320.

**309. Theft by person holding power of attorney.**—Every one commits theft who, being intrusted, 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.

The power of attorney must be in writing, and evidence of a verbal power will not bring the accused within the scope of this section. R. v. Choinard (1874), 4 Que. Law Rep. 220.

An indictment for stealing under a power of attorney which charges that the money appropriated was the proceeds of a sale made by the defendant while acting under a power of attorney will not be quashed for failure to allege that the power of attorney was one for the sale or disposition of property, but particulars will be ordered as to the date, nature or purport of the alleged power of attorney. The defect, being only a partial one, was cured by verdict, and cannot be given effect to upon a reserved case as to whether a verdict of guilty on such indictment was valid or not. R. v. Fulton (1900), 5 Can. Cr. Cas. 36; R.J.Q. 10 Q.B. 1.

A count in an indictment charging that the defendant acting under a power of attorney fraudulently sold certain bank shares and fraudulently converted the proceeds "and did thereby steal the said proceeds" is not bad as charging two offences, and the reference to the fraudulent sale and fraudulent conversion are to be taken as descriptive of the means whereby the offence of stealing under a power of attorney was committed. Ibid.

*Punishment.*]—See sec. 320.

**310. 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.

*Valuable security.*—See definition in sec. 3 (*c.c.*). A document which is a complete bill of exchange in all respects except that it lacks the signature of the drawer is, when in the hands of the intended drawer, a "security for the payment of money"; R. v. Bowerman, [1891] 1 Q.B. 112; and therefore within the statutory definition above referred to.

*Property, real or personal.*]—See definition in sec. 3 (*r.*).

*The direction to apply proceeds.*]—Defendant, a broker, had from time to time gratuitously made investments in bonds, etc., on the stock exchange as agent for the prosecutrix. He wrote to her enclosing a contract-note for three Japanese bonds at £112 each, saying he was fortunate in securing them for her, and that he had no doubt of her ratifying what he had done. The contract-note was signed by the defendant in the form of a sold-note from him to the prosecutrix. On the same day the prosecutrix wrote to the defendant that she had received the contract-note for three Japanese bonds and his letter, and that she "enclosed a cheque for £336 in payment." The cheque was payable to the defendant's order and was endorsed and cashed by him but he never paid for the bonds which after being carried over from time to time were sold by his order and he applied the proceeds of the cheque to his own use. It was held that the letter from the prosecutrix saying that she enclosed the cheque for £336 *in payment*, was a sufficient direction to apply the cheque or its proceeds to take up the Japanese bonds by paying the seller if not delivered, and if delivered by paying himself the defendant, and the conviction of the defendant was confirmed. R. v. Christian (1873), L.R. 2 C.C.R. 94, 12 Cox C.C. 502.

*Punishment.*]—See sec. 320.

**311. Theft by co-owner.**—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.

Semble, that this section would be applicable to the case of a partner defrauding his co-partner. Major v. McCraney (1898), 2 Can. Cr. Cas. 547, 554 (S.C. Can.).

As to the meaning of the phrase "anything capable of being stolen" see sec. 303 and note to sec. 354.

*Punishment.*]—The limit of punishment under this section is seven years imprisonment, unless the offender has been previously convicted of "theft," in which case the limit is ten years. Sec. 356.

*Agreement for stifling a prosecution.*]—In Jones v. Merionethshire Permanent, [1892] 1 Ch. 173, affirming [1891] 2 Ch. 587, the facts shewn were that the secretary of a building society, who had made default in accounting for money paid to him, was threatened by the society with a prosecution for embezzlement. He thereupon applied to certain relatives for assistance, and they gave a written undertaking to the society to make good the greater part of the amount due from the secretary, the expressed consideration being the forbearance of the society to sue the secretary for the sum for which the relatives made themselves responsible. In pursuance of that undertaking they gave two promissory notes and some title deeds as collateral security to the society. The relatives in giving the undertaking were actuated by a desire to prevent the prosecution, and that was known to the directors of the society, but no express promise was made that there should be no prosecution. It was held by the Court of Appeal (Lindley, Bowen, and Fry, L.JJ.,) that it was an implied term of the agreement that there should be no prosecution; that the agreement was, therefore, founded on an illegal consideration and void; and that the society could not recover on the promissory notes or enforce the securities. "Bowen, L.J., there said: "Reparation is a duty which the offender owes quite independently of his fear of prosecution or otherwise, and it would be absurd to lay down as an impossible counsel of perfection, that the relative of an offender, and his friends are not justified, nay, even are not bound, in certain instances, to assist him to make reparation to those whom he has injured. . . . The law certainly is not anxious to discourage reparation; but you must come back, after reparation made, to the one dominant test in each case. It is a circumstance which may be lawfully taken into consideration that the offender has done his best himself, or with the assistance of his friends, to make good his wrong. But the test is, what is the moral duty of the person who has been injured to himself and to others? He must make no bargain about that. If reparation takes the form of a bargain then, to my mind, the bargain is one which the court will not enforce."

The mere expectation on the part of the relatives who aid the offender to make reparation that a prosecution would not take place, would not be sufficient to nullify the transaction: Ward v. Lloyd (1843), 6 Man. & G. 785. In order to amount to a defence on the ground of illegality there must be an agreement not to prosecute. Jones v. Merionethshire, [1892] 1 Ch. 173, 182, per Lindley, L.J.

There is no distinction between getting a security for a debt from the debtor himself and getting it from a third person who is under no obligation to the creditor. A threat to prosecute is not of itself illegal, and does not necessarily vitiate a subsequent agreement by the debtor to give security for a debt which he justly owes to his creditor, although the transaction out of which the debt arises possibly involves a criminal as well as a civil liability. Flower v. Sadler (1882), 10 Q.B.D. 572 (C.A.).

If the agreement be made upon the understanding that the accused shall be discharged from custody, although not so stated in express terms, it is illegal and void. Leggatt v. Brown (1898), 29 Ont. R. 530, affirmed (1899) 30 Ont. R. 225.

**312. Concealing gold or silver with intent to defraud partner in claim.**—Every one commits theft who, with intent to 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.

*Search warrant for mined gold, 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 search, any 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. See. 571.

The decision of the justice in such case is subject to appeal as in ordinary cases coming within the provisions of Part LVIII. Sec. 571 (2).

*Punishment.*]—The offence is declared indictable and a limit of punishment fixed by sec. 343 at two years imprisonment.

**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.

In the case of R. v. Streeter, [1900] 2 Q.B. 601, two prisoners, a man and a woman, were indicted for stealing property in a dwelling house, and also for receiving the same property. The woman was the prosecutor's wife and the man had lodged in the house. After he left, the woman

packed up the property in question which belonged to her husband, and sent it to the man and afterwards left the house and joined him, and the two lived together. The property was found in their possession. It was held that the man could not be convicted of receiving, although he knew the goods were the husband's, because the stealing by a wife of her husband's property did not amount to a felony at common law, and was only made a criminal offence by the English Married Woman's Property Act 1882. But under sub-section (2) of this section the man would be guilty of theft by his complicity in receiving the goods.

PART XXV.

## RECEIVING STOLEN GOODS.

SECT.



---

**314. Receiving property dishonestly obtained.**—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.

*Receiving stolen property.*]—In the offence of receiving stolen goods the stolen goods must have been taken and stolen by a person other than the person accused of receiving. R. v. Lamoureux (1900), 4 Can. Cr. Cas 101.

The essential elements of the offence of receiving stolen goods are not included in the offence of "housebreaking and theft," and a conviction for receiving stolen goods cannot be rendered on the "speedy trial" of a person charged only with housebreaking and theft. Ibid.

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 one's self or not) for the use or benefit of one's self or of any other person. See. 3 (*k*).

Evidence of guilty knowledge may consist of proof that the accused bought the stolen property at very much under its value; 1 Hale 619; or falsely denied his possession of it. Archbold Cr. Ev. 519.

A person having a joint possession with the thief may be convicted as a receiver. Sec. 317; McIntosh v. R. (1894), 23 Can. S.C.R. 180, 193; R. v. Smith (1855), Dears. C.C. 494; R. v. Wiley (1850), 2 Den. C.C. 37. And so may the person who aids in concealing or disposing of it. Sec. 317.

When the principal has been previously convicted, such conviction is presumptive evidence that everything in the former proceeding was rightly and properly transacted, but it is competent to the receiver to controvert the guilt of the principal. Per Taschereau, J., in McIntosh v. R. (1894), 23 Can. S.C.R. at p. 189; 2 Russell on Crimes, 4th ed., 571.

The confession of the thief is not evidence against the receiver unless made in the presence of and concurred in by the latter. R. v. Cox (1858), 1 F. & F. 90; R. v. Turner (1832), 1 Mood. 347. But the evidence of the thief was admissible against the receiver even before the Canada Evidence Act; R. v. Haslam 2 Leach C.C. 467, subject, however, to proper directions being given to the jury as to its weight if uncorroborated, it being the evidence of an accomplice. R. v. Robinson (1864), 4 F. & F. 43.

As to receiving after restoration to owner see sec. 318.

*Indictment.*]—Every one charged with receiving any property knowing it to have been stolen, may be indicted, whether the person by whom such property was obtained has or has not been indicted or convicted, or is or is not amenable to justice. Sec. 627. 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. Sec. 627 (2).

*Previous conviction as evidence of knowledge.*]—See sec. 717 as to cases where the stolen property is found in the possession of an accused person who has been previously convicted "of any offence involving fraud or dishonesty."

*Recent possession as evidence.*]—Upon an indictment for receiving stolen goods, there should be some evidence to shew that the goods were in fact stolen by some other person, and a conviction for receiving should not be had on such evidence of taking possession as would ordinarily prove the defendant guilty of the theft. R. v. Densley (1834), 6 C. & P. 399. In the latter case the evidence was that the goods, having been discovered, after the loss, concealed in an old engine-house, several persons kept watch, and one of the prisoners came alone in the night and took the goods out of the engine-house. He was immediately seized and dropped the bag in which the goods were, in a field of grain, and shortly afterwards the other prisoners came up and carried the bag away. Patteson, J., in summing up to the jury on a trial for receiving, said that this was evidence on which persons are constantly convicted of stealing; that if the jury were of opinion that some other person stole it, and that the prisoners knew of that fact, and planned together in order to get the goods away, they might be convicted of receiving; there was no evidence that any other person stole the property, but "if there had been evidence that some *one* person had been seen near the house from which the property was taken, or there had been strong suspicions that some *one* person stole it, then those circumstances would have been evidence that the prisoners received it, knowing it to have been stolen." Patteson, J., in R. v. Densley (1834), 6 C. & P., at page 400.

In Deer's case (1862), 1 Leigh & Cave's Crown Cases, 240, the prisoner had been a lodger in the prosecutor's house and left the same. On the following day the prosecutor's wife also left, taking with her a small bundle. Two days afterwards the prisoner was found in company with the prosecutor's wife, who was passing by the prisoner's name, on board a ship bound from England to Canada. Property belonging to the prosecutor of a bulk *greater than* could have been comprised in the bundle *taken by the wife*, was found in the prisoner's possession on the ship, some part being upon his person. It was held by the court for Crown cases reserved, composed of Pollock, C.B., Wightman, J., Williams, J., Channell, B., and Mellor, J., that such was *some* evidence to support a conviction for receiving the property knowing it to have been stolen.

A person may steal, hand over to another, and afterwards receive from him again, and so be both a principal and a receiver, just as a person may be an accessory before the fact, and afterwards receive the goods knowing them to have been stolen. R. v. Hughes (1860), Bell C.C. 242.

Where, on the trial of an indictment for receiving a stolen shirt, it appeared doubtful whether the principal felony had not been committed by several persons, and the only evidence against the prisoner was the possession of the shirt and a statement made by her that she had received it from another person, it was objected that there was no evidence of receiving, with knowledge that it had been stolen, Littledale, J., said:—"In a case on the early part of this circuit, the only evidence was recent possession, and the counsel for the prosecution urged that that was evidence of receiving, but I held that it was not. I hold it essential to prove that the property was in the *possession of some one else* before it came to the prisoner; here the prisoner said some one brought the shirt to her; that is an admission that it had been in the possession of some one else; that is evidence of receiving." R. v. Sarah Cordy (1832), Gloucester Assizes, Littledale, J., cited 2 Russell on Crimes, 6th ed., 438.

Where the thief, who had pleaded guilty, had admitted to a constable *in the presence of the prisoner*, who was indicted as receiver, that he had stolen the property, and this was the principal evidence of the larceny, it was held that the thief's confession was evidence to go to the jury against the receiver. R. v. Cox (1858), 1 F. & F. 90, per Crowder, J. But a confession of the principal in the absence of the receiver is not evidence against the latter. R. v. Turner (1832), 1 Moo. C.C. 347. The necessary evidence that the offender knew the goods which he has received to have been originally stolen, may be collected from the circumstances of the particular case. 2 Russell on Crimes, 440. And the buying goods at an undervalue is presumptive evidence that the buyer knew they were stolen. 1 Hale 619, 2 East P.C., ch. 16, sec. 153, p. 765.

Recent possession of stolen property is evidence either that the person in possession stole the property or that he received it knowing it to be stolen, according to the circumstances of the case. So, where goods have been stolen from a dwelling house, if the defendant were apprehended a few yards from the outer door with the stolen goods in his possession, there would arise a violent presumption of his having stolen them; but if they were found in his lodgings some time after the larceny, and he refused to account for his possession of them, this, *together with* proof that they were actually stolen, would amount not to a violent, but to a probable presumption merely. Archbold's Crim. Pleading (1900), 312. But if the property were not found recently after the loss, as for instance not until sixteen months after, it would be but a light or rash presumption and entitled to no weight. Anon (1826), 2 C. & P. 459; R. v. Adams (1829), 3 C. & P. 600; R. v. Cooper (1852), 3 C. & K. 318.

If the prisoner give a *reasonable account* of the manner in which he became possessed of the goods, this will so far rebut the presumption as to throw it upon the prosecutor to negative that account. R. v. Crowhurst (1844), 1 C. & K. 370; R. v. Smith (1845), 2 C. & K. 207; R. v. Harmer (1848), 2 Cox C.C. 487.

Where, on a charge of receiving, it was proved that the prisoner had told the constable who found the stolen property in his possession, that he had purchased it from a tradesman in the same town, and that tradesman, although known, was not called for the prosecution, it was held to be unnecessary to call the tradesman if the jury could fairly infer from the other circumstances of the case that the prisoner's statement was false. R. v. Ritson (1884), 15 Cox C.C. 478 (Grove, Hawkins, Stephen, W. Williams and Matthew, JJ.). It is a question in each case, under the particular circumstances of the case, whether it is necessary to call the third party vouched by the prisoner. Ibid.

*Finding of other stolen property.*]—It is provided by sec. 716 that 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. See note to sec. 716.

**315. Receiving stolen post letter or post letter bag.**—Every one is guilty of an indictable offence, and liable to five years' 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.

This section is taken from the "Post Office Act" and the words "any chattel, etc., the stealing whereof is hereby declared to be an indictable offence," have reference to the Post Office Act and not to the Code.

*Indictment.*]—Sec. 624 provides that 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.

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 His Majesty, if the same is the property of His Majesty, or if the loss thereof would be borne by His Majesty, and not by any person in his private capacity. Sec. 624 (2).

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. Sec. 624 (3).

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, whether such letter is addressed to a real or a fictitious person or not, and whether it is intended for transmission by the post or delivery through the post or not; and a letter shall be deemed a post letter from the time of its being so deposited to the time of its being delivered to the person to whom it is addressed, or so long as it remains in the post office or in any such letter box or is being carried through the post: 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. 1 Edw. VII., ch. 19, sec. 1, amending the Post Office Act, R.S.C. ch. 35, sec. 2 (c).

**316. Receiving property obtained by offence punishable on summary conviction.**—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.

**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.

The leading English case on the subject—R. v. Villensky, [1892] 2 Q.B. 597—is in accordance with the law as here declared.

PART XXVI.

## PUNISHMENT OF THEFT AND OFFENCES RESEMBLING THEFT COMMITTED BY PARTICULAR PERSONS IN RESPECT OF PARTICULAR THINGS IN PARTICULAR PLACES.

SECT.

*(Amendment of 1894.)*

**319. Theft by clerks and servants.**—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 His 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.

*Evidence.*]—Section 319 deals with the offence of theft by a clerk or servant while sec. 308 includes cases of misappropriation in which the accused though he may not have been either a clerk or a servant of the person to whom he was to account, and though not bound to deliver over the identical money or valuable security received by him, fraudulently converts the same to his own use or fraudulently omits to account for the same or the proceeds, having received the same "on terms requiring him to account for or pay the same or the proceeds thereof, or any part of such proceeds to any other person."

The test as to whether a person is a "clerk or servant" is: was he under the control of and bound to obey his alleged master? R. v. Negus

(1873), L.R. 2 C.C.R. 34, 12 Cox 492. To constitute the offence formerly designated "embezzlement" there must have been an employment as clerk or servant, the receipt of the money by him must have been for and on behalf of the master, and the fraudulent appropriation by him must have taken place before the money got into the master's possession. Ferris v. Irwin, 10 U.C.C.P. 117.

Where the accused was employed by the prosecutor to solicit orders and collect monies, for which he was paid by commission, being at liberty to get orders when and where he pleased, but to be exclusively in the employ of the prosecutor and to give his whole time to the prosecutor's service, it was held that he was the "servant" of the prosecutor. R. v. Bailey (1871), 12 Cox 56. And where a director of a joint stock company was employed at a salary to superintend its business and collect monies due to the company, he is a servant of the company. R. v. Stuart, [1894] 1 Q.B. 310. But a person employed by the prosecutors as their agent for the sale of coal on commission and to collect money in connection with his orders, but who was at liberty to dispose of his time as he thought best and to get or abstain from getting orders as he might choose was held not to be a "clerk" or "servant." R. v. Bowers (1866), L.R. 1 C.C.R. 41, 10 Cox C.C. 250.

And where the accused was a collector and accountant carrying on an independent business, and was employed by the prosecutors to collect certain accounts for them on commission, and he was to pay over the net proceeds as the collections were made, but time and mode of collecting were left to the discretion of the collector, it was held that he was not a "clerk" or "servant" of the prosecutors. R. v. Hall (1875), 13 Cox C.C. 49.

In Regina v. Topple, 3 Russell & Chesley (Nova Scotia), 566, the accused, not having been in the employ of the prosecutor, was sent by him to one M. with a horse, as to which M. and the prosecutor, who owned the horse, and had some negotiations, with an order to M. to give the bearer a cheque if the horse suited. Owing to a difference in the price the horse was not taken, and the accused brought it back. Shortly afterwards the accused, without any authority from the prosecutor, took the horse to M. and sold it as his own property or professing to have the right to dispose of it, and received the money. It was held the money was not received by the accused as clerk or servant of the prosecutor, and a conviction for embezzlement was set aside. Regina v. Topple, 3 Russell & Ches. 566.

A charge against a city officer for collecting sums of money upon the pretence that they were payable to the city and not thereafter accounting for the same is not sustainable as a charge of theft, if in fact the sums collected were not payable to the city. To constitute the offence of theft (sec. 305), or of theft by a clerk (sec. 319 (*a*)), or of theft by municipal employees (sec. 319 (*c*)), the person alleged to have been defrauded by the taking must have had a right at the time of the taking either to the ownership or to the possession of the property taken. R. v. Tessier (1900), 5 Can. Cr. Cas. 73 (Que.).

An indictment against a Government or municipal officer for theft or embezzlement under Code sec. 319 (*c*) would be demurrable if it did not allege that the officer had received the money by virtue of his employment, but on such being alleged and proved, the wrongful appropriation is an offence under sec. 319 (*c*) whether the property be public (or municipal) property or not. Ibid.

The relationship of servant or clerk, etc., is essential to this offence and should be proved by the prosecution with proper evidence. If the contract of hiring was in writing, and the writing is still in existence, it should be produced. R. v. Taylor (1867), 10 Cox C.C. 544. The prisoner's answer to the charge may be that by the terms of the hiring, he was entitled to retain money received by him for the firm to be spent for the firm's purposes and in that case it is essential that the written contract should be produced if the firm have it. R. v. Dodson, 33 L.J. (Eng.) 547.

A false account or false entries of the expenditure of money will afford evidence from which a jury may say that a clerk who had money entrusted to him by his master has been guilty of embezzling it, just as much as not accounting for money received from others for the master will, if the receipt of it or the like be denied, afford evidence from which to infer embezzlement. R. v. Cummings (1858), 16 U.C.Q.B. 15, 31.

Evidence only of a general deficiency in the clerk's books will not support the indictment; R. v. Glass (1877), Ramsay's Cases (Que.) 186; but if in addition to the evidence of general deficiency there is evidence of unlawful appropriation, though no precise sum paid by any particular person is proved to have been taken, it will be sufficient. R. v. Glass (1877), 1 Leg. News, Montreal, 141.

A director of a corporation may also be its clerk or servant and amenable as such to the provisions of sec. 319. R. v. Stuart, [1894] 1 Q.B. 310.

**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 provisions of sections three hundred and eight, three hundred and nine and three hundred and ten.

See notes to secs. 308, 309 and 310.

**321. Public servants.**—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, being employed in the service of His 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.

*Municipality.*]—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. See. 3 (*p*).

*Valuable security.*]—This term is defined by sec. 3 (*cc*) ante p. 10.

**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 and fixture exceeds the sum of twenty-five dollars to four years' imprisonment. R.S.C., c. 164, s. 57.

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 a lodger, and in either case the property may be laid in the owner or person letting to hire. See. 625.

It is also an offence under sec. 504 for any person, being possessed of any dwelling house or other building or part of any dwelling house or other building, 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 owner to pull down or sever from the freehold any *fixture* fixed in or to such dwelling house or building or part of such dwelling house or building.

As to stealing metal fences, area guards, etc., see sec. 335.

**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.

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. Sec. 353.

*Testamentary instrument.*]—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. Sec. 3 (*aa*).

**324. Document of title to lands.** — 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.

*Document of title.*] — The expression "document of title to goods" includes any bill of lading, India warrant, dock warrant, warehousekeeper'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. Sec. 3 (*g*).

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. Sec. 3 (*h*).

See also note to preceding section.

**325. Judicial or official documents.** — Every one is 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 His 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 note to sec. 323.

**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.

*Evidence.*]—A confession by an accused person charged with stealing post-letters, induced by a false statement made to him by a detective employed by the prosecution, in presence of a post office inspector, that the accused had been seen taking the letters, will render the confession inadmissible in evidence against the accused. R. v. MacDonald (1896), 2 Can. Cr. Cas. 221.

*Post letter.*]—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, whether such letter is addressed to a real or a fictitious person or not, and whether it is intended for transmission by the post or delivery through the post or not; and a letter shall be deemed a post letter from the time of its being so deposited to the time of its being delivered to the person to whom it is addressed, or so long as it remains in the post office or in any such letter box or is being carried through the post; 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. 1 Edw. VII., ch. 19, sec. 1, amending the Post Office Act R.S.C. ch. 35, sec. 2 (*i*).

*Post letter bag.*]—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. See. 4; Post Office Act R.S.C., c. 35; 52 Vict. (Can.), c. 20; (sec. 2 (*k*)).

*In the Territories.*]—In the North West Territories it is held that the accused is entitled to ask for a jury under sec. 67, N.W.T. Act, as the offence is not one comprised in the list of cases mentioned in sec. 66, N.W.T. Act, not being larceny either at common law or under the Larceny Act, nor declared to be larceny under the Act originally creating the offence. (38 Vict. (Can.) c. 7, s. 72); R. v. MacDonald (1896), 32 C.L.J. 327, per Scott, J. Regina v. Allen, decided by Rouleau J., on Nov. 16, 1895, dissented from.

**327. Stealing post letters, packets and keys.**—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.

A person improperly inducing a postman to deliver letters to persons not entitled to have them, to enable them to commit a fraud, may be convicted as a principal with the postman for stealing them. R. v. James (1890), 24 Q.B.D. 439.

*Destroying post letter.*]—Every one is guilty of the indictable offence of mischief who wilfully destroys or damages a post letter bag or post letter or any street letter box, pillar box or other receptacle established by authority of the Post Master General for the deposit of letters or other mailable matter; sec. 499 (D.); and for such offence is liable to five years imprisonment. Ibid.

*Post letter.*]—See note to last preceding section.

*Other postal offences.*]—Sec. 89 of the Post Office Act R.S.C. 1886, c. 35 is still in force. Sec. 981, schedule II. It provides as follows:—

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 misdemeanor.

The same statute also contains the following enactments:

Every one who encloses a letter or letters, or any writing intended to serve the purpose of a letter or post card, in a parcel posted for the parcel post—or in a packet of samples or patterns posted to pass at the rate of postage applicable to samples and patterns—or encloses a letter or post card, or any writing to serve the purpose of a letter or post card, or encloses any other thing, in a newspaper posted to pass as a newspaper at the rate of postage applicable to newspapers (except in the case of the accounts and receipts of newspaper publishers, which will be permitted to pass folded within the newspapers sent by them to their subscribers)—or encloses a letter or any writing intended to serve the purpose of a letter or post card,

in any mail matter sent by post not being a letter, shall incur a penalty not exceeding forty dollars and not less than ten dollars in each case. R.S.C. c. 35, s. 93.

Every one who, with fraudulent intent, removes from any letter, newspaper or other mailable matter sent by post, any postage stamp which has been affixed thereon, or wilfully, with intent aforesaid, removes from any postage stamp or post card, post band or wrapper which has been previously used, any mark which has been made thereon at any post office, is guilty of a misdemeanor. R.S.C. 1886, c. 35, s. 94.

Every one who abandons, or obstructs or wilfully delays the passing or progress of any mail, or any car, train, locomotive engine, tender, carriage, vessel, horse or animal employed in conveying any mail on any railway, public highway, river, canal, or water communication, is guilty of a misdemeanor: Provided always, that nothing in this section contained shall prevent any person from being liable, under any other Act or otherwise, to any other or greater punishment than is provided for any offence under this section: but no person shall be punished twice for the same offence. R.S.C. 1886, c. 35, s. 95.

The punishment for offences under sections 89, 94 and 95 of the Post Office Act is regulated by sec. 951 of the Code, which declares that every person convicted of an indictable offence for which no punishment is specially provided shall be liable to imprisonment for five years.

**328. Stealing mailable matter other than post letters.**—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.

*Destroying mailable matter.*]—Every one is guilty of the indictable offence of mischief who wilfully destroys or damages 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; sec. 499 (D.); and for such offence is liable to five years' imprisonment. Ibid.

*Evidence.*]—A confession by the accused person charged with stealing post-letters from a post-office box is not admissible in evidence against him if it were induced by a false statement made to him by a detective employed by the prosecution in presence of a post office inspector, that the accused had been seen taking the letters. R. v. MacDonald (1896), 2 Can. Cr. Cas. 221, per Scott, J.

**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 years' imprisonment, or to both fine and imprisonment, who steals, or unlawfully takes from any person having the lawful 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.

The offences of destroying, injuring or obliterating poll books, voters' lists, etc., are provided for by sec. 503.

**330. Railway 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.

**331. Cattle stealing.**—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.

*Summary trial in N.W.T.*]—The indictable offence of "stealing cattle" is theft within the provisions of the North-West Territories Act respecting summary trials without a jury. Although the punishment which 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, a person charged with having stolen cattle the value of which does not, in the opinion of the trial Judge, exceed $200, has not the right in the N.W. Territories to be tried by jury. R. v. Pachal (1899), 5 Can. Cr. Cas. 34 (N.W.T.).

*Any cattle.*]—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 techical or familiar name known, and shall apply to one animal as well as to many. Sec. 3 (*d.*).

*Killing with intent to steal.*]—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. Sec. 307.

*Killing or wounding cattle.*]—Every one is guilty of the indictable offence of "mischief," who wilfully destroys or damages any cattle or the young thereof, if the damage be caused by killing, maiming, poisoning or wounding; sec. 499 (B. (*b.*)); and is liable for such offence to fourteen years' imprisonment. Ibid.

*Attempt to injure cattle.*]—Every one is guilty of an indictable offence and liable to two years' imprisonment who wilfully attempts to kill, maim, wound, poison or injure any cattle or the young thereof, or wilfully places poison in such a position as to be easily partaken of by any such animal. Sec. 500. 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. Sec. 64.

*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. Sec. 502.

*(Amendments of 1900 and 1901.)*

**331A. Cattle frauds.**—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 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.

*Evidence.*]—Sec. 707 A of the Code (amendment of 1901), is as follows:—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 prima 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 331 A 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 approval.

*(Amendment of 1900.)*

**332. Stealing domestic animals.**—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.

*Injuries to dogs, birds, etc.*]—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. Sec. 501. For the second offence the offender is liable to a fine or imprisonment, or both, in the discretion of the court. Ibid.

**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.

Sec. 304 declares that in contemplation of law tame pigions are capable of being stolen so long only as they are in a dovecote or on their owner's land.

**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 wilfully 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 wilfully 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.

*Indictment.*]—An indictment under this section shall be deemed sufficient if the oyster bed, laying or fishery is described by name or otherwise, without stating the same to be in any particular county or place. Sec. 619 (*e*).

**335. Things fixed to buildings or in 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 anything 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.

This is a statutory offence and was not larceny at common law. R. v. Millar (1837), 7 C. & P. 665.

A wharf may be a building under this section. R. v. Rice (1859), 28 L.J.M.C. 64; and so may an unfinished structure intended for a dwelling, the roof of which has not been completed. R. v. Worrall (1836), 7 C. & P. 516.

The evidence of a house agent that he managed the property for a non-resident and collected the rents for him is sufficient evidence of the ownership of such non-resident in proving an offence under this section. R. v. Brummitt (1861), L. & C. 9.

**336. 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.

*Unlawful possession of tree.*]—See sec. 340.

**337. Trees of the value of twenty-five cents.**—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 amount of the damage done.*]—This refers to the actual damage to the tree itself not consequential injury resulting from the act of the accused, and in estimating the amount regard cannot be had to the extra expense of replacing part of a hedge. R. v. Whiteman (1854), Dears. 353, 23 L.J.M.C. 120.

If several trees be stolen at the same time, or so continuously as to form one transaction, it will be sufficient if the value or damage in the aggregate is of the statutable amount. R. v. Shepherd (1868), L.R. 1 C.C.R. 118, 11 Cox C.C. 119.

*Bona fide claim.*]—If the taking of the trees is done upon a bona fide claim of right in respect of the title to the land upon which they are growing, the criminal intent will be negatived. Robichaud v. La Blanc (1898), 34 C.L.J. 324 (N.B.).

*Wilfully damaging trees or shrubs.*]—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. Sec. 508. Every one who, having been convicted of any offence under sec. 508 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. Sec. 508 (2).

3. Every one who, having been twice convicted of any offence under sec. 508 afterwards commits any such offence, is guilty of an indictable offence and liable to two years' imprisonment. Sec. 508 (3).

*Unlawful possession of tree.*]—See sec. 340.

**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 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.

By the Timber Marking Act, R.S.C. 1886, ch. 64 it is enacted that every person engaged in the business of lumbering or getting out timber, and floating or rafting the same on the inland waters of Canada, within the Provinces of Ontario and Quebec, shall, within one month after he engages therein, select a mark or marks, and having caused such mark or marks to be registered in the manner hereinafter provided, shall put the same in a conspicuous place on each log or piece of timber so floated or rafted; and that every one who violates such provision shall incur a penalty of fifty dollars. Sec. 1.

The Minister of Agriculture is directed by that statute to keep at the Department of Agriculture, at Ottawa, a book to be called the "Timber Mark Register," in which any person engaged in the business of lumbering or getting out timber as aforesaid, may have his timber mark registered by depositing with the Minister a drawing or impression and description in duplicate of such timber mark, together with a declaration that the same is not and was not in use, to his knowledge, by any other person than himself at the time of his adoption thereof; and the Minister, on receipt of the fee hereinafter provided, shall cause the said timber mark to be examined, to ascertain whether it resembles any other mark already registered; and if he finds that such mark is not identical with, or does not so closely resemble any other timber mark already registered as to be confounded therewith, he shall register the same, and shall return to the proprietor thereof one copy of the drawing and description, with a certificate signed by the Minister or the deputy of the Minister of Agriculture, to the effect that the said mark has been duly registered in accordance with the provisions of this Act; and such certificate shall further set forth the day, month and year of the entry thereof, in the proper register; and every such certificate shall be received in all courts in Canada as evidence of the facts therein alleged, without proof of the signature. Ibid, sec. 2.

3. The person who registers such timber mark shall thereafter have the exclusive right to use the same, to designate the timber got out by him and floated or rafted as aforesaid. Ibid, sec. 3.

Every person, other than the person who has registered the same, who marks any timber of any description with any mark registered under the provisions of that Act, or with any part of such mark, shall, on summary conviction before two justices of the peace, be liable, for each offence, to a penalty not exceeding one hundred dollars and not less than twenty dollars,—which amount shall be paid to the proprietor of such mark, together with the costs incurred in enforcing and recovering the same: Provided always, that every complaint under this section shall be made by the proprietor of such timber mark, or by some one acting on his behalf, and thereunto duly authorized. Ibid, sec. 7.

Sec. 708 of the Code provides that in any prosecution, proceeding or tria for any offence under sec. 338, a timber mark, duly registered under the statute just quoted, on any timber, mast, spar, saw-log or other description of lumber, shall be prima 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. Sec. 708.

**339. 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.

*Unlawful possession.*]—See sec. 340.

**340. Unlawful possession.**—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, 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.

A conviction stated that C. had on his premises a quantity of chopped wood, to wit, about half a cord, belonging to F. which said F. states was stolen from him, and that said C. could not satisfactorily account for its possession. It was held that the conviction was bad, because the enactment 32 & 33 Vict., ch. 21, sec. 25, under which it was made, (re-enacted in sec. 340) applied to trees attached to the freehold, not to trees made into cordwood, and because cordwood is not "the whole or any part of a tree" within the statute. Re Caswell (1873), 33 U.C.Q.B. 303.

**341. Roots, plants, etc., growing in gardens, etc.**—Every one who steals any plant, root, fruit or vegetable production growing in any garden, orchard, pleasure ground, nursery ground, hot-house, green-house 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 months' 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. Roots, plants, etc., growing elsewhere than in gardens, etc.**—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 conviction, to a penalty not exceeding five 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 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. 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.

*Search warrants for mined ore.*]—See sec. 571.

**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.

The offence of stealing, i.e., 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. See. 305 (4). It is therefore submitted that if the offender merely begins to cause the thing to become movable from the person, the offence of stealing from the person is complete.

The removal caused or begun to be caused must be a removal from the person. So it was held that where a man went to bed with a prostitute, leaving his watch in his hat on the table, and the woman stole it while he was asleep, such was not a stealing from the person but stealing in a dwelling-house. R. v. Hamilton (1837), 8 C. & P. 49.

Before the enactment of sec. 305 (4) it was necessary in order to constitute the offence that the thing taken should be completely removed from the person.

Where it appeared that the prosecutor's pocket-book was in the inside front pocket of his coat, and the prosecutor felt a hand between his coat and

waistcoat attempting to get the book out, and the prosecutor thrust his right hand down to his book, and in doing so brushed the prisoner's hand; the book was just lifted out of the pocket, an inch above the top of the pocket, but returned immediately into the pocket; it was held by majority of the judges that the prisoner was not rightly convicted of stealing from the person, because from first to last the book remained about the person of the prosecutor; but the judges all agreed that the simple larceny was complete. R. v. Thompson (1825), R. & M. 78.

Although to constitute the offence there must be a removal of the property from the person, yet a hair's breadth will do it. Per Alderson, B., in R. v. Simpson (1854), Dears. C.C. 421; 24 L.J.M.C. 7. Upon an indictment for stealing a watch from the person it appeared that the watch was carried by the prosecutor in his waistcoat pocket, and the chain, which was attached to the watch at one end, was at the other end passed through a button-hole of his waistcoat, where it was kept by the watch-key turned, so as to prevent the chain slipping through. The prisoner took the watch out of the prosecutor's pocket and forcibly drew the chain out of the button-hole, but his hand was seized by the prosecutor's wife; and it then appeared that, although the chain and watch-key had been drawn out of the button-hole, the point of the key had caught upon another button and was thereby suspended. It was contended that the prisoner was guilty of an attempt only; but the Court thought that, as the chain had been removed from the button-hole, the felony was complete, notwithstanding a subsequent detention by its contact with the button; and, upon a case reserved, it was held that the conviction was right. Ibid.

Theft from the person is an indictable offence, although the amount is less than $10, and notwithstanding that the case might have been summarily tried by a magistrate without the prisoner's consent. R. v. Conlin (1897), 1 Can. Cr. Cas. 41.

If in such case the prisoner consents to be tried by a *police* magistrate having the extended powers of a Court of General Sessions, where such consent is given, he is liable to sentence for the more onerous punishment which the General Sessions might impose in excess of the powers of a "magistrate," as the term is used in the Summary Trials part, sec. 782. Ibid.

Where in a charge of pocket picking the evidence in the opinion of the Court of Appeal goes no further than to support a reasonable surmise or suspicion that the accused was guilty of the offence and lacks the material ingredients necessary to establish guilt, the conviction will be quashed upon appeal under Cr. Code secs. 744 and 746. R. v. Winslow, 3 Can. Cr. Cas. 215 (Man.).

A conviction on summary trial that the accused "attempted to pick the pocket" of a person named, sufficiently describes the offence of attempting to commit theft. R. v. Morgan (1901), 5 Can. Cr. Cas. 63 (Ont.).

**345. Stealing in dwelling-houses.** — 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.

A theft by the owner or occupier of the house is covered by this section. R. v. Bowden, 2 Mood. C.C. 285; R. v. Taylor, R. & R. 418. But goods which are under the protection of the person of the prosecutor at the time they are stolen are not within it. So where the prosecutor was induced by the trick of ring dropping to lay down his money upon a table and the defendant took it up and carried it away, it was held not to be the offence of "stealing in a dwelling house." R. v. Owen, 2 Leach 572. And where money was delivered to the defendant for a particular purpose by his procurement, and he forthwith ran away with it, it is not an offence under this section. R. v. Campbell, 2 East P.C. 644. But if a person on going to bed puts his clothes and money by his bedside they are under the protection of the dwelling house and not of the person. R. v. Thomas, Car. Supp. 295; R. v. Hamilton, 8 C. & P. 49.

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. R. v. Thomas, Car. Supp. 295. The section corresponds with sec. 60 of the Imperial Act, 24 and 25 Vict. c. 96, under which it is said that it is necessary that the goods should be under the protection of the house and be deposited in it for safe custody. Archbold Cr. Pl. (1900), 612. But property 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 stealing in a dwelling house. R. v. Carroll, 1 Mood. C.C. 89.

**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.

If upon a summary trial for the theft of money from a locked box on a ship in port, effected by picking the lock, 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 was committed he had borrowed a small sum of money on the plea that he had none, that shortly after the stolen money was missed he had considerably more money on him, that he had meanwhile received nothing in respect of wages, that on the money being missed he suggested that he should not be suspected as he had borrowed money from another party named, which latter statement was shewn to be untrue, such constitutes legal evidence to support a conviction. R. v. MacCaffery (1900), 4 Can. Cr. Cas. 193 (N.S.).

If, however, the trial judge in making his finding, bases the same upon the theory that, as a matter of law, it would be presumed that it was possible for him to shew how he had come by the money seen in his possession and that the onus was upon him to do so, such is an error in law entitling the accused to a new trial. Ibid.

**347. Stealing in manufactories, 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.

*Stage, process or progress of manufacture.*]—Goods may be within this section though the texture is complete if they have not yet been brought into saleable condition. R. v. Woodhead, 1 M. & Rob. 549.

On an indictment under the English statute, 18 George II. c. 27, for stealing yarn out of a bleaching ground, the evidence was that the yarn had been spread upon the ground, but was afterwards taken up and thrown into heaps in order to be carried into the house, in which state some of it was stolen by the prisoner, Thompson, B., held that the case did not come within the statute, as there was no occasion to leave the yarn upon the ground in the state in which it was taken by the prisoner as a stage, process or progress of manufacture. Hugill's Case, 2 Russell Cr. 6th ed. 403.

**348. Fraudulently disposing of goods intrusted 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, wharfs, etc.**—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.

FORM FF.—The following form of stating the offence is provided for by Code form FF. (*b*):—"A stole a sack of flour from a ship called the —— at —— on ——"

*Goods or merchandise.*]—The words "goods, wares and merchandise" in a similar statute, 24 Geo. II. c. 45 (Imp.) were held to extend to such goods only as are usually lodged in vessels or on wharves and quays. R. v. Grimes, Fost. 79 (*a*), 2 East P.C. 647; R. v. Leigh, 1 Leach C.C. 52. A passenger's luggage is included. R. v. Wright, 7 C. & P. 159.

*Steals from any dock, etc.*]—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. Sec. 305 (4). It is, therefore, submitted that an actual removal of the thing from the dock, etc., is not essential to the offence.

**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*).

*Wreck.*—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. Sec. 3 (*dd*).

**351. Stealing on railways.**—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who steals anything in or from any railway station or building, or from any engine, tender or vehicle of any kind on any railway.

A conviction for stealing "in or from" a building charges only one offence and is not, because of the disjunctive, void for duplicity and uncertainty. R. v. Patrick White (1901), 4 Can. Cr. Cas. 430 (N.S.).

**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, etc., 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.

Maliciously destroying an information or record of a Police Court is an offence within this section. R. v. Mason (1872), 22 U.C.C.P. 246.

For the statutory definitions of the terms "valuable security," "testamentary instrument," "document of title," see sec. 3.

**354. Concealing.**—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.

The words at the end of the section "anything capable of being stolen" do not mean anything capable of being stolen *by the accused*. They include anything which comes within the definition given in sec. 303. R. v. Goldstaub (1895), 10 Man. R. 497. The same expression is used in sec. 311, where theft by a co-owner is dealt with. The gist of the offence created by sec. 354 is the concealing for a fraudulent purpose and it is not incumbent on the prosecution to shew that the fraudulent purpose was accomplished. R. v. Goldstaub (1895), 10 Man. R. 497.

**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.

The receiver of property obtained out of Canada by any acts which would if committed in Canada constitute an indictable offence, is liable under sec. 314, if he knew such thing to have been so obtained.

*Property.*]—Deeds and instruments relating to or evidencing the title or right to any property real or personal or giving a right to recover or receive any money or goods, are included in the term "property." Sec 3 (*r*).

**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.

This section was enacted to cover all cases under sec. 305 et seq., the punishment for which is not specially otherwise provided for.

*Procedure.*]—Where it is sought to make the accused liable to ten years' imprisonment, it is sufficient, after charging the subsequent offence, to state in the indictment that the offender was at a certain time and place, or at certain times and places, convicted of theft 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. Sec. 628.

An indictment is not bad by reason of an omission to state who is the owner of any property therein mentioned, but the court may, if satisfied that it is necessary for a fair trial, order that a particular further describing the property be furnished by the prosecutor. Sec. 613 (*b*).

The form of procedure when a previous conviction for theft is charged, is regulated by sec. 676.

*Evidence.*]—M. was convicted of stealing goods, the property of S. The evidence to convict the prisoner with the crime was that of a policeman who had him in charge and who stated in cross-examination that he said to the prisoner that S. was a good-hearted man, and he (the policeman)

thought that if S. got his goods back he might not prosecute. About an hour after this the prisoner told the policeman that if he went to a certain place in the woods, which he described particularly, he would find the goods. The policeman went to the place described and found the goods. It was held, following the rule laid down by Lord Eldon in Harvey's case (2 East's P.C. 658), that the prisoner's statement to the policeman was improperly admitted. R. v. McCafferty (1886), 25 N.B.R. 396.

Sec. 716, allowing evidence of guilty knowledge to be given by shewing the finding in the possession of accused of other stolen property, is limited to cases where the charge is either "receiving" or "having in possession stolen property" (sec. 314) and, if a charge of theft is joined therewith, it would appear that such evidence must then be excluded. See note to sec. 716.

**357. Additional punishment when value of property exceeds $200.**—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 PRETENSES AND OTHER CRIMINAL FRAUDS AND DEALINGS WITH PROPERTY.

SECT.



---

**358. Definition of false pretense.**—A false pretense 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, 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 pretense, 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.

*By words or otherwise.*]—The false pretence need not be made in words or writing, it may be made "otherwise" and it will suffice if it is signified by the conduct and acts of the accused. R. v. Létang (1899), 2 Can. Cr. Cas. 505. As put by Bishop (on Crimes, vol. 2, par. 430): "The pretence need not be in words, but it may be sufficiently gathered from the acts and conduct of the party."

*False pretence by conduct.*]—A false pretence need not be in words or in writing but may be in the conduct and acts of the accused. R. v. Létang (1899), 2 Can. Cr. Cas. 505. (Würtele, J., Montreal). In that case a debtor had made a judicial abandonment for the benefit of his creditors whereby his property became vested in another, and, knowing that he was no longer entitled to receive the rent, he presented himself afterwards as the landlord to a tenant of the property and received the rent as he had formerly been accustomed to do. It was held that he was properly found guilty of a false pretence by his acts and conduct.

A workman employed by clothiers was to keep an account of the number of shearmen employed, and the amount of their earnings and wages which he was weekly to deliver in, in writing, to a clerk who paid him the amount. He delivered in a false memorandum of the total alleged wages of shearmen for the week giving no details and received the amount. The prisoner was not allowed to draw any sum that he thought fit on account but only so much as had been actually earned by the shearmen. It further appeared that the prisoner was required to keep a book with the names of the men employed and of the work they had done, and that he had entered in this book the names of several men who had not been employed as having earned various sums of money, and had overstated the amount of work done by those who were employed so as to make out the total mentioned in the memorandum handed in by him. It was held that as the prisoner would not have obtained the custody of the particular sum of money but for the false memorandum, he was properly convicted, distinguishing it from a case of money paid generally on account. R. v. Witchell (1878), 2 East P.C. 830.

In R. v. Eagleton (1855), 1 Dears. C.C. 515, 6 Cox C.C. 559, the defendant contracted in writing with the guardians of a parish to supply and deliver for a certain term to the out-door poor, at such times the guardians should direct, loaves of bread, each of a specified weight. The guardians were, during such period, to pay certain prices for the bread so supplied, on being furnished with a bill of particulars. On a poor person applying for relief, the relieving officer gave the applicant a ticket for "bread, one loaf," the presentation of which to the defendant entitled the applicant to receive a loaf. The defendant received the tickets and gave to the poor persons presenting them loaves of bread deficient in weight as he well knew. The defendant would then return the tickets in the following week with a statement in writing of the number of loaves he had supplied, and the relieving officer would credit the defendant's account with the guardians with the amount, and the money would then be paid to him at the time stipulated in the contract. Tickets were returned by the defendant and he was credited with same, but the fraud was discovered before the stipulated time for payment of the money had arrived. The jury found that the defendant intended to defraud the out-door poor and that by returning the tickets to the relieving officer he intended to represent that he had delivered the loaves mentioned in them of the weights contracted for. It was held that, as no false weights or tokens had been used, the defendant could not be convicted as for a common law misdemeanour in supplying to the poor persons loaves deficient in weight with intent to injure and defraud such persons and to deprive them of proper sustenance and endanger their healths. But it was held that the defendant was properly convicted on other counts, of attempting to obtain money by false pretences, his obtaining the credit in account being the last act depending on himself towards obtaining the money. Parke, B., in delivering the judgment of the court (Jervis, C.J., Parke, B., Maule, J., Wightman, J., Erle, J., Platt, B., Williams and Crompton, JJ.) said:—"We think that the contingency of the whole sum due to him, being subject to deductions in a future event, does not the less make the obtaining credit an attempt to obtain money, if it would be so without that contingency; but our doubt has been whether the obtaining that credit, though undoubtedly a necessary step towards obtaining the money, can be deemed an attempt to do so? The mere intention to commit a misdemeanour is not criminal. Some act is required, and we do not think that all acts towards committing a misdemeanour are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit, but acts immediately connected with it are; and if, in this case, after the credit with the relieving officer for the fraudulent overcharge, any further step on the part of the defendant had been necessary to obtain payment, as the making out a further account, or producing the vouchers to the board, we should have thought that the

obtaining credit in account with the relieving officer would not have been sufficiently proximate to the obtaining the money. But, on the statement in this case, no other act on the part of the defendant would have been required. It was the last act, depending on himself, towards the payment of the money, and therefore it ought to be considered as an attempt. The receipt of the money appears to have been prevented by a discovery of the fraud by the relieving officer; and it is very much the same case, as if, supposing rendering an account to the guardians at their office, with the vouchers annexed, were a preliminary necessary step to receiving the money, the defendant had gone to the office, rendered the account and vouchers, and then been discovered, and the money consequently refused."

It is a fraudulent obtaining of goods by false pretences if delivery of the goods was obtained by the purchaser giving in payment his cheque upon a bank with which he had no account, or, even where there is an account, if there are insufficient funds there to meet it and he knows that it will not be paid. R. v. Jackson (1813), 3 Camp. 370. The giving of a cheque on bankers is a representation of authority to draw, or that it is a valid order for payment of the amount. R. v. Hazelton (1874), L.R. 2 C.C.R. 134.

If the money is parted with from a desire to secure the conviction of the prisoner there is no obtaining by false pretences. R. v. Mills (1857), Dears. & B. 205, 26 L.J.M.C. 79; R. v. Gemmell, 26 U.C.Q.B. 315. The false pretence must have been the inducing cause to the defrauded party to part with his property. Ibid.

If a person offers in exchange for goods the promissory note of another, he is to be taken to affirm, although he says nothing, that the note has not to his knowledge been paid either wholly or to such an extent as to almost destroy its value. R. v. Davies, 18 U.C.Q.B. 180.

Where an attorney who had been struck off the rolls obtained money out of court under such circumstances as amounted to a false pretence practised on the court, his object being to obtain the fund that he might retain his costs out of it, it was held that it was none the less a false pretence by reason of the fact that the accused had intended to pay and did in fact pay over the balance to the person properly entitled. P. v. Parkinson, 41 U.C.Q.B. 545.

A person who is present when a false representation is made by another person acting in conjunction with him, and who knows it to be false, and gets part of a sum of money obtained by such false pretence, is guilty of obtaining such sum of money by false pretences. R. v. Cadden (1899), 5 Can. Cr. Cas. 45 (N.W.T.).

*Evidence.*]—Where prisoners were indicted for obtaining money by false pretences, and the evidence shewed that W., one of the prisoners, asked H., another of the prisoners, for tobacco, and H. handed W. a box, saying, "plenty of tobacco there," and W. said he would bet $50 the box could not be opened without taking a screw-nail out; H. asked prosecutor to step aside, and when he had done so asked the loan of $50 for a few minutes, which prosecuter loaned to him; W. immediately slipped the money out of H's hands, and went away with it; prosecutor asked H. for the money and the latter said: "Come to the hotel and I will give you a cheque," which he did, telling prosecutor it was a bank thirty miles away, the Court held that the offence proved was a larceny and not a false pretence, pointing out the distinction there is between the possession merely being gained by fraud, and the property as well as the possession being parted with by fraud: (citing R. v. McKale (1868), L.R. 1 C.C.R. 125 and R. v. Prince (1868), Ib. 150); R. v. Haines (1877), 42 U.C.Q.B. 208.

If by means of any trick or artifice the owner of property is induced to part with the *possession* only, still meaning to retain the right of property, the taking by such means will amount to theft; but if the owner part with, not only the possession of the goods, but the *right of property* in them also,

the offence of the party obtaining them will not be theft, but the offence of obtaining goods by false pretences. Roscoe Cr. Evid., 12th ed. (1898) 562; R. v. Middleton (1873), L.R. 2 C.C.R. 38.

If a person is convicted upon an indictment for obtaining goods by false pretences or other fraud, he cannot afterwards be lawfully tried upon an indictment for theft of the same goods. Reg. v. King, [1897] Q.B. 214, 75 L.T. 392. On a trial for false pretences, where the alleged pretence is an untrue statement as to the prisoner's position and occupation, the opinion of the prosecutor as to such position and occupation, based on a letter received by him from the prisoner, is admissible (though not conclusive) as evidence of the belief of the prosecutor in the truth of such false statement. Ibid. It has been held that a false pretence may consist of being garbed in a university cap and gown for the purpose of fraudulently obtaining credit. R. v. Barnard (1837), 7 C. & P. 784. Or falsely pretending to be one of a class of traders at a market. R. v. Burrows (1869), 11 Cox C.C. 258.

Many cases of obtaining goods by false pretences have been tried in which the pretence was contained in a letter ordering the goods, which made no *direct* pretence, but which was meant to convey, and did in fact convey, the impression that the writer was a person in a large way of business. Thus, in R. v. Cooper (1877), 25 W.R. 696, 2 Q.B.D. 510, the prisoner, who was a mere huckster, wrote a letter to the prosecutor ordering from him two railway-truckloads of potatoes "as samples," and expressing a hope that the quality would be good, as then a good trade would follow for both of them. The Court for Crown Cases Reserved held that this letter might reasonably be construed as containing a representation that the writer was a dealer in potatoes in a large way of business, and that it was a question for the jury whether he intended the prosecutor to put this meaning upon the letter.

In R. v. King, [1897] 1 Q.B. 214, the prisoner was convicted of having obtained certain churns by false pretences as to his position and business. He had written a letter to the prosecutor containing these words: "The two six-gallon milk churns in order do not require name on them, as they are only required for home use." This letter was produced in evidence by the prosecutor, and he was thereupon asked what opinion he had formed from the letter as to the position and occupation of the accused. The question was objected to by counsel for the defence, but was allowed, and the answer was to the effect that the prosecutor inferred from the letter that the writer was either a farmer or a dairyman. The prisoner was convicted, subject to the case stated as to the admissibility of this question and answer.

The objection was based on the ground that the witness was being asked to construe a written document, which was a question of law for the court, and not a question of fact. The court, however, held that the question was admissible, not as to whether the latter was capable of bearing the meaning put upon it, but for the purpose of shewing whether the prosecutor believed the statement made. Hawkins, J., pointed out that in a charge for obtaining goods by false pretences it must be proved (1) that a false pretence was made, (2) that the prosecutor believed the pretence, and (3) that the goods were obtained by means of the pretence; and he held that the only way to find out whether the prosecutor believed the pretence in the letter was to ask his opinion of the letter.

The doctrines of commercial agency do not apply to prevent the operation of the criminal law. So where one Clark, a policy holder of a fire insurance company, conspired with Howse, their local agent, to defraud the company and handed to Howse for transmission to the company an unfounded proof of claim for pretended losses by fire, and obtained the money through Howse from the company, it was held that the knowledge of Howse of the falsity of the pretence could not be imputed as the knowledge of the company so as to affect the criminality of Clark. R. v. Clark (1892), 2 B.C.R. 191.

Where a person tenders to another a promissory note of a third party in exchange for money or goods, although he may say nothing upon the subject, yet he should be taken by his conduct to affirm or pretend that the note has not to his knowledge been paid, either wholly or to such an extent as has almost destroyed its value, leaving only such a trifling sum due as would make the note a wholly inadequate consideration for what was obtained in exchange. And a jury may infer from the conduct of a prisoner in selling the note for $100 that he had sold it as if it was unpaid to that amount; and the selling of it for that amount when it was all paid but a small amount is a "false pretence." R. v. Davis (1859), 18 U.C.Q.B. 180.

In the Queen v. Jones, [1898] 1 Q.B. 119, the accused had gone into a restaurant with only a half-penny and ordered and consumed a four shilling meal. The court held that it was not obtaining goods by false pretences, as no representation was made by the prisoner, but that the offence was obtaining credit by fraud within the meaning of the Debtors' Act (Imp.), 1869, sec. 13. There is no similar provision to the latter section in the Code.

A representation by the person obtaining goods that he would pay for them the following week is not a representation of fact, either past or present, and any belief by the prosecutor that such a promise was a false pretence within the meaning of the Criminal Code is unreasonable. Mott v. Milne (1898), 31 N.S.R. 372.

On an indictment for the offence of having obtained money by false pretences, the defendants cannot be convicted of the full offence when it is proved by the discount of their promissory note they had only obtained a credit in account, such credit in account being a thing not capable of being stolen, but they might, if the evidence should establish an attempt to obtain the money, be convicted of such an attempt. R. v. Boyd (1896), 4 Can. Cr. Cas. 219 (Que.).

To prove that the board of a corporation had acted on the faith of the false representation made, it is not necessary to examine one or more of the directors, if the fact can be proved by other competent witnesses. R. v. Boyd (1896), 4 Can. Cr. Cas. 219 (Que.).

Evidence is admissible of facts which are subsequent to the false representation, to prove the insolvency of the defendants a very short time after the false representation had been made, as an evidence of their knowledge of its falsity when they made it. Ibid.

On an indictment for obtaining money by false pretences it appeared that the prosecutor took out a $2 bill saying he would get it changed. Prisoner offered to change it upon which the prosecutor handed it to him, and prisoner kept it without giving the change. It was held that if the prisoner replied to the prosecutor that he then had the change to give him for the bill, and if on that representation he obtained it for the alleged purpose of changing it, whether at the time he obtained it he really had the change mentioned, or whether his representation in that respect was false and was used as a pretence to get the bill; then he would be guilty; but if he did not make such representation, or if having so made it, he did not obtain the bill on such representation, and having in fact the change to give, although wrongfully withholding the change and retaining the bill, in either of these instances the prisoner would not be guilty of obtaining the money by false pretences. If the inducement to the prosecutor to part with his money was on a mere promise to get change, or to change it, the case would fail. R. v. Gemmell (1867), 26 U.C.Q.B. 312.

Prisoner having agreed to lend prosecutor $5,000, gave him certain drafts, representing that they were good and would be paid, whereas they turned out worthless and merely fictitious. On the strength of prisoner's representations prosecutor gave prisoner a note for $1,200, which note prosecutor retired before maturity. It was held that an indictment for obtaining $1,200 by false pretences was not supported by proof of the above

facts, there not having been a renewal of the false pretence when the money was paid. Though remotely the payment arose from the false pretence, yet, immediately and directly, it was made because prosecutor desired to retire the note. R. v. Brady (1866), 26 U.C.Q.B. 13.

R. v. Ollis, [1900] 2 Q.B. 758, was a prosecution for obtaining money by falsely pretending that three cheques which the accused gave to the prosecutors were good and valid orders for the payment of money. The accused had been previously acquitted on a similar charge on the prosecution of another person. It was held that the facts connected with the charge on which the accused had been acquitted could be given in evidence to shew that he had no reasonable ground for believing that there would be funds to meet the cheques on which he obtained the money from the prosecutors in the case then being tried. The fact that the accused had on another day passed a cheque which had been dishonoured was a circumstance to shew a course of conduct on the part of the accused, and that the passing of the cheques in question was not a matter of forgetfulness, but that they were bad to his knowledge. R. v. Ollis, [1900] 2 Q.B. 758.

If the indictment charges a pretence which is proved to have been made, but it also appears that the defrauded party gave up the money or property wholly in consequence of another subsequent representation, a conviction cannot be sustained on the indictment so laid. R. v. Bulmer (1864), L. & C. 476.

Where on an athletic sport competition one of the competitors personates another party for the purpose of securing a good handicap and falsely declares that he had never previously won a prize race, the object of obtaining the prizes is not too remote from the false representation. R. v. Button, [1900] 2 Q.B. 597; R. v. Larner (1880), 14 Cox C.C. 497, disapproved.

A debtor who has made a judicial abandonment for the benefit of his creditors whereby his property becomes vested in another, and who, knowing that he no longer had any right to receive the rent, presents himself afterwards as landlord to a tenant of the property, and receives the rent as he had formerly been accustomed to do, is guilty of a false pretence by his acts and conduct. R. v. Létang (1899), 2 Can. Cr. Cas. 505.

In the case of R. v. Rhodes, [1899] 1 Q.B. 77, the prisoner had been indicted for obtaining from one William Bays a number of eggs by false pretences, to the effect that he was a farmer and dairyman and required them for his business. The prisoner had advertised in various newspapers, under the style of Norfolk Farm Dairy, High Street, Mitcham, for new-laid eggs, and had obtained consignments of eggs at different dates, extending over two months, from Bays and from other persons named Ellston and Chambers. He was indicted for the single transaction with Bays. It was proved on the part of the prosecution that the prisoner's business at Mitcham was an entire sham, and he was found guilty and sentenced to a term of imprisonment. It was held on a case reserved that the evidence of Ellston and Chambers of dealings with the prisoner, the one a week and the other two months after the offence charged in the indictment, was, on the whole, admissible. It was not too remote, since the transactions of these witnesses with the prisoner were the result of the same advertisement, and went to shew the prisoner's intention to carry out one entire scheme of fraud by means of a business which was a sham.

To prove a charge of obtaining goods by false pretences where there is a lapse of time between the making of the pretence and the delivery of the goods, there must be a direct connection between them constituting the former a continuing pretence up to the time of delivery. R. v. Harty (1898), 2 Can. Cr. Cas. 103.

The word "owner" following the signature of the accused in a letter written by him inviting negotiations for the charter of a vessel in his possession and managed by him, does not in itself constitute a representation by the accused that he is the "registered owner." Ibid.

The prisoner represented to the prosecutor that a lot of land on which he wished to borrow money had a brick house upon it, and thus procured a loan, when in fact the land was vacant. It was held that he was properly convicted of obtaining the money under false pretences. R. v. Huppel (1861), 21 U.C.Q.B. 281; R. v. Burgon (1856), 1 Dears. & B. C.C. 11, 7 Cox C.C. 131; R. v. Eagleton (1855), 6 Cox C.C. 559.

When the prosecutor does not intend to part with the right of property in the goods or money taken by the defendant, and in some cases does not intend to part with the possession of them until they are paid for, and the defendant fraudulently gets possession of them contrary to the intention of the owner, intending all the time not to pay for them, then the jury may find the party guilty of theft. But where the owner voluntarily parts with the possession and property in the goods, and intends to vest them in the defendant, because he relies on the defendant's promise to pay the money, or bring other property or money in place of those vested in him, then the defendant cannot be convicted of theft. Per Richards, C.J. R. v. Bertles (1863), 13 U.C.C.P. 607.

**359. Punishment of false pretense.**—Every one is guilty of an indictable offence and liable to three years' imprisonment who, with intent to defraud, by any false pretense, either directly or through the medium of any contract obtained by such false pretense, 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.

FORM FF.—The following form of stating the offence is provided by Code form FF. (*c*):—"A obtained by false pretenses from B a horse, a cart, and the harness of a horse at —— on ——"

*Procedure.*]—It is not necessary that the indictment should allege an intent to defraud a particular person. Cr. Code 613 (*c*). And before the Code an indictment for obtaining money by false pretences by means of fraudulent post office orders was upheld upon a general allegation of "intent to defraud." R. v. Dessauer (1861), 21 U.C.Q.B. 231.

The intent to defraud is necessary to constitute the offence, and yet Form C contains no allegation of such intent. Mr. Justice Taschereau in his work on the Code expresses the view that a count for false pretences is perhaps the only one that can be laid without an averment of the intent, where such intent is necessary to constitute the offence, but see sec. 147 and R. v. Skelton (1898), 4 Can. Cr. Cas. 467 (N.W.T.), as to the effect of Form FF.

Section 616 (2) of the Criminal Code makes an indictment which charges any false pretence, etc., valid, although it does not set out in detail in what the false pretence consisted. This, it is submitted, does not mean that the false pretence need not be set out at all. While Meredith, C.J., in his judgment in R. v. Patterson (1895), 2 Can. Cr. Cas. 339, speaks of the "addition of the words unnecessarily setting out in what the false pretences consisted," and expresses the view that the indictment would have been

fully authorized by sec. 641 if laid "without alleging in what the false pretence consisted," it will be observed that Rose, J., limits his opinion to the case of an indictment in which the false pretence is not set out in detail.

Form FF (*c*) of the Code gives as an "example of the manner of stating" a charge of false pretences:—

"A. obtained by false pretences from B., a horse, a cart, and the harness of a horse, at —— on ——."

And by Code sec. 982 the several forms varied to suit the case, or forms to the like effect, shall be deemed "good, valid and sufficient in law."

It is submitted, however, that the form FF cannot override the express requirement of sec. 611, which demands that every count of an indictment shall be in "words sufficient to give the accused notice of the offence with which he is charged" (sub-sec. 3). Sub-sec. 4 of sec. 611 is in its terms confined to the setting forth of details of the circumstances of the alleged offence, and it is submitted that to state what the false pretence was, is a matter rather of describing the offence than of detailing the circumstances. Moreover, the false pretence, and not the mere fact of obtaining the property, would seem to be the gist of a charge of obtaining goods by a false pretence.

It seems probable also that sec. 616 (2) applies only where the false pretence, etc., is charged against the accused, and if the charge were for knowingly "receiving" goods obtained by false pretences, it would be necessary to look at the law as it was before the Code to find whether or not the false pretence should be particularized.

In the case of Taylor v. The Queen, [1895] 1 Q.B. 25, it was held that an indictment for receiving goods, knowing the same to have been unlawfully obtained by false pretences, is good without setting out the false pretences, for, the gist of the offence being the receipt of the goods with knowledge that they had been unlawfully obtained by some false pretence, it is sufficient to so allege without specifying the nature of the pretence (Mathew, J., and Charles, J.). The court there refused to treat as a binding authority the unreported case of Reg. v. Hill decided in 1851 and noted in 2 Russell on Crimes, 5th ed. 482, 6th ed. 437, in which the contrary had been held at the Gloucester Assizes. Mathew, J., said that for many years it had been the practice not to set out the particular false pretences by which the money or goods were alleged to have been obtained, in an indictment for "receiving"; and Charles, J., decided the case "on the broad ground that the indictment contains all the allegations which it is necessary to prove in order to bring home the offence charged to the defendant."

In The Queen v. Broad (1864), 14 U.C.C.P. 168, it was held by the Court of Common Pleas of Upper Canada that an indictment was valid where a prosecutor had been bound by recognizance to prosecute and give evidence upon a certain trial, notwithstanding that there was a variance between the specific perjury charged in the information and the specific charge of perjury contained in the indictment, and although the statute then in force, 24 Viet. (Can.), ch. 10, sec. 10, forbade an indictment for certain offences named, including perjury, unless a recognizance had been given "to prosecute or give evidence against the person accused of such offence," or unless the accused had been committed or bound over to "answer to an indictment to be preferred against him for such offence," etc. John Wilson, J., in delivering the judgment of the court, said: "If the indictment set forth the substantial charge contained in the information, so that the defendant had reasonable notice of what he had to answer, we should incline to think this a compliance with the statute, and would refuse to quash the indictment." (Richards, C.J., Adam Wilson, J., and John Wilson, J.)

The prisoner at Seaforth, in the County of Huron, falsely represented to the agent of a sewing machine company there that he owned a parcel of land when in fact he never owned any land. The goods were obtained at Huron though they were sent from Toronto, and the false pretence relied on was made in Huron. It was held that the offence was complete in Huron County and could not be tried in the County of York. R. v. Feithenheimer (1876), 26 U.C.C.P. 139.

On an indictment for obtaining money under false pretences, the accused may be convicted of an attempt to commit the offence. Code sec. 711; R. v. Goff (1860), 9 U.C.C.P. 438.

**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 pretense, 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.

In R. v. Brady, 26 U.C.Q.B. 13, and R. v. Rymal, 17 Ont. R. 227, both decided upon the authority of R. v. Danger (1857), Dears. & B. 307, 3 Jur. N.S. 1011, it was held that "valuable securities" meant valuable security to the person who parts with it on the strength of the false pretence. After the decision in R. v. Danger, and in consequence of it the statute was amended by the enactment of 24-25 Viet. (Imp.) ch. 96, sec. 90, which corresponds with Code sec. 360. Archbold's Cr. Pl. (20th ed.) 566; R. v. Gordon (1889), 23 Q.B.D. 354.

As to what is included in the term "valuable security," see the statutory definition given in sec. 3 (*ee.*).

On the charge of obtaining the giving of a note by false representations, evidence is receivable that at the same time the prisoner was engaged in practising a series of systematic frauds upon the farming community by similar representations, for the purpose of explaining motives and intention on the part of the prisoner. R. v. Hope (1889), 17 O.R. 463; R. v. Francis (1874), L.R. 2 C.C.R. 128; Blake v. Albion Ins. Co. 4 C.P.D. 94.

**361. Falsely pretending to inclose money, etc., 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 inclosed and sent, or caused to be inclosed and sent, in any post letter any money, valuable security or chattel, which in fact he did not so inclose and send or cause to be inclosed and sent therein. R.S.C., c. 164, s. 79.

It is not 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. Sec. 618.

**362 Obtaining passage by false tickets.**—Every one is guilty 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.

*Trustee.*]—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." Sec. 3 (*bb*).

By the Revised Statutes of Canada, ch. 164, sec. 58, it was enacted that:—"Every one who, being a member of any co-partnership owning any money or other property, or being one of two or more beneficial owners of any money or other property, steals, embezzles or unlawfully converts the same or any part thereof to his own use or that of any person other than the owner, is liable to be dealt with, tried, convicted and punished as if he had not been or were not a member of such co-partnership or one of such beneficial owners." This section was not re-enacted in "The Criminal Code (1892)" and the Act in which it was contained was by that legislation repealed. Major v. McCraney (1898), 2 Can. Cr. Cas. 547, 557.

*Any property.*]—The expression "property" as here used includes 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. Sec. 3 (*v*). It covers not only such property as was originally in the possession or under the control of the accused, 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. Sec. 3 (*v*). So where certain promissory notes were given to the accused for the specific purpose of paying certain other notes with the proceeds it was considered by Falconbridge, J., that an indictment for the misappropriation of the notes themselves would have been sufficient. R. v. Barnett (1889), 17 O.R. 649.

*Consent of Attorney-General.*]—No proceeding or prosecution against a trustee for a criminal breach of trust, as defined in this section, shall be commenced without the sanction of the Attorney-General. Sec. 547.

It is not necessary that the indictment should allege the consent of the Attorney General. Knowlden v. R. (1864), 5 B. & S. 532; R. v. Barnett (1889), 17 Ont. R. 649. And it seems that if the consent be stated on the record, it must be proved if traversed. Knowlden v. R. (1864), 5 B. & S. at p. 549, per Cockburn, C.J.

PART XXVIII.

## FRAUD.

SECT.

---

**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.

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, with intent to deceive, sufficiently charges the offence, under sec. 99 of The Bank Act, of having made, "a wilfully false or deceptive statement *in* any return or report" with such intent. R. v. Weir (No. 1) (1899), 3 Can. Cr. Cas. 102, R.J.Q. 8 Q.B. 521.

**365. False statement by official.**—Every one is guilty of an indictable offence and liable to five years' imprisonment who, being a promoter, director, public officer or manager of any body 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.

Where the offence charged was the making, circulation and publication of false statements of the financial position of a company, and it appeared that the statements were mailed from a place in Ontario to the parties

intended to be deceived in Montreal, the offence, although commenced in Ontario, is completed in the Province of Quebec by the delivery of the letters to the parties to whom they were addressed. R. v. Gillespie (No. 2) (1898), 2 Can. Cr. Cas. 309.

In such case, the courts of the Province of Quebec have jurisdiction to try the accused, if he has been duly committed for trial by a magistrate of the district. Ibid.

If a director or manager of a public company publishes a false statement of account knowing that it is false, with the intent that it shall be acted upon by those whom it reaches, he is guilty in law of publishing such statement with intent to defraud. R. v. Birt (1899), 63 J.P. 328 (Central Cr. Court).

Judicial notice will be taken of the statutory law of a province, other than the one in which the charge is laid, whereby the "president" of a company must necessarily be one of the "directors," and on proof of the manner of incorporation a description of the accused as the "president" of the company seems to be sufficient. R. v. Gillespie (1898), 1 Can. Cr. Cas. 551 (Que.).

**366.—False accounting by clerk.**—Every one is guilty of an indictable offence and liable to seven years' imprisonment who, 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.

An entry in an official cash book as "balance in hand" of an amount which correctly represented the amount which the defendant should have had in his possession but did not then have, is not a "false entry" if the cash book is not one kept to shew the state of account between the defendant and his employer, but between his employer and the employer's superior as to whom the entry correctly represents the amount he is entitled to receive. R. v. Williams (1900), 63 J.P. 103, 19 Cox C.C. 239.

Blackstone's definition of forgery is "the fraudulent making or alteration of a writing to the prejudice of another's right." The possibility of prejudice to another is sufficient. R. v. Ward (1727), 2 Str. 747; 2 Ld. Ray 1461. A clerk, representing his superior, makes a correct entry in official books, and afterwards without authority and malo animo changes the entry for his own gain; yet so as to make it appear to be still the official record; such an act constitutes forgery. Re Hall (1883), 3 O.R. 331.

**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 wilful intent to make a false return may be inferred by the jury from all the circumstances of the case proved to their satisfaction. R. v. Hincks (1879), 24 L.C. Jur. 116.

**368.—Assigning property with intent to defraud 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,

(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.

This section is a re-enactment of sec. 21 of 22 Vict. (Can.), c. 96.

Under section 5 of the Canada Evidence Act, 1893, as amended in 1901, 1 Edw. VII., c. 36, the answer of a witness to any question which pursuant 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 subsec. 1 of sec. 5, and which, but for that enactment, he would upon such ground have been excused from answering, shall not be used or be 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. This abrogates the former law as laid down in R. v. Douglas (1896), 1 Can. Cr. Cas. 221 (Man.).

It is not essential that the debt of the creditor should at the time of assignment be actually due. R. v. Henry (1891), 21 O.R. 113, following Macdonald v. McCall, 12 A.R. 393.

It is properly left to the jury to say whether the defendant put the property out of his hands, transferred or disposed of it for the purpose of defrauding his creditors, although in the course of that transaction he satisfied a debt due to the creditor to whom the property was assigned. R. v. Potter (1860), 10 U.C.C.P. 39 (Draper, C.J., and Hagarty, J.).

In a case where the nature of the proceedings and the evidence clearly shewed that criminal process issued against S. was used only for the purpose of getting S. to Montreal to enable his creditors there to put pressure on him, in order to get their claims paid or secured, a transfer made by S.'s father of all his property for the benefit of the Montreal creditors was set aside as founded on an abuse of the criminal process of the court. Shorey v. Jones (1888), 15 Can. S.C.R. 398, affirming the decision of the Supreme Court of Nova Scotia, 20 N.S. Rep. 378.

In Nova Scotia it is held that the disposition of the property under this section must be such as would, if not interfered with, deprive the creditors of any benefit whatever therefrom. R. v. Shaw (1895), 31 N.S.R. 534.

**369. Destroying or falsifying books with intent to defraud creditors.**—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.

**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 concealing deeds and encumbrances as defined by this section 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. Sec. 548.

**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 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 an 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.

**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 into execution, the *bona 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 and silver.**—Every one is guilty of an indictable offence and liable to two years' imprisonment, who—

(*a*) being the holder of any lease or license 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 His 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 authorized 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.

*Search warrant.*]—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 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. Sec. 571.

The decision of the justice in such case is subject to appeal as in ordinary cases coming within the provisions of Part LVIII. Sec.571 (2).

**376. Warehousemen, etc., giving false receipts - knowingly using the same.**—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 acknowledgement 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. Consignments on which advances made.**—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 under "The Bank Act."**—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.

Receipts given by any person in charge of logs or timber in transit from timber limits or other lands to their place of destination are covered by the term "warehouse receipt" used in the Bank Act. Stat. Can. 1890, ch. 31, sec. 2 (*d*); Stat. Can. 1900, ch. 26, sec. 3.

**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 co-partnership 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. Selling vessel or wreck not having title thereto.**—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*).

*Wreck.*]—The term "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.

**381. Other offences respecting wrecks.**—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.

**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 daytime 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.

**383. Definitions.**—In the next six sections, the following expressions have the meaning 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 His 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 His 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 His Majesty in the right of his 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. |

**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.

**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 His 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.

**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.

*Right of search.*]—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 seach any person reasonably suspected of having or conveying in any manner any public stores defined in sec. 383, 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. See 570.

A constable or other peace officer shall be deemed to be deputed within the meaning of sec. 570 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. Sec. 570 (2).

As to searching for stores near His Majesty's ships see sec. 389.

*Evidence.*]—In any prosecution, proceeding or trial under sections 385 to 389 inclusive for offences relating to public stores, proof that any soldier, seaman or marine was actually doing duty in His Majesty's service shall be prima facie evidence that his enlistment, entry or enrolment has been regular. Sec. 709. If the person charged with the offence relating to public stores mentioned in article 387 was at the time at which the offence is charged to have been committed in His 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 384 shall be presumed until the contrary is shewn. Sec. 709 (2).

**388. Not satisfying justices that possession of public stores is lawful.**—Every one, not being in His 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.

See note to sec. 387.

**389. Searching for stores near His 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 His Majesty, or in His Majesty's service, or from any mooring place or anchoring place appropriated to such vessels, or from any mooring belonging to His Majesty, or from any of His 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.

See note to sec. 387.

**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 His Majesty, or any such articles belonging to any soldier, militiaman 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.

**391. Receiving, etc., necessaries from mariners 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 acting 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 months' 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 His Majesty's Navy, and is borne on the books of any one of His 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 His 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 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.

*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 such a design rests in *intention only*, it is not indictable. But where two agree to carry it into effect, the very plot is an act in itself and is the act of each of the parties, promise against promise, actus contra actum, capable of being enforced if lawful, punishable if for a criminal object or for the use of criminal means. Mulcahy v. R. (1868), L.R. 3 H.L., Eng. & Ir. App. 306, 317, Archbold's Crim. Evid., 21st ed. 1104.

The conspiracy itself is the offence, and whether anything has been done in pursuance of it or not is immaterial. R. v. Gill (1818), 2 B. & Ald. 204; R. v. Seward (1834), 1 A. & E. 706; R. v. Richardson (1834), 1 M. & Rob. 402; R. v. Kenrick (1843), 5 Q.B. 49.

The date mentioned in the indictment as the day when the conspiracy took place is not material, but in form some day before the indictment preferred, must be laid; evidence is not thereby precluded in respect of an earlier date. R. v. Charnock (1698), 12 Howard's State Trials, 1397.

*Evidence.*]—It is not necessary to prove that the defendants actually met together and concerted the proceeding; it is sufficient if the jury are satisfied from the defendants' conduct either together or severally, that they were acting in concert. R. v. Fellowes (1859), 19 U.C.R. 48, 58.

The jury may group the detached acts of the parties severally, and view them as indicating a concerted purpose on the part of all as proof of the alleged conspiracy. R. v. Connolly (1894), 1 Can. Cr. Cas. 468 (Ont.).

When the existence of the common design on the part of the defendants has been proved, evidence is then properly receivable as against both of what was said or done by either in furtherance of the common design. Ibid.

Evidence is admissible of what was said or done in furtherance of the common design by a conspirator not charged, as against those who are charged, after proof of the existence of the common design on the part of the defendants with such conspirator. Ibid.

A conspiracy to defraud is indictable, although the conspirators have been unsuccessful in carrying out the fraud. R. v. Frawley (1894), 1 Can. Cr. Cas. 253 (Ont.).

Conspiracy to defraud is indictable although the object was to commit a civil wrong, and although if carried out the act agreed upon would not constitute a crime. R. v. Defries (1894), 1 Can. Cr. Cas. 207 (Ont.).

Any overt act of conspiracy is to be viewed as a renewal or continuation of the original agreement made by all of the conspirators, and, if done in another jurisdiction than that in which the original concerted purpose was formed, jurisdiction will then attach to authorize the trial of the charge in such other jurisdiction. R. v. Connolly (1894), 1 Can. Cr. Cas. 468.

The bare consulting of those who merely deliberate in regard to the proposed conspiracy, although they may not agree on a plan of action, is of itself an overt act. Ibid.

One person alone cannot be guilty of a conspiracy, and if all the alleged conspirators are prosecuted for such a conspiracy and all are acquitted but one, the acquittal of the others is the acquittal of that one also. 1 Hawkins P.C. 448. But one person alone may be tried for a conspiracy, provided that the indictment charged him with conspiring with others who have not appeared. Rex v. Kinnersley, 1 Str. 193, or who are since dead. Rex v. Nicholls, 2 Str. 1227, 13 East, p. 412 (*a*).

And it has recently been held in Ontario, in a case under the Code, that one conspirator may be indicted and convicted without joining the others, although they are living and within the jurisdiction. R. v. Frawley (1894), 1 Can. Cr. Cas. 253 (Ont.).

A person was charged with conspiring with two others to obtain goods by false pretences from various tradesmen. During the trial a deputy chief constable was called and asked with reference to a shop opened by one of the persons charged who had pleaded guilty, "Did you make inquiries as to whether any trade had been done?" The anwswer was, "I did." He was then asked, "Did you as a result of such enquiries find that any trade had been done?" and he answered, "I did not." It was held that the evidence was merely hearsay and inadmissible and the conviction was quashed. R. v. Saunders (1899), 63 J.P. 150.

*Particulars of charge.*]—Sec. 616 (sub-sec. 2), provides that "No count which charges any false pretences 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 pretences 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.

A copy of the particulars is to be given without charge to the accused or his solicitor and shall be entered in the record and the trial shall proceed in all respects as if the indictment had been amended in conformity with same. Cr. Code 617. The court may have regard to the depositions, in determining whether a particular is required or not. Cr. Code 617 (2).

An indictment charging that two parties named did conspire by false pretences and subtle means and devices to obtain from F. divers large sums of money of the moneys of F., and to cheat and defraud him thereof was held good although the means of the alleged conspiracy were not stated in detail. R. v. Kenrick (1843), 5 Q.B. 49. Lord Denman, C.J., in that case said: "There have not been wanting occasions when learned judges have expressed regret that a charge so little calculated to inform a defendant of the facts intended to be proved upon him should be considered by the law as well laid. All who have watched the proceedings of courts are aware that there is danger of injustice from calling for a defence against so vague an accusation, and judges of high authority have been desirous of restraining its generality within some reasonable bounds. The ancient form, however, has kept its place and the expedient now employed in practice of furnishing defendants with a particular of the acts charged upon them is probably effectual for preventing surprise and unfair advantages.

*Venue.*]—The venue may be laid either where the agreement was entered into or where any overt act was done in pursuance of the common design. R. v. Connolly (1894), 1 Can. Cr. Cas. 468 (Ont.).

**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.

*Cheating.*]—To constitute the offence of cheating at common law it is necessary to shew, (1) that the act has been completed, (2) that there has been injury to the individual. R. v. Vreones, [1891] 1 Q.B. 360.

**396. Pretending to practice witchcraft.**—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 pretends 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.

Deception is an essential element of the offence of "undertaking to tell fortunes" under sec. 396, and to uphold a conviction for that offence there must be evidence upon which it may be reasonably found that the accused was asserting or representing, with the intention that the assertion or representation should be believed, that he had the power to tell fortunes, with the intent in so asserting or representing of deluding and defrauding others. R. v. Marcott (1901), 4 Can. Cr. Cas. 437 (C.A. Ont.).

The word "undertakes," as used in this section of the Code, implies an assertion of the power to perform, and a person undertaking to tell fortunes impliedly asserts his power to tell fortunes and in doing so is asserting the possession of a power which he does not possess and is thereby practising deception, and when this assertion of power is used by him with the intent of deluding and defrauding others the offence aimed at by the enactment is complete. Per Armour, C.J.O., in R. v. Marcott (1901), 4 Can. Cr. Cas. 437; Penny v. Hanson (1887), 18 Q.B.D. 478; R. v. Entwistle, [1899] 1 Q.B. 846; Monck v. Hilton, 2 Ex. D. 268.

The word "pretend" in itself implies that there was an intention to deceive and impose upon others. R. v. Entwistle, ex parte Jones (1899), 63 J.P. 423.

The mere undertaking to tell fortunes is an offence. A conviction obtained upon the evidence of a person who was a decoy, but not a dupe or a victim, was affirmed. R. v. Milford (1890), 20 Ont. R. 306.

PART XXIX.

## ROBBERY AND EXTORTION.

SECT.



---

**397. Robbery defined.**—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.

*Robbery at common law.*]—"Robbery is larceny committed by violence, from the person of one put in fear."—Bishop.

The following are some of the definitions of this offence:—

Lord Coke. "Robbery is a felony by the common law, committed by a violent assault upon the person of another, by putting him in fear, and taking from his person his money or other goods of any value whatsoever." 3 Inst. 68.

Lord Hale. "Robbery is the felonious and violent taking of any money or goods from the person of another, putting him in fear, be the value thereof above or under one shilling." 1 Hale P.C. 532.

Hawkins. "Robbery is a felonious and violent taking away from the person of another, goods or money to any value, putting him in fear." 1 Hawk. P.C. Curw. Ed. p. 212.

East. "A felonious taking of money or goods, to any value, from the person of another, or in his presence, against his will, by violence or putting him in fear." 2 East P.C. 707.

Blackstone. "The felonious and forcible taking, from the person of another, of goods or money to any value, by violence or putting him in fear." 4 Bl. Com. 242.

Lord Mansfield. "A felonious taking of property from the person of another by force." Rex v. Donolly, 2 East P.C. 715, 725.

*The act of violence.*]—To constitute robbery, there must be either some act of direct violence, or some demonstration from which physical injury to the person robbed may be reasonably apprehended. 2 Bishop's Cr. Law 967.

The fear of physical ill must come before the relinquishment of the property to the thief, and not after; else the offence is not robbery. Rex v.

Harman, 2 East P.C. 736. The general doctrine is, that physical force, actual or apprehended, in taking property, is essential to constitute a crime of this kind. 1 Bishop 430. And the injury may be, as just mentioned, either actual or apprehended.

No sudden taking of a thing unawares from the person, as by snatching any thing from the hand or head, is sufficient to constitute a robbery, unless some injury be done to the person, or unless there be some previous struggle for the possession of the property. 2 East P.C. 708. But in the later editions of Hawkins, it is said to be robbery "to snatch a basket of linen suddenly from the head of another." 1 Hawk. P.C. Curw. Ed. 214, sec. 9. The true doctrine is, that such a snatching will constitute robbery, provided the article is so attached to the person or clothes as to create resistance, however slight; not otherwise. 2 Bishop 968. And where a watch was fastened to a steel chain passing round the neck of its owner, one who snatched it away, breaking the chain, was held to be guilty of this offence. "For the prisoner could not obtain the watch at once, but had to overcome the resistance the steel chain made, and actual force was used for the purpose." Rex v. Mason, Russ. & Ry. 419. To snatch a pin from a lady's headdress, so violently as to remove with it a part of the hair from the place where it was fixed (Rex v. Moore, 1 Leach, 4th ed. 335), or to force an ear-ring from her ear (Rex v. Lapier, 1 Leach, 4th ed. 320, 2 East P.C. 557, 708), is robbery; but not, to snatch property merely from another's hand. Rex v. Baker, 1 Leach, 4th ed. 290, 2 East P.C. 702; Rex v. Macauley, 1 Leach, 4th ed. 287; Rex v. Robins, 1 Leach, 4th ed. 290, note.

If the robber has, in any way, disabled his victim, a simple taking then from the person is sufficient. And where a bailiff handcuffs his prisoner, under pretence of conducting him the more safely to prison, but really for the purpose of robbing him; then, if, having so disabled him, he takes money from the prisoner's pocket, the offence is robbery. Rex v. Gascoigne, 1 Leach, 4th ed. 280, 2 East P.C. 709. So also, if one seizes another by the cravat, then forces him against the wall, then abstracts his watch from his pocket even without his knowledge, this graver form of larceney is committed. Commonwealth v. Snelling, 4 Binn. 379.

*Apprehended violence.*]—There is no need of actual force to be employed by the robber. If he assaults one (1 Hale P.C. 533; 1 Hawk. P.C. Curw. Ed. p. 214, sec. 7), or threatens him in such a manner as to create in his mind a reasonable apprehension of bodily harm in case of resistence, the taking is robbery. So that, where money was given to a person connected with a mob in a time of riot, on his coming to the house and begging in a manner which implied menace if it were not given him, the getting of this money was held to be robbery. Rex v. Taplin, 2 East P.C. 712. And where the threat was to tear down corn and the house, the giving under fear of this threat was deemed sufficient to constitute the taker a robber. Rex v. Simons, 2 East P.C. 731. See Rex v. Gnosil, 1 Car. & P. 504. Even where the danger was not immediate, but a threat was to bring a mob from a neighbouring town, in a state of riot, and burn down the prosecutor's house, and the prosecutor parted with the goods through fear of this consequence, which he believed would follow refusal, but not otherwise from apprehension of personal danger, the crime was held to be committed. Rex v. Astley, 2 East P.C. 729; Rex v. Brown, 2 East P.C. 731. The offer of money, less than the value of the goods, will not make the act of taking less criminal. Rex v. Simons, 2 East P.C. 712; Rex v. Spencer, 2 East P.C. 712.

To constitute robbery, under such circumstances mentioned in the last section, the menace must be of a kind to excite reasonable apprehension of danger; nothing short will do. 2 East P.C. 713; 1 Hawk. P.C. Curw. Ed. p. 214, sec. 8. Moreover, though the danger need not be immediate and the money need not be parted with instantly, yet the money must be delivered and taken while the fear is on the mind, and not after time has elapsed,

especially in the absence of the robber, for the fear to be removed. Long v. The State, 12 Ga. 293; Rex v. Jackson, 1 East P.C. Add. XXI., 1 Leach, 4th ed. 193, note, 2 Ib. 618, note; 1 Hawk. P.C. Curw. Ed. p. 213, sec. 1. Lord Hale says: "If thieves come to rob A., and, finding little about him, enforce him by menace of death to swear upon a book to fetch them a greater sum, which he doth accordingly, this is a taking by robbery, yet he was not in conscience bound by such compelled oath; for the fear continued, though the oath bound him not." 1 Hale P.C. 532.

Obtaining money from a woman by threat to accuse her husband of an indecent assault, is not robbery. Rex v. Edwards, 5 Car. & P. 518, 1 Moody & R. 257.

*The taking.*]—If the person assaulted merely drops the property, and the assailant is apprehended before he takes it up, his offence is not robbery. Rex v. Farrell, 1 Leach, 4th ed. 322, note, 2 East P.C. 557; ante, sec. 701. And, Lord Hale says, "if A. have his purse tied to his girdle, and B. assaults him to rob him, and in struggling the girdle breaks, and the purse falls to the ground, this is no robbery; because no taking. But if B. take up the purse; or, if B. had the purse in his hand, and then the girdle break, and striving lets the purse fall to the ground, and never takes it up again; this is a taking and robbery." 1 Hale P.C. 533, referring to 3 Inst. 69; Dalt. Just., ch. 100; Cromp. 35. After the taking has been effected, the crime is not purged by giving back the thing taken. 1 Hale P.C. 533; Rex v. Peat, 1 Leach, 4th ed. 228, 2 East P.C. 557.

It is no objection, that the person assaulted delivered with his own hand the property to the assailant, if the necessary other circumstances concurred. 1 Hale P.C. 533.

Since robbery is an offence as well against the person as the property, the taking must be, in the language of the law, from the person. 2 Bishop 975. But the person may be deemed to protect all things belonging to the individual, within a distance, not easily defined, over which the influence of the presence extends. "If a thief," says Lord Hale, "come into the presence of A.; and, with violence and putting A. in fear, drives away his horse, cattle, or sheep"; he commits robbery. 1 Hale P.C. 533. The better expression is, that a taking in the presence of an individual (of course, there being a putting in fear) is to be deemed a taking from his person. Rex v. Frances, Comyns 478, 2 Stra. 1015, Cas. temp. Hardw. 113, Foster 128. In robbery, it is sufficient if the property be taken in the presence of the owner; it need not be taken immediately from his person, so that there be violence to his person or putting him in fear. As where one, having first assaulted another, takes away his horse standing by him; or having put him in fear, drives his cattle out of his pasture in his presence, or takes up his purse which the other in his fright had thrown into a bush, or his hat which had fallen from his head. 2 East P.C. 707. "Or," adds Hawkins, "robs my servant of my money before my face." 1 Hawk. P.C., Curw. Ed., p. 214, sec. 5; Rex v. Fallows, 5 Car. & P. 508.

*The fear.*]—Where there is no actual force, there must be actual fear; but, where there is actual force, the fear is conclusively inferred by the law. Rex v. Reane, 2 Leach, 4th ed., 616. And, within this distinction, assaults, where there is no actual battery, are probably to be deemed actual force. 1 Bishop 317. Where neither this force is employed, nor any fear is excited, there is no robbery, though there be reasonable grounds for fear. Rex v. Reane, 2 East P.C. 734, 2 Leach, 4th ed., 616. And see 2 East P.C. 665, 666.

*Accomplices.*]—Hawkins observes: "In some cases a man may be said to rob me, where in truth he never actually had any of my goods in his possession; as where I am robbed by several of one gang, and one of them only takes my money; in which case, in judgment of law, every one of the company shall be said to take it, in respect of that encouragement which they give to another, through the hopes of mutual assistance in their enter-

prise; nay, though they miss of the first intended prize, and one of them afterwards ride from the rest, and rob a third person in the same highway without their knowledge, out of their view, and then return to them—all are guilty of robbery, for they came together with an intent to rob, and to assist one another in so doing." 1 Hawk. P.C., Curw. Ed., p. 213, sec. 4. And see Code secs. 61-63.

**398. Punishment of aggravated robbery.**—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 any 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 Punishment of robbery.**—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. Assault with intent to rob.**—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.

*Indictment.*]—When the complete offence of robbery is charged but not proved and the evidence establishes an attempt to commit the offence, the accused may be convicted of such attempt and punished accordingly. Sec. 711. An assault with intent to rob is a form of attempt to rob. Sec. 64. On a count for robbery the accused may be convicted of any offence the commission of which would be included in the commission of robbery and which is proved; or he may be convicted of an attempt to commit any offence so included. Sec. 713. An attempt to assault with intent to rob is in itself an indictable offence. Sec. 529.

When an attempt to commit an offence is charged but the evidence establishes the commission of the full offence, the accused is not entitled to be acquitted, but the jury may convict him of the attempt, unless the court where the trial takes place, 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. Sec. 712. After a conviction for the attempt the accused is not liable to be tried again for the offence which he was charged with attempting to commit. Sec. 712 (2). If a count for assault with intent to rob is joined with a count for robbery the prosecutor cannot proceed with both and is put to his election. R. v. Gough (1831), 1 M. & Rob. 71.

It was formerly held that a prisoner could not be convicted of a common assault on an indictment for an assault with intent to rob; R. v. Woodhall (1872), 12 Cox C.C. 240; R. v. Sandys (1844), 1 Cox C.C. 8; but sec. 713 abrogates that rule.

*Form of indictment.*]—The indictment may be in the following form:—

"County of —— to wit: The jurors for our Lord the King upon their oath present that A.B. on the —— day of —— in the year of our Lord 190—, in and upon one J. N. did make an assault with intent the moneys, goods and chattels of the said J. N. from the person and against the will of him the said J. N. then unlawfully and violently to steal, take and carry away; against the form of the Criminal Code (sec. 400) and against the peace of our Lord the King, his Crown and dignity."

*With intent to rob him.*]—The English Larceny Act, 1861, 24-25 Vict., ch. 96, sec. 40, which deals with this offence, omits the word "him," and may possibly include the case of an assault upon A. with intent to rob B., but such would not be the case under the Code.

Under a former English Act, 7 Geo. III., ch. 21, now repealed, which made it felony for any person with an offensive weapon to assault any other person "with intent to rob such person," a charge of assault with intent to rob the occupant of a carriage was held not sustainable on evidence that the assault was made upon the driver of the carriage only, without threats or violence to the occupant. R. v. Thomas (1784), 1 Leach C.C. 330, 1 East P.C. 417.

*Evidence.*]—As to what constitutes an assault, see sec. 258. An attempt or threat, by any act or gesture to apply force to the person of another without the latter's consent is an assault, 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. See. 258.

Where the defendant decoyed the prosecutor into a house and chained him down to a seat, and there compelled him to write orders for payment of money and for the delivery of deeds, and the papers on which he wrote remained in his hands for half an hour, but he was chained all the time, this was held not to be an assault with intent to rob. R. v. Edwards (1834), 6 C. & P. 515, 521; R. v. Phipoe (1795), 2 Leach 673. Such cases are now provided for by sec. 402, following sec. 48 of the English statute 24-25 Vict., ch. 96, which was framed to meet such cases.

The evidence on the charge usually proves all the elements of a robbery with the exception of the taking and carrying away.

Assaulting and threatening to charge an infamous crime with intent thereby to extort money, is an assault with intent to rob. R. v. Stringer (1842), 2 Mood. C.C. 261, 1 C. & K. 188.

No actual demand of money is required to make out the offence. R. v. Trusty (1783), 1 East P.C. 418; R. v. Sharwin (1785), 1 East P.C. 421.

**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.

The expression "mail" is to be interpreted by the Post Office Act, R.S.O. 1886, ch. 36. Code sec. 4. That Act (sec. 2) declares that "mail" includes every conveyance by which post letters are carried, whether it is by land or by water.

**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.

As to the origin of this section see note to sec. 400.

*Valuable security.*]—See definition of this term in sec. 3 (*cc*). A document as follows:—"I hereby agree to pay you 100*l* sterling on the 27th inst. to prevent any action against me" has been held to be a "valuable security." R. v. John (1875), 13 Cox C.C. 100.

**403. Sending letter demanding property with menaces.**—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.

*Form of indictment.*]—The following form of indictment may be used:—

"County of ——, to wit:—The jurors for our Lord the King upon their oath present that J. S. on the —— day of —— in the year of our Lord —— at the —— in the County of ——, unlawfully did send (*or* delivered or uttered and caused to be received) to one J. N. a certain letter (*or* writing) directed to the said J. N. by the name and description of Mr. J. N., demanding money (*or* a certain valuable security to wit, etc.) from the said J. N. with menaces and without any reasonable or probable cause, he the said J. S. then well knowing the contents of the said letter; and which said letter is as follows, that is to say (*here* set out the letter verbatim), against the form of the Criminal Code (sec. 403) and against the peace of our Lord the King his Crown and dignity."

*Inspection.*]—In R. v. Harrie (1833), 6 C. & P. 105, an order was made that the letter be deposited in the hands of the Clerk of the Peace in order that the defendant's witnesses might inspect it before the trial.

*Sends, delivers, etc.*]—Proof that the letter is in the defendant's handwriting and that it came to the prosecutor by post is sufficient evidence that the defendant sent it. R. v. Heming (1799), 2 East P.C. 1116; R. v. Jepson (1798), 2 East P.C. 1115. 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. R. v. Paddle (1822), R. & R. 484 and the leaving a letter directed to A. so that it may not only reach A. but B. also and with the intent that it should reach them both is a sending to B. if it reaches him; and it is for the jury to decide as to whom it was intended to reach. R. v. Carruthers (1844), 1 Cox C.C. 138; R. v. Grimwade (1844), 1 Den. C.C. 30, 1 Cox 85.

*Knowing the contents thereof.*]—The knowledge by the accused of the contents of the letter or writing is an essential ingredient of the offence in all cases under this section. R. v. Girdwood (1776), 1 Leach 142.

*The demand.*]—A letter signifying an intention to impute a crime to the party from whom it is attempted to obtain the property, in case he does not choose to comply with the sender's suggestion by delivering the property, is a sufficient demand. R. v. Michael Robinson (1796), 2 Leach C.C. 869; 2 East's P.C. 1,110. But a mere request without imposing any conditions would not suffice. Ibid. And see secs. 405 and 406.

*With menaces.*]—The word "menace" means "a threat or threatening; the declaration or indication of a disposition or determination to inflict an evil; the indication of a probable evil or catastrophe to come." The word as here used in the Code (similar to Imp. Larceny Act, 1861, 24 and 25 Vict., c. 96, s. 44,) is to be given its natural meaning, and will include menaces, or threats of a danger, by an accusation of misconduct, though of misconduct not amounting to a crime, and is not confined to a threat of injury to the person or property of the person threatened. Lord Russell in R. v. Tomlinson, [1895] 1 Q.B. 706, 708.

If the threat be to accuse of a crime, it is no less an offence because the person threatened was really guilty, for, if he was guilty, the accused ought to have prosecuted him for it, and not have extorted money from him. R. v. Gardner (1824), 1 C. & P. 479.

The threat must be of such a nature as is calculated to overcome a firm and prudent man, and to induce him from fear to part with his money or property. R. v. Southerton, 6 East 126, per Lord Ellenborough; but this must be taken to refer to the nature of the demand itself, and not to the state of mind of the party on whom it is made, and if the threatening demand be of such a nature as is calculated to affect a man of a reasonably sound state of mind, the court will not enquire into the degree of nerve possessed by the individual. R. v. Smith (1850), 19 L.J. N.S. M.C. 80, 82.

In the more recent case of R. v. Tomlinson, [1895] 1 Q.B. 706, 710, Mr. Justice Wills said that the threat must not be one that ought to influence nobody, and as persons who are thus practised upon are not, as a rule, of average firmness, there should be given in practice a liberal construction to the doctrine that the threat must be of a nature to operate on a man of reasonably sound or ordinarily firm mind.

A threat or menace to execute a distress warrant which he had no authority to do is not of a character to excite either fear or alarm, but may be made with such gesture and demeanour, or with such other unnecessarily violent acts, or under such circumstances of intimidation, as to have that effect, and this should be decided by the jury. R. v. Walton (1863), 1 Leigh & Cave's Crown Cases, 288, 298.

It is not for the judge to say, as a matter of law, that the conduct of the accused constituted a menace within the statute, and the jury should be told that the question was whether the threats or words used were such as would naturally and reasonably operate on the mind of a reasonable man; in other words, whether they would have such an effect on such a person as to deprive him of his free volition and put a compulsion on him to act as he would not act otherwise. R. v. Tomlinson, [1895] 1 Q.B. 706, 709.

In Reg. v. McDonald, 8 Man. R. 493, a case that was decided on the provision of the criminal law that is now found in this section, it was held, following Reg. v. Southerton (1805), 6 East, 126, that sending a letter threatening a prosecution for a breach of The Liquor License Act unless a sum of money was paid, was not an offence within this section, because the threat was not one that would be likely to overcome a man of an ordinarily firm and prudent mind. But in the recent case of Reg. v. Tomlinson, [1895] 1 Q.B. 706, 18 Cox C.C. 75, the Court, took a less restricted view of the meaning to be given to the word "menaces" in this section than had been taken in previous cases. For this reason it was intimated in R. v. Gibbons (1898), 1 Can. Cr. Cas. at page 345, that when a case arises again under section 403, it may be desirable to reconsider the decision in Reg. v. McDonald.

Under this section what is made criminal is the sending a letter demanding money with menaces; and in these cases it must always be a question of law, whether the menaces in the letters sent are such as are contemplated by the statute. R. v. Gibbons (1898), 1 Can. Cr. Cas. at p. 345, per Bain J. Under section 404, however, the offence is demanding money or property with menaces with intent to steal it. An essential element of that offence is the intent to steal; and any menace or threat that comes within the sense of the word menace in its ordinary meaning, proved to have been made with the intent of stealing the thing demanded, would bring the case within the section. For that reason it cannot be determined as a question of law, and without reference to the circumstances of the particular case whether a demand for money with menaces is within section 404 or not. Ibid.

*Without reasonable or probable cause.*]—The words "without reasonable or probable cause" apply to the demand for the money and not to the accusation threatened to be made (following R. v. Hamilton (1843), 1 C. & K. 212, a prosecution under 7 and 8 Geo. IV., ch. 29, sec. 8, the wording of which section is identical with the words of Code sec. 403). R. v. Mason (1874), 24 U.C.C.P. 58.

On a charge of delivering a letter demanding property with menaces and without reasonable or probable cause, the question as to whether the demand was made without reasonable or probable cause is one of fact, and the onus of proof is upon the prosecution to prove the want of reasonable or probable cause. R. v. Collins (1895), 1 Can. Cr. Cas. 48 (N.B.).

The words "without reasonable or probable cause" have reference to the state of the prisoner's mind when making the demand. R. v. Miard (1844), 1 Cox C. C. 22; R. v. Chalmers (1867), 10 Cox C.C. 450.

If the money were actually due, the demand of same with menaces would not come within the section. R. v. Johnson, 14 U.C.Q.B. 569; but see sec. 523. A person who threatens to make an accusation with intent to extort money is equally guilty whether the accusation threatened was or was not true. R. v. Richards (1868), 11 Cox C.C. 43.

*Property.*]—As to meaning of this term see sec. 3 (*e*).

*Valuable security.*]—See sec. 3 (*cc*).

**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.

*Demurrer.*]—The courts do not quash indictments for extortion but leave the defendant to demur. R. v. Wadsworth (1694), 5 Mod. 13; R. v. Tisdale and another (1860), 20 U.C.Q.B. 272.

*Evidence.*]—A demand of money from a hotel keeper under threat of prosecution for selling intoxicating liquor in prohibited hours contrary to a Liquor License statute if the demand be not complied with, may constitute the offence of demanding money with menaces, "with intent to steal the same." R. v. Gibbons (1898), 1 Can. Cr. Cas. 340 (Man.).

Such 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 cancellation of his license, as well as to heavy penalties, is such a threat as is calculated to do him harm and as would be likely to affect any man in a sound and healthy state of mind, and any such threat is an illegal menace. Ibid.

Demanding with menaces money actually due is not a demand with intent to steal. Where prisoner who owned a house deserted his wife, who in his absence rented the house to P., and on returning demanded the rent with menaces from P., who had in the meantime paid it over to the wife, it was held that if he had succeeded in inducing P. thus to pay him the rent he claimed he never could be held to have stolen that money from him, and that his demanding it with threats under such circumstances could not be held to have been a demand with intent to steal. R. v. Johnson (1857), 14 U.C.Q.B. 569. See, however, sec. 523, as to the offence of intimidation.

Two or more persons may be jointly convicted of extortion when they act together and concur in the demand. Two defendants sat together as magistrates and one illegally exacted a sum of money for justice's fees for his discharge from a person charged before them with a felony, against whom they found no evidence. The other justice made no objection. It was held they might be jointly convicted. R. v. Tisdale (1860), 20 U.C. Q.B. 272.

For the purpose of proving the "intent to steal" it is sufficient if an inference of such intent is deducible from the acts and conduct of the prisoner as shewn by the evidence. The question of "intent to steal" is one entirely for the jury, and cannot be determined as a question of law by the judge. R. v. Gibbons (1898), 1 Can. Cr. Cas. 340 (Man.).

To demand and obtain possession of goods from a debtor for the purpose of holding them as security for a debt actually owing, is not a demand with menaces made with "intent to steal," although such possession is obtained by means of an unjustified threat of the debtor's arrest made by the creditor's agent without any honest belief that the debtor was liable to arrest. R. v. Lyon (1898), 2 Can. Cr. Cas. 242 (Ont.).

**405. Extortion by certain threats.**—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; 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. R.S.C. c. 173, ss. 3, 4, 1 and 5.

The accusation need not be one made or to be made before a judicial tribunal; a threat to charge before any third person is sufficient. R. v. Robinson (1857), 2 M. & Rob. 14.

It is immaterial whether the prosecutor be innocent or guilty of the offence imputed to him if the accused intended to extort money. R. v. Richards (1868), 11 Cox C.C. 43; R. v. Gardner (1824), 1 C. & P. 479.

Although the prosecutor may be cross-examined as to his guilt of the offence imputed to him with a view to shake his credit, yet no evidence will be allowed to be given by another witness even in cross-examination to prove that the prosecutor was guilty of that offence. R. v. Cracknell (1866), 10 Cox C.C. 408.

Where an information for rape or other offence under sec. 405 is laid with the sole intent to extort money or property from the person against whom the charge is made, the informant thereby "accuses" such person with intent to extort or gain something from him under sec. 405; and commits an indictable offence thereunder. R. v. Kempel (1900), 3 Can. Cr. Cas. 481 (Ont.).

A crime punishable by law with imprisonment for seven years or more means a crime the minimum punishment for which is seven years; and the section does not apply where no minimum term of imprisonment is prescribed. R. v. Popplewell (1890), 20 Ont. R. 303.

If a person has been indicted for an offence or is in custody therefor it is not an offence under this section to threaten to procure witnesses to prove the charge. Archbold Cr. Pl. (1900), 505.

*Valuable security.*]—For the statutory definition of this term see sec. 3 (C.C.).

**406. Extortion by other threats.**—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.

The "offence" to accuse, or threaten to accuse, a person of which with intent to extort or gain anything from him is here made an indictable offence, need not be an offence under the Code or other Dominion law, but may be an offence under a provincial law, *ex. gr.* an offence under a Liquor License Act. R. v. Dixon (1895), 2 Can. Cr. Cas. 589 (N.S.).

Where, in 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 handwriting, and to submit to the jury for comparison with an exhibit, already in evidence, admittedly written by the accused. A jury may properly make a comparison of doubtful or disputed handwriting, and draw their own conclusion as to its authenticity, if the admittedly genuine handwriting and the disputed handwriting are both in evidence for some purpose in the case, although no witness was called to prove the handwriting to be the same in both. R. v. Dixon (No. 2) (1897), 3 Can. Cr. Cas. 220. (N.S.).

PART XXX.

## BURGLARY AND HOUSEBREAKING.



---

**407. Definition of dwelling-house, etc.**—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 occupier 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 dwelling-house 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 necessary purpose, shall be deemed to have broken and entered that building. R.S.C. c. 164, s. 2.

**408. Breaking place of worship and commiting offence.**—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 an indictable offence therein, or who, having committed any indictable offence therein, breaks out of such place. R.S.C. c. 164, s. 35.

**409. Breaking place of worship with intent to commit offence.**—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.

*(Amendment of 1900.)*

**410. Burglary defined.**—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.

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.

*Breaks and enters a dwelling house.*]—Some violence is necessary to constitute the actual breaking of a house, though very slight violence is necessary.

If one unlatches a door, opens a window when fastened, or raises it when shut, but being without any fastening, puts back a lock or a bolt, or picks a lock with a false key, takes a pane of glass out of the window, either by taking out the nails or other fastening, or by drawing or bending them back, or by unloosing any other fastening, either to doors or windows, which the owner has provided, all these are burglarious breakings. But where a pane of glass had been cut or cracked for a month, but there was no opening or hole 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. 1 Russell, by Greaves, 787; Rex v. Bird, 9 Carrington & Payne 44; per Bosanquet, J. So where a window, opening upon hinges, is fastened by a wedge, so that pushing against it will open it, if such window be forced open by pushing against it, there will be a sufficient breaking. 1 Russell, by Greaves, 787.

*Entrance by threat, artifice or collusion.*]—If there be no *actual* breaking there must be a breaking by *construction of law*, as where any one by fraud, conspiracy, or threats, procure the door of a dwelling house to be opened to him.

"Thieves come with a pretended hue and cry, and require the constable to go along with them to search for felons, and whilst he goes with them into a man's house, they bind the constable and dweller, and rob him, this is burglary." Coke, 3 Inst. 64; 1 Hale P.C. 552. "This," says Hale, "happened in Blackfriars, 1664, where thieves, pretending that A. harboured traitors, called the constable to go with him to apprehend them, and the constable entering, they bound the constable and robbed A., and were executed for burglary, and yet the owner opened the door of his own accord to the constable." 1 Hale 553; Crompton 22a.

Where divers persons came to a house with intent to rob it, and knocked at the door, pretending to have business with the owner, and being by that means let in, rifled the house, they were found guilty of burglary. 1 Hawkins P.C., ch. 38, sec. 5.

Le Mott's case was thus: "Thieves came with intent to rob him, and finding the door locked up, pretended they came to speak with him, and, thereupon, a maid servant opened the door, and they came in and robbed him, and this being in the night time, this was adjudged burglary, and the persons hanged; for their intention being to rob, and getting the door open by false pretence, this was in fraudem legis, and so they were guilty of burglary, though they did not actually break the house; for this was in law an actual breaking, being obtained by fraud to have the door opened; as if men pretend a warrant to a constable, and bring him along with them, and under that pretence rob the house, if it be in the night, this is burglary." Le Mott's case, Kelyng 42.

"Nor were those less guilty," says Hawkins, "who, having a design to rob a house, took lodging in it, and then fell on the landlord and robbed him; for the law will not endure to have its justice defrauded by such evasions." 1 Hawkins P.C., ch. 38, sec. 5.

"At the jail delivery in the Old Bailey, 10th of October, 1666, Thomas Cassy and John Cotter were indicted for robbing William Pinkney, a goldsmith, by the Temple Bar, in his house near the Highway, in the nighttime, and stealing several parcels of plate and other things from him. And they were also indicted for the same offence for burglary, for breaking his house in the night, and stealing his plate, and on both these indictments they were arraigned and tried; and upon the evidence the case appeared to be, that Cotter was a lodger in the house of the said Pinkney, and knowing that he had plate and money to a good value, he combined with the afore-

said Cassy, and one John Barrington, and Gerrard Cleashard, and they three contrived, that one of these three should come as servant to the other to hire lodgings there for his master and another gentleman; and Cotter told them that Pinkney was one who constantly kept prayers every night, and they could not have so good an opportunity to surprise him as to desire to form in prayer with him, and at that time to fall on him and his maid, there being no other company in the house; and accordingly one of them came on Saturday in the afternoon and hired lodgings there, pretending it to be for his master and another gentleman of good quality, and about eight o'clock at night they all came thither, two of them being in very good habit, and when they were in their chamber they sent for ale, and desired Pinkney to drink with them, which he did; and whilst they were drinking, Cotter came into his lodging, and they, hearing one go up stairs, asked who it was, and Pinkney told them it was an honest gentleman, one Mr. Cotter, who lodged in the house, and they desired to be acquainted with him, and that he might be desired to come to them; and, thereupon, Pinkney sent his maid to let him know the gentlemen desired to be acquainted with him, to which Cotter sent word it was late, the next day was the Sabbath, and he desired to be private, and thereupon these persons told Pinkney they had heard he was a religious man, and used to perform family duties, in which they desired to join with him; at which Pinkney was very well pleased that he had got such religious persons, and so called to prayers, and while he sat at his devotion they rose up and bound him and his servant, and then Cotter came to them and shewed them where his money and plate lay, and they ransacked the house, and broke open the several doors and cupboards fixed to the house; and upon this evidence it was held that the entrance into the house being gained by fraud, with an intent to rob, and they making use of this entrance, thus fraudulently obtained, as in the night-time, to break open doors, etc., this was burglary. Cassy and Cotter's case, Kelyng 62.

Ann Hawkins was indicted for burglary, and, upon evidence, it appeared that she was acquainted with the house, and knew the family were in the country. That meeting with the boy who kept the key, she desired him to go with her to the house, and, to induce him, promised him a pot of ale. The boy accordingly went with her, opened the door, and let her in. She then sent the boy for the pot of ale, robbed the house, and went off. This being in the night-time, Holt, C.J., Tracy and Bury, adjudged it to be clearly burglary in the woman, for she prevailed with the boy, by fraud, to open the door with intent that she might rob the house. Hawkins' case, 2 East P.C. 485.

In The State v. Henry, 9 Iredell 463, it was held that there cannot be a constructive breaking by enticing the owner out of his house by fraud and circumvention, and thus inducing him to open his door, unless the entry be immediate, or in so short a time that there is no opportunity for the owner or his family to refasten the door. In that case, the owner was decoyed to a distance from his house, leaving his door unfastened, and it was not fastened by his family after his departure. At the expiration of ten or fifteen minutes, the prisoner entered the house, by opening the unfastened door, with intent to commit a felony. Held, that this was not burglary.

So to persuade an innocent agent, either under colour of right or on any other excuse, or to incite a child under years of discretion, to open the door of another man's dwelling-house in the night-time, and thence bring out goods, would be burglary in him that should thus persuade, although he take no part himself in the transaction; but the agent or the child, by reason of its tender years, would stand excused. "If A.," says Lord Hale, "being a man of full age, takes a child of seven or eight years old, well instructed by him in this villanous art, as some such there be, and the child goes in at the window, takes goods out, and delivers them to A., who car-

ries them away, this is burglary in A., though the child that made the entry be not guilty, by reason of his infancy." 1 Hale P.C. 555.

"So if the wife, in the presence of her husband, by his threats or coercion, breaks and enters in the house of B. in the night, this is burglary in the husband, though the wife, that is the immediate actor, is excused by the coercion of her husband." 1 Hale P.C. 556; 3 Greenleaf, Ev. sec. 7, note.

Hawkins compares the case of a servant letting in a thief at night with that where many act in concert, and although some of the party keep watch at a distance, they are, by construction of law, equally guilty of breaking and entering the dwelling-house as those who actually break and enter. "It is certain that in some cases one may be guilty of burglary who never made an actual entry at all, as where divers come to commit a burglary together, and some stand to watch in adjacent places, and others enter and rob, etc., for in all such cases the act of one is, in judgment of law, the act of all. And upon the like ground, it seems difficult to find a reason why a servant, who confederating with a rogue, lets him in to rob a house, etc., should not be guilty of burglary as much as he, for it is clear that if the servant were out of the house, the entry of the other would be adjudged to be his also, and what difference is there when he is in the house." Hawkins P.C., ch. 38, secs. 8, 9.

East, 2 P.C. 446, and Blackstone have adopted the reasoning of Hawkins. "If a servant," says the latter (4 Com. 227), "conspires with a robber, and lets him into the house by night, this is burglary in both, for the servant is doing an unlawful act, and the opportunity afforded him of doing it with greater ease rather aggravates than extenuates the guilt."

This, too, was the ground upon which the judges based their decision in Cornwall's case, although the point raised at the trial, and which caused the doubt in the minds of the judges who tried the case, was the fact that the servant did not go out with the prisoner after letting him out of the house. The case is reported in Strange. "Joshua Cornwall was indicted, with another person, for burglary, and upon the evidence it appeared that he was a servant in the house where the robbery was committed, and in the night-time opened the street door and let in the other prisoner, and shewed him the sideboard from whence the other prisoner took the plate; then the defendant opened the door and let him out, but the defendant did not go out with him, but went to bed. Upon the trial before Lord C.J. Raymond, Raymond, J., Dennison, J., and Baron Comyns, at the Old Bailey, it was doubted whether this was burglary in the servant, *he not going out* with the other; and it being laid down in Hale, P.C. 81, Dalton 317, that it is not burglary in the servant, the judges ordered it to be found specially. And afterwards, at a meeting of all the judges at Sergeant's Inn, they were all of opinion that it was burglary in both, and not to be distinguished from a case which had often been ruled, and allowed in the same page in Hale, that if one watches at the street end while the other goes in, it is burglary in all; and upon report of this opinion the next sessions, the prisoner was executed." Cornwall's case, 2 Strange 881.

It was formerly considered doubtful how far it might be considered as a breaking, if a servant, acting in confidence, and with the assent of his master, let robbers in by agreement with them to steal, but in truth with a view to their apprehension. 2 East P.C. 486, 494; but the question was settled in Regina v. Johnson, Carrington & Marshman 218, where it was held that if a servant pretending to agree with a robber, open the door and let him in, for the purpose of detecting and apprehending him, this was no burglary, for the door was lawfully open. Roscoe Crim. Ev. 345.

There may also be a breaking in law where, in consequence of violence commenced or threatened, in order to obtain an entrance, the owner, either from apprehension of the force, or with a view more effectually to repel it,

opens the door, through which the robber enters. 2 East P.C. 486; Hawkins, ch. 38, sec. 4. Although the door was literally opened by one of the family, yet if such opening proceeded from the intimidations of those who were without, and from the force which had been used, knocking at and breaking the windows, calling out and insisting upon the door being opened, and firing of guns; if under these circumstances the persons within were induced to open the door, it was as much a breaking by those who made use of such intimidations, to prevail upon them so to open it, as if they had actually burst the door open. Rex v. Swallow (1813), 1 Russell 792.

But if upon a bare assault upon a house, the owner fling out his money, it is no burglary. 1 Hawkins 38, sec. 3; though, if the money were taken up in the owner's presence, it would be robbery. 2 East P.C. 486; 1 Russell 793.

(*b*) *Breaking out of dwelling-house after committing indictable offence therein.*]—In their Fifth Report the English Commissioners on Criminal Law made the following remarks on burglary, by breaking out of a dwelling-house: "By the statute 12 of Queen Anne, statute 1, ch. 7 (now repealed by 7 and 8 of Geo. IV., ch. 27, and re-enacted by ch. 29 of the same statute), the crime of burglary was extended to the case of an offender, who, having committed a felony in a dwelling-house, or having entered therein with intent to commit a felony, afterwards broke out of such dwelling-house in the night-time. This extension does not, we think, rest upon any just principle. After a felony has been committed within the dwelling-house, the offence is not in reality aggravated by lifting the latch of the door, or the sash of a window, in the night-time, in order to enable the offender to escape. A breaking out, indeed, may be an innocent act, as it may be committed by one desirous of retiring from the further prosecution of a crime; and the extension of the law of burglary to such a case is not warranted by the principles upon which the law is founded, inasmuch as a circumstance not essential to the guilt of the offender, or the mischief of the act, is made deeply essential to the crime. It is ineffectual, even with a view to the object proposed; the pretext for the conviction fails in the absence of a breaking out, which is a casual and uncertain circumstance."

*By night.*]—The expression "night" is declared by sec. 3 (*q*) to mean the interval between 9 p.m. and 6 a.m.

(2)—*Having offensive weapon.*]—See definition of the expression "offensive weapon" in sec. 3 (*r*).

**411. Housebreaking and committing an indictable offence.**—Every one is guilty of the indictable offence called housebreaking, 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.

*Housebreaking.*]—The principal distinction between this offence, as declared in this and the following section, and the offence of burglary, is that housebreaking is usually applied to the offence committed by day and burglary to that committed by night. But if it be proved on an indictment for housebreaking that the offence was committed by night, *i.e.*, between 9 p.m. and 6 a.m. (sec. 3 (*q*)) and that it is therefore burglary the defendant

may notwithstanding be convicted of housebreaking. R. v. Robinson (1817), R. & R. 321.

**412. Housebreaking with intent to commit an indictable offence.**—Every one is guilty of an indictable 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.

**413. Breaking shop and committing an indictable offence.**—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 an 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. Breaking shop with intent to commit an indictable offence.**—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.

It is not necessary that an indictment which sufficiently describes that which is by statute an indictable offence should conclude with the words "against the form of the statute in such case made and provided, and against the peace of Our Lord the King, his Crown and dignity." R. v. Doyle (1894), 2 Can. Cr. Cas. 335 (N.S.).

**415. Being found unlawfully in dwelling house by 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.

**416. Being found armed with intent to break a dwelling-house.**—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 instrument 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.

*Offensive weapon.*]—See sec. 3 (*r*).

*By day.*]—See sec. 3 (*q*).

*Dwelling house.*]—See sec. 407 (*a*).

*By night.*]—See sec. 3 (*q*).

**417. Being disguised or in possession of housebreaking instruments.**—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.

*Having in his possession.*]—Knowingly having in any place, whether belonging to or occupied by the offender or not, is included, and whether for the use or benefit of the offender or of another person. See. 3 (*k*).

*Instrument of housebreaking.*]—Any instrument capable of being used as an implement of housebreaking and intended to be so used will be included. R. v. Oldham (1852), 2 Den. 472, 3 C. & K. 250, 21 L.J. (Eng.) 134. The possession of a crowbar or other implement of housebreaking by one of two persons acting in concert will be the possession of both. R. v. Thompson (1869), 11 Cox 362, 33 J.P. 791.

**418. Punishment after previous conviction.**—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.

*Indictment.*]—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. Sec. 628.

*Procedure.*]—The following is the procedure upon an indictment for committing any offence after a previous conviction or convictions:—The offender shall, in the first instance, be arraigned upon so much only of the indict-

ment 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 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. Sec. 676.

PART XXXI.

## FORGERY.

SECT.



---

**419. Document defined.**—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" and "exchequer bill" defined.**—"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 state, government, or governor or other authority lawfully authorized thereto in any of His 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.

The punishment for forgery of a bank note or exchequer bill may be imprisonment for life. See. 423, sub-secs. A (*q*) and A (*r*).

Two prisoners were tried and convicted on an indictment charging them with feloniously offering, etc., a certain forged note, commonly called a Provincial note; the evidence shewed that the prisoners had, with the knowledge that the figure 5 had been pasted over the figure 1, and the word "five" over the word "one" upon a note purporting to be a note issued by the government of the late Province of Canada, passed off and uttered the same as a five dollar note of that denomination, but no evidence was given that the note so altered was a note issued by the Government of Canada, beyond the production of the note. It was objected, but not before the jury were prepared to deliver their verdict, that no proof had been given of the note being a Provincial note. The evidence further shewed that when the attention of the prisoners was called to the paper, they both said, "give it back if it is not good and we will give good money for it," but upon its being placed upon the counter one of the prisoners took it up and refused to return it, or substitute good money for it. The prisoners were found guilty and sentenced. On a case reserved by the judge at the trial it was held that looking at the particular character of the forgery—that is to say an alteration—and the conduct of the prisoners with regard to it, that the onus was on them to dispute the validity of the writing, if its invalidity would be a defence. R. v. Portis (1876), 40 U.C.Q.B. 214.

A forged paper purporting on the face of it to be a bank note is within the definition, although there be no such bank as named. R. v. McDonald, 12 U.C.Q.B 543.

The alteration of a Dominion note for $2 to one for $20, such alteration consisting in the addition of a cipher after the figure two wherever that figure occurred in the margin of the note, was held to be forgery. R. v. Bail (1884), 7 O.R. 228.

On an indictment charging prisoner with uttering a certain writing—to wit, a certain bank note "with intent to defraud," on which he was convicted, it was insisted by prisoner's counsel that there should have been evidence that the bank whose note it purported to be was a corporation legally authorized to issue notes such as that described in the indictment. Carter, C.J., delivering the judgment of the Supreme Court of New Brunswick, said: "The writing in question carries on its face the semblance of a bank note issued by a company in the State of Maine, and there is nothing in its frame which shews that it is illegal, even if there were no charter or Act of incorporation authorizing the issue of such note. The evidence proved that there are genuine instruments of which this is an imitation, which are of value in the State of Maine, and if the illegality of such instruments would afford a defence to the prisoner, and such illegality could be shewn by the Act of incorporation or any other evidence, such proof would lie on him, rather than the negative proof on the Crown." Assuming that illegality of the note would be a defence the court held that the onus of proving illegality lay upon the prisoner. R. v. Brown, 3 Allen (N.B.) 13.

**421. False document defined.**—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.

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.

*False document.*]—The definition of a false document given in the Code makes no change in the law but merely defines in statutory form what had by judicial construction in the courts been held to constitute a false document, the making of which with the knowledge and intent mentioned in the statute is declared to be forgery, and the uttering of which with like knowledge by one who uses, deals with, or acts upon it as if it were genuine, is made an indictable offence punishable in like manner as forgery. Per Burton, J.A., in Re Murphy (1895), 2 Can. Cr. Cas. 578, 583.

Where a fraudulent conspiracy was entered into between two persons in pursuance of which one of them opened an account in a bank in a fictitious name and gave to the other a cheque, for which the latter knew there were no funds, drawn in the fictitious name, and the same was negotiated by the payee in furtherance of such conspiracy by obtaining another bank to cash the same on the faith of its being a genuine cheque, the cheque is a "false document" both by the Criminal Code (sec. 421) and at common law. Re Murphy (1894), 2 Can. Cr. Cas. 562; S.C. in appeal (1895), 2 Can. Cr. Cas. 578.

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 the instrument purports on the face of it to be good and valid as to the purposes for which it was intended to be made. R. v. Sterling (1773), 1 Leach 996; R. v. Portis (1876), 40 U.C.Q.B. 214.

*Altering genuine document.*]—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. Sec. 422 (2).

Where the forgery consists of the alteration of the time of maturity of an endorsed note, the intent to prejudice someone (see sec. 422) or to defraud may be inferred if the facts warrant the conclusion that either the maker or the endorser might be defrauded, although it appears that the prisoner fully intended to retire the note. R. v. Craig (1858), 7 U.C.C.P. 241. R. v. Hodgson, 2 Jurist N.S. 453.

**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.

*Filling in check signed in blank.*]—If a check is given to a person with a certain authority, the agent is confined strictly within the limits of that authority, and if he choose to alter it, the crime of forgery is committed. If a blank check be delivered to him with a limited authority to complete it, and he fill it up with an amount different from the one he was directed to insert, and if, after the authority was at end, he fill it up with any amount whatever, that too would be clearly forgery. R. v. Bateman (1845), 1 Cox C.C. 186; R. v. Hart (1836), 7 C. & P. 652, 1 Moody C.C. 486; R. v. Wilson (1847), 1 Den. C.C. 284.

Filling in the body of a blank check to which a signature is attached, without any authority, is a forgery. The prisoners were indicted for uttering a forged check, 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 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. The learned judge was also of opinion that if the bankers had paid the check they might have recovered the amount from the prosecutor, as he was in the habit of leaving blank checks out, with his name written at the bottom. Wright's case, 1 Lewin, C.C. 135.

*Forgery generally.*]—To forge is, in its general sense, to counterfeit, to falsify; though to convict the person who made the false instrument of a crime the intent to defraud must be made to appear. R. v. Dunlop (1857), 15 U.C.Q.B. 118.

Mr. Justice Stephen, in his third edition of his Digest of the Criminal Law, p. 285, defines forgery as the "making of a false document with intent to defraud." The making of a false document includes the alteration of it, for the alteration of a genuine instrument makes it a false instrument. R. v. Bail (1884), 7 Ont. R. 228.

To constitute the crime of forgery it is not necessary that the writing charged to be forged should be such as would be effectual if it were a true and genuine writing. R. v. Portis (1876), 40 U.C.Q.B. 214.

The counterfeiting of any writing with a fraudulent intent, whereby another may be prejudiced, is forgery at common law. 2 Russ. Cr. (4th ed.) 768; Ex parte Cadby (1886), 26 N.B.R. 452, 492; R. v. Stewart (1875), 25 U.C.C.P. 440; R. v. Ward (1727), 2 Ld. Raym. 1461.

The prisoner, with intent to defraud, wrote out a telegraph message purporting to be sent by one C. to D., authorizing the latter to furnish the prisoner with funds. This was left by a boy, as from the telegraph office, being written on paper having the heading and appearance of a telegraphic despatch. Afterwards on the same day prisoner called on D., who told him he had received a telegram from C.; prisoner said, "I thought so." Upon the faith of the document D. went with prisoner to the bank and endorsed a draft drawn by the prisoner on C. for $85, the proceeds of which were handed over to the prisoner. It was held that the counterfeiting of what purported to be only a copy of C.'s signature was a forgery. R. v. Stewart (1875), U.C.C.P. 440.

It is a forgery to fraudulently make a deed which purports to be something quite different from that which it really is, ex. gr. by antedating it for a fraudulent purpose, even though it is executed by the parties between whom it is expressed to be made. R. v. Ritson (1869), L.R. 1 C.C.R. 200. The execution of a deed by prisoner in the name of and representing himself to be another may be a forgery if done with intent to defraud, even though he had a power of attorney from such person, but fraudulently concealing the fact of his being only such attorney, and assuming to be the principal. R. v. A. I. Gould (1869), 20 U.C.C.P. 154.

*Fictitious name.*]—The result of the cases is, that where a fictitious name is assumed for the purposes of a fraud, the offence of forgery may be proved, but not where the credit is given solely to the person without any regard to the name, as in R. v. Martin (1880), 5 Q.B.D. 34, per Hagarty, C.J.O. in Re Murphy (1895), 2 Can. Cr. Cas. 578, 582; R. v. Whyte (1851), 5 Cox C.C. 290; R. v. Wardell (1862), 3 F. & F. 82.

Where a person passing under an assumed name falsely represents that he is in the employment of a certain firm, and that he is authorized to make a draft upon such firm, his signature in such assumed name to a draft upon the firm, and his fraudulent negotiation of it, constitute forgery, if the credit obtained in negotiating the bill was not personal to himself alone, without relation to his supposed employers, and if the false name, although that of a non-existent person, was assumed for the very purpose of perpetrating the fraud. Re M. B. Lazier (1899), 3 Can. Cr. Cas. 167 (Ont. C.A.).

In R. v. Dunn (1765), 1 Leach C.C. 68, the accused had represented herself to be the widow of John Wallace, a deceased seaman, and in that character applied to a prize agent for prize money due to him by the Government. She exhibited what purported to be the probated will of the deceased, and thereby induced the agent to advance money to her on a promissory note, signed by her in the name of the supposed widow, for which advances the agent was to reimburse himself out of the prize money, when obtained. A conviction on a charge of forgery was confirmed on a case reserved. Nine of the ten judges in that case agreed to the following (Leach C.C. 68), as the rules governing the case:

(1) In all forgeries, the instrument supposed to be forged must be a false instrument in itself;

(2) If a person gives a note *entirely as his own*, his subscribing it by a fictitious name will not make it forgery, the credit being there wholly given to *himself*, without any regard to the name, or without any relation to a third person;

(3) An instrument which is uttered as the act and instrument of another, and in that light obtains a superior credit, when in truth it is not the act of

the person represented, is strictly and properly a false instrument, for in that case the party deceived does not advance his money or accept the instrument upon the personal credit of the party producing it, but upon the name and character of the third person, whose situation and circumstances import a superior security for the debt; and therefore, if in truth it is not the instrument of that third person, whose name and situation induced the credit, it is certainly a false instrument, and the intention fraudulent to the party imposed upon by it, for he believed, when he accepted the security, that he had a remedy upon it against the third person in whose name it was given and on whom he relied when he advanced the money, but, this being false, he has no such remedy, and therefore is materially deceived:

(4) If an instrument be false in itself, and by its purporting to be the act of another a credit is obtained which would not otherwise have been given, it is forgery, though the name it is given in be really a non-entity;

(5) The case is very different if the person borrowing money upon his own note and assuming a fictitious name does so without any relation to a different person. In that case the whole credit is given to the party himself; the lender accepts the security as the security of that person only; he has no other remedy in view, but merely against the man he is dealing with, and the security is really and truly the instrument of the party whose act it purports to be, however subscribed by a fictitious name; he has, therefore, a remedy upon it against the person on whose credit he took it, and consequently is not substantially defrauded.

In R. v. Whyte (1851), 5 Cox C.C. 290, the prisoner had purchased goods of a warehouseman and represented that he was in business with one Whiffen, under the firm name of Whiffen & Co. Several bills for goods so purchased were met, but finally Whyte desired the warehouseman to draw on the firm for a certain bill of goods. This was done, and the bill was accepted by him in the name of the pretended firm. Talfourd, J., there said: "I think it will scarcely be sufficient to shew that the name of Whiffen was assumed for the purpose of fraud generally; it must have been taken for the specific object of passing off this bill; the carrying on business in the false name might be for the purpose of creating a false impression with a view to obtain credit. That might support a charge of obtaining money or goods by false pretences, but not a charge of forgery."

To sustain a conviction, it should appear either that the prisoner had not gone by the fictitious name before the signing, or that he had assumed the name for the purpose of committing the fraud. R. v. Bontien (1813), Rus. & Ry. 260; R. v. Peacock (1814), ibid. 278; R. v. Lockett (1772), 1 Leach C.C. 94; R. v. Sheppard (1781), 1 Leach C.C. 226; R. v. Francis (1811), Russ. & Ry. 209.

In a recent Georgia case a person who, in an assumed name, made a draft on another whom he falsely claimed to be his father, was held guilty of forgery. Lascelles v. The State, 90 Ga. 347.

*Forgery at common law.*]—At common law the offence of forgery was punishable as a misdemeanor. It is defined by Sir W. Blackstone as "the fraudulent making or altering of a writing to the prejudice of another man's right." 4 Com. 247. And by Mr. East, as "a false making, a making malo animo, of any written instrument for the purpose of fraud and deceit." 2 East P. C. 852. Forgery consists not in making a deed which has a false statement in it, but in making an instrument appear to be what it is not. Per Blackburn, J., in R. v. Ritson, L.R. 1 C.C.R. 200, 39 L.J.M.C. 10; Ex parte Windsor, 34 L.J.M.C. 163.

Though doubts were formerly entertained on the subject, it is now clear that forging any document, with a fraudulent intent, and whereby another person may be prejudiced, is within the rule. Thus, after much debate, it was held that forging an order for the delivery of goods was a misdemeanor

at common law. R. v. Ward, Str. 747, 2 Ld. Raym. 1461. And the same was held by a majority of the judges, with regard to a document purporting to be a discharge from a creditor to a gaoler, directing him to discharge a prisoner in his custody. R. v. Fawcett, 2 East P.C. 862. R. v. Ward is considered by Mr. East to have settled the rule, that the counterfeiting of *any writing*, with a fraudulent intent, whereby another may be prejudiced, is forgery at common law. 2 East P.C. 861.

Forgery at common law must be of some document or writing. Therefore where the prisoner was indicted for forging the name of J. Linnell, and the evidence was that he painted it in the corner of a picture, with intent to pass off the picture as a work of that artist, this was held not to be a forgery. But that, if money had been obtained by the fraud, the defendant was indictable for a cheat at common law. R. v. Closs, Dears. & B.C.C. 460, 27 L.J.M.C. 54. So where the prisoner caused wrappers to be printed similar to those of another tradesman, and sold in them a composition called "Borwick's Baking Powder," but caused the signature and the notification that without such signature no powder was genuine, which appeared on the genuine wrappers, to be omitted, it was held that this was no forgery, though the jury found that the wrappers were procured by the prisoner with intent to defraud. R. v. Smith, Dears. & B.C.C. 566, 27 L.J.M.C. 225.

It is not necessary to the sustaining an indictment for forgery at common law that any prejudice should in fact have happened by reason of the fraud. R. v. Ward, Str. 747, 2 Ld. Raym. 1461. Nor is it necessary that there should be any publication of the forged instrument. 2 East P.C. 855, 951; Russ. on Cri. 618, 5th ed.

It is not forgery fraudently to procure a party's signature to a document, the contents of which have been altered without his knowledge. R. v. Chadwicke, 2 Moo. & R. 545. Or fraudulently to induce a person to execute an instrument on a misrepresentation of its contents. Per Rolfe, B.; R. v. Collins, M.S. 2 Moo. & B. 461.

*No ratification.*]—Though fraud or breach of trust may be ratified, forgery cannot be. La Banque Jacques Cartier v. La Banque d'Epargne, 13 App. Cas. 118; Burton v. L. & N. W. Ry. Co., 6 L.T. Rep. 70; Merchants Bank of Canada v. Lucas (1890), 18 Can. S.C.R. 704, affirming 15 Ont. App. 572, which reversed that of the Divisional Court, 13 O.R. 520.

**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 His Majesty; 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, 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 hereditatment, or to any interest in or to any charge upon any land or hereditatment, 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 *proces-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 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 His 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 thereon; 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 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, col-

ony or possession of His 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 beng, 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 then 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.

*Jurisdiction.*]—In Ontario a provincial statute, 53 Vict., ch. 18, was passed, by which it was declared that Courts of General Sessions should have jurisdiction to try any person for any offence under certain sections of the Forgery Act, R.S.C., ch. 165. It was held that the provincial legislature had power to so enact, and that such a provision was one relating to the constitution of a court rather than to criminal procedure. R. v. Levinger, 22 O.R. 690. But a provision in the same statute authorizing police magistrates to try and to convict persons charged with forgery was declared ultra vires. R. v. Toland, 22 O.R. 505.

*Indictment.*]—Where in an indictment for forgery the forged document is set out verbatim it is not necessary to give a description of its legal character. R. v. Carson (1864), 14 U.C.C.P. 309.

*Order for payment of money.*]—A writing not addressed to any one may be an order for the payment of money if it be shewn by evidence for whom it was intended. In this case the order was for $15 in favour of "bearer or R.R. and purported to be signed by one B." The prisoner in person presented it to M., representing himself to be the payee and a creditor of B. It was held that it might fairly be inferred to have been intended for M., and a conviction for forgery was sustained. R. v. Parker (1864), 15 U.C.C.P. 15.

*Evidence.*]—The fact of his flight from a charge of forgery militates against the accused. R. v. Judd (1788), 2 T.R. 255; R. v. Van Aerman (1854), 4 U.C.C.P. 288.

*Corroboration.*]—A conviction cannot be made for forgery upon the evidence of one witness unless such witness is corroborated in some material particular by evidence implicating the accused. Cr. Code, sec. 684. And see note to that section.

A witness who testified that the forged signatures were written by the accused is not corroborated in a "material particular by evidence implicating the accused" by proof that certain other signatures were in the same handwriting, when the only evidence shewing that the latter signatures were written by the accused was the testimony of the *same* witness who had testified to the handwriting of the signatures first mentioned. R. v. McBride (1895), 2 Can. Cr. Cas. 544 (Ont.).

**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.

*Uttering forged paper.*]—Where a defendant had forged the name of the payee of a cheque, payable to his order, on the back of a cheque it was held that he was rightly convicted of uttering a forged "order for the payment of money," but that he could not be convicted of uttering a forged cheque. R. v. Cunningham (1885), 6 N.S.R. 31.

Prisoner drew a promissory note payable *two* months after date to the order of T.S., who endorsed it; after the endorsement by T.S. prisoner altered the note by making it payable at *three* months after date. The indictment contained six counts, the fourth of which was "offering and putting off a forged promissory note," and the prisoner was convicted on the fourth count of the indictment. On motion for a new trial it was held that the moment the note was altered in a material point it ceased to be that

which T.S. had endorsed; and that being uttered in the altered state as a note endorsed by him, when it was not the note endorsed by him, such uttering was the uttering of a *note altered* so as to constitute forgery—a forgery of a note at three months, endorsed by T.S.—and not a forgery of T.S.'s endorsement on a genuine note at three months. R. v. Craig (1858), 7 U.C.C.P. 241. The transfer of the note to a third party who had sued the endorser and failed to recover because of the alteration is evidence of the intent to defraud which is a question for the jury. Ibid.

The shewing of a forged receipt to a person with whom the defendant is claiming credit on account of that receipt is an uttering, although the defendant never voluntarily parts with the possession of it. R. v. Radford (1844), 1 Den. C.C. 59, 1 Cox C.C. 168.

*Invoices certified in blank.*]—The customs tariff, 1897, 60-61 Vict., ch. 16, makes the following additional provision regarding blank invoices with certificate of correctness:—"Any person who, without lawful excuse, the proof of which shall be on the person accused, sends or brings into Canada, or who being in Canada, has in his possession, any bill-heading or other paper appearing to be a heading or blank capable of being filled up and used as an invoice, and bearing any certificate purporting to shew, or which may be used to shew, that the invoice which may be made from such bill-heading or blank is correct or authentic, is guilty of an indictable offence and liable to a penalty of five hundred dollars, and to imprisonment for a term not exceeding twelve months, in the discretion of the court, and the goods entered under any invoice made from any such bill-heading or blank shall be forfeited."

**425. Counterfeiting 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 His 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.

**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.

**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 King'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.

**428. Sending telegrams in false names.**—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.**—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 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.

*Has in his custody or possession.*]—See the interpretation clause, Code sec. 3 (*k*).

**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.

*Any document.*]—A "document" here means 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. Sec. 419.

An indictment may be laid 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 directing that the defendants be not arraigned until after the particulars have been delivered. R. v. Weir (No. 2) (1899), 3 Can. Cr. Cas. 155.

A count of an indictment charging the defendant with having, with intent to defraud, unlawfully made use of and uttered a promissory note, alleged to have been made and signed by one of the defendants by procuration without lawful authority or excuse and with intent to defraud, is defective if it does not also allege that the defendants knew it to have been so made and signed. Such a defect is one of substance and cannot be amended under Code sec. 629. R. v. Weir (No. 5) (1900), 3 Can. Cr. Cas. 431 (Que.).

**432. Using 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

(*b*) attempts to do any such thing as aforesaid. R.S.C. c. 165, s. 45.

PART XXXII.

## PREPARATION FOR FORGERY AND OFFENCES RESEMBLING FORGERY.

SECT.



---

**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 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 His Majesty, or by any foreign prince or state, or by any body corporate, or other body of the like nature, whether within His 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.

**435. Counterfeiting stamps.**—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 His 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 aforesad, or any part thereof; or

(*d*) fraudulently cuts, tears or in any way removes from any material any such stamp, with intent that any use should be made of such stamp or any part thereof; or

(*e*) fraudulently mutilates any such stamp with intent that any use should 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.

On a prosecution under the Post Office Protection Act (Imp.), 1884, sec. 7 (*e.*) for having in possession "without lawful excuse" a die for making a fictitious stamp, it appeared by the evidence that the defendant was the proprietor of a newspaper circulating among stamp collectors, and had caused a die to be made for him abroad, from which imitatations of a current colonial postage stamp could be made. The only purpose for which he had actually used it was for making on an illustrated catalogue illustrations in black and white, and not in colors of the stamp in question. This catalogue was sold as part of his newspaper. On a case stated by a magis-

trate as to whether this evidence shewed "a lawful excuse," Grantham and Collins, JJ., were unanimous that it did not, and that the defendant was liable under the Act. Dickins v. Gill, [1896] 2 Q.B. 310, 18 Cox 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.

*Evidence.*]—A register is none the less defaced or injured because when produced in court the torn part has been pasted in and is as legible as before the offence. R. v. Bowen (1844), 1 Cox C.C. 88; 1 Den. 22.

A person who knowing his name to be A. signs another name as a witness to a marriage in an authorized register, is guilty of the offence of inserting a false entry in the register although he so signs as a third witness and two only were required by law. R. v. Asplin (1873), 12 Cox C.C. 391.

Where the false entry is actually made on the information of and at the instance of the accused, he is guilty of the offence of inserting the entry in the register and not merely of making a false statement for that purpose. R. v. Mason (1848), 2 C. & K. 622; R. v. Dewitt (1849), 2 C. & K. 905.

The offence of making false statements as to births, marriages and deaths in regard to particulars for registration is controlled by provincial law. See R.S.O. 1897, ch. 44, sec. 28.

**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 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

(*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 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. Clerks 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.

SECT.



---

**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* 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 meanng of this part;

(*c*) the expression "false trade description" means a trade 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 *bona fide* carrying on business in connection with such goods. 51 V., c. 41, s. 2.

(1*a*) *Trade mark.*]—A trade mark cannot exist in gross, Cotton v. Millard, 44 L.J. Ch. 90; nor can there be an exclusive right to a mere adjective description, ex. gr., "nourishing stout." Raggett v. Findlater, L.R. 17 Ex. 29.

(1*b*) *Place in which goods made.*]—In any prosecution, proceeding or trial for any offence against this Part, if the offence relates to imported goods evidence of the port of shipment is prima facie evidence of the place or country in which the goods were made or produced. Sec. 710.

(1*c*) *False trade description.*]—See note to sec. 446.

(3*c*.)—*Person not bona fide carrying on business.*]—It seems that all three conditions contained in sub-sec. 3 must exist concurrently in order to constitute the offence of applying a false trade description by means of a false name or initials.

**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 *prima 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. Definition of forgery of a trade mark.**—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 to goods.**—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.

*False trade description.*]—The use of the words "quadruple plate" in an advertisement of sale of silverplated ware may constitute a false trade description, the application of which is an offence under this section. R. v. T. Eaton Co. (1899), 3 Can. Cr. Cas. 421.

It is not necessary that the false trade description should be physically connected with the goods or that it should accompany the same, and oral evidence is admissible to connect the description of the goods in the advertisement with the goods afterwards sold. Ibid.

The description in an invoice of the goods is sufficient, but an oral statement made on the sale is not within this section. Coppen v. Moore, [1898] 2 Q.B. 300, 306; Langley v. Bombay Tea Co., [1900] 2 Q.B. 460.

Gunpowder manufacturers contracted to supply gunpowder under the trade mark of "R. L. G., No. 4." Owing to an explosion they were unable to manufacture the powder, but they obtained gunpowder equal in quality from a German manufacturer, and packed it in barrels supplied by the Government, and inserted their own trade name on the labels as contractors. They sustained a loss by having to import the gunpowder, and no complaint was made by the Government, but no communication was made on delivery that the gunpowder was of German manufacture. The Q.B. Division held justices were wrong in refusing to convict, as the description attached implied they were delivering gunpowder of their own manufacture, when, in fact, it was not such. Starey, Secretary of Trade Mark Owners' Protection Society v. Chilworth Gunpowder Co., 24 Q.B.D. 90; 59 L.J.M.C. 13. Selling machine-made cigarettes with a label describing them as hand-made is a false trade description. Kirshenboim v. Salmon and Gluckstein, Limited, [1898] 2 Q.B. 19. A. bought six barrels of beer from L., a brewer, and received with the casks an invoice describing the casks as barrels. One was six gallons short:—Held, that the delivery of the invoice might be an application of a false trade description, although such invoice was not physically attached to the goods, and that evidence of L. having in previous transactions sent casks of short measure was admissible evidence of L. having authorized a false trade description to be used. Budd v. Lucas, [1891] 1 Q.B. 408.

The foundation of a margarine mixture made in France and imported as "Oleo margarine" was mixed at Southampton with a small precentage of imported Danish butter and English milk. The finished product was called "Le Dansk" and sold in England in card boxes under the description of "Le Dansk French Factory, Le Dansk, Paris." The conviction was affirmed on the ground that the words were a false trade description and the article was obviously represented as being of foreign make when it was not. Bischop v. Toler, 44 W.R. 189; 65 L.J.M.C. 1. At his establishment in Ireland, Lipton sold under the descriptions—(1) "Lipton's prime, mild cured," and (2) "First quality smoked ham, own cure at Lipton's market," hams which had been manufactured and cured by him in America. The Queen's Bench (Ireland) held that neither of the descriptions was a false trade description within this section. R. v. Lipton, Q.B.D. (Ir.); 32 L.R. (Ir.) 115. Appellant asked at respondent's shop for two half-pounds of tea, and was supplied with two packets, on each of which was stamped on the outside in ink a notice that the weight, including the wrapper, was half a pound. The weight of the tea in each case was slightly less than half a pound, but the weight of the tea and wrapper was more than half a pound. The Q.B. Division upheld the refusal of the magistrates to convict, and held there had been no false trade description applied within the meaning of the Act. Langley v. Bombay Tea Co., [1900] 2 Q.B. 460; 69 L.J.Q.B. 752; 19 Cox C.C. 551.

An article was sold in packets as "S.'s patent refined isinglass," preceded by the words "By Her Majesty's Royal Letters Patent," and the Royal coat-of-arms. On analysis the contents were found to be gelatine. An information for unlawfully applying to gelatine a false description, and thereby stating it to be isinglass, also with representing it to be the subject of an existing patent, was rightly dismissed on the ground that isinglass was often used for gelatinous matters, and that the words "patent refined isinglass" were not an untrue description. Gridley v. Swinborne, 52 J.P. 791; 5 T.L.R. 71. B., a mineral water manufacturer, made use of bottles moulded with the name and address of W., another manufacturer, but caused a paper label, bearing his own name and address, to be put upon the bottles. The delivery was accompanied by an invoice, which left no doubt that B. was the vendor. The magistrates dismissed the summons on the ground that B. had acted

"innocently" (sec. 448 (*e*)). The Q.B. Division held that an intent to defraud the purchaser was not an ingredient in the offence, and B. was guilty of using a false trade description. Wood v. Burgess, 24 Q.B.D. 162; 59 L.J.M.C. 11.

A piece of china was sold at Christie's, marked in the catalogue "Dresden," but on the lot being reached the auctioneer said to the assembled buyers, "Our attention has been drawn to this lot, and we sell it for what it is worth," and put his pen through the word "Dresden." No attempt was made to shew the article was Dresden china. The Q.B. Division set aside a conviction of the auctioneers, and held that defendant might shew in his defence he acted innocently, although at the time of sale he had reason to suspect the genuineness of the trade mark or trade description, and so be exonerated under this sub-section. Christie, Manson and Woods v. Cooper, [1900] 2 Q.B. 522.

W. was convicted for applying to a watch a false trade description as an "English lever," the facts being that several of its parts were of foreign manufacture, though they were finished and all put together and adjusted at appellant's factory at Coventry. It was contended that the proper description of the watch was an "Anglo-Swiss" watch. The Q.B. Division eventually sent the case back to the magistrate to be re-stated on one point. Williamson v. Tierney, 83 L.T. 592; 65 J.P. 70. In the re-stated case, the magistrate held that he found, as a fact, upon the evidence before him that the watch would not be regarded as an "English" watch in the trade by reason of certain material parts being of foreign manufacture. The Q.B. Division held that the question was one of fact, and that no appeal lay. Id. 17 T.L.R. 424.

"*Calculated to deceive.*"]—The question as to what resemblance to an already registered trade mark will be a bar to registration under The Trade Marks and Industrial Designs Act (Can.), 54-55 Viet., ch. 35, is not the same as that which arises in an action for the infringement of a trade mark; and it does not follow that, because the person objecting to the registration of a trade mark could not get an injunction against the applicant, the latter is entitled to put his trade mark on the register. Re Melchers and De Kuyper (1898), 6 Can. Exch. Ct. Rep. 82, 100; Re Speer, 55 L.T. 880; Re Australian Wine Importers, 41 Ch. Div. 278.

The Minister of Agriculture may refuse to register a trade mark . . . (*b*) if the trade mark proposed for registration is *identical with* or *resembles* a trade mark already registered; (*c*) if it appears that the trade mark is *calculated to deceive* or *mislead* the public, 54-55 Viet. (Can.), ch. 35, sec. 11.

Under that statue it has been held that "if the trade mark proposed to be registered so resembles one already on the register that the owner of the latter is liable to be injured by the former being passed off as his, then a case is presented in which the proposed trade mark is *calculated to deceive* or *mislead* the public. Whenever the resemblance between two trade marks is such that one person's goods are sold as those of another the result is that the latter is injured and some one of the public is misled." Re Melchers and DeKuyper (1898), 6 Can. Exch. Rep. 82, 95.

The prosecutor must make out beyond all question that the goods are so got up as to be calculated to deceive. Payton v. Snelling, 70 L.J. Ch. 644.

*Imported goods.*—In any prosecution hereunder for applying a false trade description in that the place or country in which any goods are made or produced is misrepresented (sec. 443 (*b*)), evidence of the port of shipment is prima facie evidence of the place or country in which such goods were made or produced. Sec. 710.

*Time.*]—No prosecution for this offence shall be commenced after the expiration of three years from its commission. Sec. 551 (*a*).

**447. Forgery of trade marks, etc.**—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.

*At common law.*]—The appropriation of the trade mark of another, apart from any signature therein included, is not forgery at common law. R. v. Smith (1858), 1 Dears & B. 566; 27 L.J.M.C. 225. Nor is it forgery if the signature copied be not upon a document or paper, and therefore an imitation of an artist's signature upon a spurious picture was held not to be an offence at common law. R. v. Closs (1858), Dears & B. 460; 7 Cox C.C. 494.

*Time.*]—The prosecution must be commenced within three years from the time the offence was committed. Code sec. 551 (*a*).

If the offence charged be under sub-section (*b*) of sec. 447 of the Code, for falsely *applying* to any goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive, it would seem to be necessary for the prosecution to negative the assent of the proprietor.

By the corresponding English Act, the Merchandise Marks Act, 1887, 50 & 51 Vict., ch. 28, in separate provisoes, the one in repect of forging, and the other as to falsely applying, the onus is placed in both cases upon the defendant (sections 4 and 5).

"*Calculated to deceive.*"]—See note to preceding section.

*Evidence.*]—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, for sec. 710 applies only to cases of "forgery" of a trade mark and not to cases of "falsely applying," to shift the onus to the defendant of proving such assent. R. v. Howarth (1898), 1 Can. Cr. Cas. 243 (Ont.).

*Punishment.*]—See sec. 450.

**448. Selling goods falsely marked.—Defence.**—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 Canadian law respecting trade-marks being derived from English legislation, reference for its interpretation should be had to English decisions, more especially as the law extends throughout the Dominion, and it is desirable that the jurisprudence should be uniform. Per Wurtele, J. in R. v. Authier (1897), 1 Can. Cr. Cas. 68 (Que.).

The offences specified in secs. 451 and 452, of falsely representing goods as having been manufactured for the Government, and of unlawfully importing goods liable to forfeiture under the trade-mark law would appear to be examples of Code offences for which a corporation *must* be proceeded against under the Summary Convictions clauses. But for the offence declared by sec. 448 of selling goods to which a false trade description has been applied, provision is made by sec. 450 for punishment: (*a*) upon indictment, by imprisonment or fine, or both; (*b*) upon summary conviction, by imprisonment or fine; and it was held that under that section a justice has no summary jurisdiction against a corporation, and that the intention to be inferred from such an alternative provision is that where the accused is a corporation, the only authorized procedure is that of indictment. The Queen v. Eaton (1898), 2 Can. Cr. Cas. 252.

*Evidence.*]—Where a trade-mark is complained of as being forged and as infringing the rights of a proprietor of a duly registered trade-mark, any resemblance of a nature to mislead an incautious or unwary purchaser, or calculated to lead persons to believe that the goods marked are the manufacture of some person other than the actual manufacturer, is sufficient to bring the person using such trade-mark under the purview of this section.

In such cases 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. R. v. Authier (1897), 1 Can. Cr. Cas. 68 (Que.). The trial judge may examine the label for himself and form a conclusion as to the resemblance without expert evidence as to its tendency to deceive. In re Marks & Tellefsen's Application, 63 L.T. 234; R. v. Authier (1897), 1 Can. Cr. Cas. 69.

*Reasonable precaution.*]—In Coppen v. Moore, [1898] 2 Q.B. 300 and 306, decided under the English Merchandise Act, 1887 (50 and 51 Vict., Imp., c. 38), the prosecution was for selling goods to which a false description was applied, and in the case stated by the justices it appeared that the prosecutor asked a salesman in the accused's shop for an English ham; the salesman pointed to some American hams, and said: "These are Scotch hams." The prosecutor chose one, and asked for an invoice containing a description of the ham bought, and was given one, stating the purchase of a "Scotch" ham. It was held by Wright and Darling, JJ., that the oral statement that the ham was Scotch did not amount to a breach of the Act,

but the statement in the invoice was an application of a false description to the goods sold, within the meaning of the statute; but they reserved the question of whether the employer was liable for the act of his servant, for the consideration of the Court for Crown Cases Reserved. On this point it appeared that the employer was not present at the time of the sale; that he had issued a printed circular to his employees, forbidding the sale of the hams under any specific name or place of origin, but there was evidence that the American hams were dressed so as to deceive the public; on the strength of which it was found that the employer had not taken all reasonable precautions against committing an offence against the Act, and the Court (Lord Russell, C.J., Jeune, P.P.D., Chitty, L.J., Wright, Darling and Channell, JJ.,) therefore held that under the circumstances the employer was criminally responsible for the act of his servant, as he had not discharged the onus of shewing that he had acted innocently. On this point Lord Russell says, "We conceive the effect of the Act to be to make the master a principal liable criminally (as he is already, by law, civilly) for the acts of his agents and servants, in all cases within the section with which we are dealing, when the conduct constituting the offence was pursued by such servants and agents within the scope or in the course of their employment, subject to this: that the master or principal may be relieved from criminal responsibility when he can prove that he had acted in good faith, and done all that it was reasonably possible to do to prevent the commission by his agents and servants of offences against the Act."

*Time.*]—Prosecutions must be commenced not later than three years from the time of the offence. See. 551 (*a*).

*Punishment.*]—See sec. 450.

*(Amendment of 1900).*

**449. Trade mark offences.**—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.

The former section which this replaces applied to bottles only and the trade mark had to be one which was "blown or stamped or otherwise permanently affixed thereon." This substituted section is designed to protect manufacturers and bottlers whose business is now injured by the action of unscrupulous persons, who procure bottles from second-hand dealers, junk stores, etc., and fill them with inferior soda water, ginger ale, etc., and by merely covering up the manufacturer's name on the bottle, and covering up his trade mark, sell the inferior ginger ale, etc.; and although it is impossible to shew that there is any fraudulent representation or deception practiced on the public in the first instance (as the name and trade mark are covered up), still the use of the bottles in this way eventually injures the manufacturer, as the new cover sometimes slips off and his reputation becomes injured in some cases thereby. Commons Sessional Debates, 1900, page 5290.

On the consideration of the amendment in the Senate the Hon. Mr. Power said:—"The necessity for this provision has arisen from the practice of persons who make up certain kinds of mineral and other waters using the siphons and bottles bearing the trade mark of the person who has manufactured that which was in the bottle first, and it is really a sort of forgery. If one wishes to use a bottle which has contained———'s ale, he can wipe the label off, but this is intended to meet the cases of bottles and siphons which have the original maker's name stamped on the bottle or siphon, and one can readily understand how fraud is perpetrated by selling an inferior article with one of these trade marks on it." Senate Debates, 1900, page 710.

It will be observed that under this enactment the trade mark is protected only when it has been "duly registered," i.e. registered in Canada under the Canadian Trade Mark Act. The words "or unless such package has been purchased from such other person," which appear at the end of sub-paragraph (*a*), are probably intended to except from its operation all cases in which the trade mark proprietor has parted with his right of property in the "cask, keg, bottle, etc., or other package."

Sub-paragraph (*b*) and sub-section (2) are limited to bottles and siphons and do not include casks, kegs and cases, and packages of that class, as does sub-paragraph (*a*). The offences under sub-paragraph (*b*) consist either in

(1) trading or trafficking in the bottles and siphons, or

(2) filling the bottles and siphons for the purpose of sale or traffic.

The mere "having in possession" is not made an indictable offence and it therefore seems doubtful whether that part of the second sub-section which enacts that the fact that a junk dealer "has in his possession any such bottle or siphon" shall be prima facie evidence that "such *possession* is unlawful within the meaning of this section" can have any operative force.

*Time.*]—The prosecution must be commenced within three years from the time of the commission of the offence. See. 551 (*a*).

*Punishment.*]—See sec. 450.

**450. Punishment of offences defined in this part.**—Every one guilty of any offence defined in this part is liable—

(*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.

*Time for prosecution.*]—Sec. 551 (*a*) provides that no prosecution for any offence against Part XXXIII. relating to the fraudulent marking of merchandise and no action for penalties or forfeiture thereunder shall be commenced after the expiration of three years from the time of the commission of the offence.

**451. Falsely representing that goods are manufactured for His Majesty.**—Every one is guilty of an indictable 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 His Majesty or any of the Royal Family, or any Government department of the United Kingdom or of Canada. 51 V., c. 41, s. 21.

*Time.*]—The prosecution must be commenced within three years from the date of the offence. Sec. 551 (*a*).

**452. Unlawful importation of goods liable to forfeiture under this Part.**—Every 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.

*Time.*]—The prosecution must be commenced within three years from the date of the offence. Sec. 551 (*a*).

The offence here specified if laid against a corporation *must* be prosecuted under the Summary Convictions clauses.

The offence specified in this section would appear to be an example of an offence for which a corporation can be proceeded against, only under the Summary Convictions clauses.

**453. Defence where person charged innocently in the ordinary course of business makes instruments for forging trade marks.**—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 offender is a servant.**—No servant of a master, resident in Canada, who *bona 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 respecting trade description, lawfully applied to goods on 22nd May, 1888, etc.**—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.

This and the preceding sections of Part XXXIII. are taken from the statute 51 Vict. (Can.) ch. 41. The following additional sections of that statute remain unrepealed (Code sec. 983), and should be read with Part XXXIII. of the Code:—

(15.) 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.

(16.) 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.

(18.) 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.

(22.) 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 colourable 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 sub-sections 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.

(23.) 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.

PART XXXIV.

## PERSONATION.

SECT.



---

**456. Personation.**—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.

*Evidence.*]—Although the fund to obtain which the personation takes place has in fact been previously paid to the party entitled there may be a conviction of the personator endeavouring to obtain payment. R. v. Cramp (1817), R. & R. 324. See also the definition of "property" in sec. 3 (*e*). But it would appear doubtful whether a conviction could be supported for personation in respect of a supposed property or fund which had never existed. Cf. R. v. Pringle (1840), 2 Mood. C.C. 127, 9 C. & P. 408. The intent must be "fraudulently to obtain" the property, and it would seem doubtful whether a personation at the instance of the personated party would be included. Under the English Army Prize-money Act, 2 & 3 Wm. IV., ch. 53, sec. 49, it was declared an offence to knowingly and willingly personate or falsely assume the name or character of a soldier in order to receive prize-money, and it was held that it was 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. R. v. Lake (1869), 11 Cox C.C. 333.

**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.

**458. Personation of certain persons.**—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.

The corresponding English statute is the Forgery Act, 1861, 24-25 Vict., ch. 98, secs. 3, 4, 14 and 35.

*Form of indictment.*]—The jurors, etc., present that J.S. on the ——— day of ——— in the year of our Lord ——— at the ——— of ——— did falsely and deceitfully personate one J.N., the said J.N. being the owner of a certain share and interest in certain stock and annuities which were then transferable at the Bank of ———, to wit (*here* state the amount and nature of the stock), and that the said J.S. thereby did then transfer (*or* endeavour to transfer) the said share and interest of the said J.N. in the said stock and annuities as if he, the said J.S., were then the true and lawful owner thereof, against the form of the statute in such case made and provided.

**459. Acknowledging instrument in 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.

PART XXXV.

## OFFENCES RELATING TO THE COIN.

SECT.



---

**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 His 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 His Majesty's dominions.

(*b*) "Current copper coin," includes copper coin coined in any of His Majesty's mints, or lawfully current, by virtue of any proclamation or otherwise, in any part of His 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.

*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 His Majesty's mint, or other person employed in producing the lawful coin in His 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. Sec. 692.

A coin made by splitting two genuine coins and joining the heads together so as to make a double-headed coin has been held in Australia to be a counterfeit. R. v. McMahon (1894), 15 N.S.W. Law Rep. 131.

A genuine sovereign which had been fraudulently filed at the edges to such an extent as to reduce the weight by one twenty-fourth part, and to remove the milling entirely or almost entirely, and to which a new milling has been added in order to restore the appearance of the coin, was held to be a false and counterfeit coin. R. v. Hermann (1879), L.R. 4 Q.B.D. 284.

It is sufficient to prove such general resemblance to the lawful coin as will shew an intention that the counterfeit shall pass for it. Sec. 718.

*Variance from true coin.*]—Upon the trial of any person accused of any offence respecting the currency or coin or against the provisions of this 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. Sec. 718.

**461. When offence completed.**—Every offence 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.

**462. Counterfeiting coins, etc.**—Every one is guilty of an indictable offence and liable to punishment 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

(*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, ss. 3 and 4.

"*Gilds*" *or* "*silvers.*"]—These words 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. Sec. 460 (*e*). The words above italicized were intended to remove the doubts which existed under previous statutes. See R. v. Lavey (1776), 1 Leach C.C. 153, as to whether the word "colouring" was confined to superficial application. Archbold Cr. Pl. (1900), 917.

An indictment charging the use of such a wash or material will be supported by proof of a colouring with real gold or silver, as the case may be. R. v. Turner (1838), 2 Mood. C.C. 42.

*Evidence.*]—See sec. 460 and note to same.

**463. Dealing 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. 167, 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 His Majesty. R.S.C. c. 167, s. 28.

The following portions of the Revised Statutes as to "offences relating to the coin" (R.S.C. 1886, ch. 167), remain unrepealed and relate to the manufacture and importation of uncurrent copper coin:—

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. Sec. 26.

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. Sec. 26 (2).

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. Sec. 26 (3). Sec. 26 appears to have been inadvertently omitted from the unrepealed statutes printed as an appendix to the official edition of the Code.

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. Sec. 29.

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. Sec. 30.

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.

Any officer of His 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.

Every one who utters, tenders 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.

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 His Majesty, for the public uses of Canada. Sec. 34.

"*Copper coin.*"]--See sec. 460 (*e*), as to the interpretation of this term.

**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.

Where the defendant employed 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 and under their direction made the die for the purpose of detecting the prisoner, it was held that the defendant was rightly convicted as a principal although the die-sinker was an innocent agent in the transaction. R. v. Bannon (1844), 2 Mood. C.C. 309, 1 C. & K. 295.

*Search warrant.*]—See sec. 569.

**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 His 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.

*Indictment.*] — Where an indictment for having possession of counterfeit coin was, on demurrer, held bad for not alleging that the counterfeit coin "resembled some gold or silver coin then actually current," the order made was that the indictment be quashed, so that another indictment might be preferred, not that the defendants be discharged, R. v. Tierney (1869), 29 U.C.Q.B. 181.

**472. Offences respecting copper coin.**—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.

See note to sec. 464.

**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.

On a charge of having counterfeit coins in possession, proof that the accused also had in his possession 'trade dollars,' which, although genuine, were not worth their stamped value, and that he had attempted to put them off as worth their stamped value, is not admissible as shewing intent to put off the counterfeit coin. R. v. Benham (1899), 4 Can. Cr. Cas. 63 (Que.).

**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.

*Uttering.*]—To "utter" includes to tender or to put off. Sec. 460 (*f*).

*Evidence.*]—The word "apparently" in this section would seem to confine the proof of intended resemblance to the counterfeit coin itself, and if the so-called coin was not in itself apparently intended to resemble or pass for a current coin it would not aid the prosecution to shew that the prisoner had represented that, although not a genuine coin, it could be easily passed as such.

In the case of persons who have passed counterfeit money or bills, when it is necessary to establish a guilty knowledge on the part of the prisoner, the prosecutor is allowed to give evidence of the prisoner having passed other counterfeit money or bills at about the same time, or that he had many such in his possession, which circumstances tend strongly to shew that he was not acting innocently and had not taken the money casually, but that he was employed in fraudulently putting it off. R. v. Brown (1861), 21 U.C.Q.B. 330, per Robinson, C.J.

If it be proved that the accused 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 to a different person, or had other pieces of base money about him when he uttered the counterfeit money in question, such will be evidence from which a guilty knowledge may be presumed. R. v. Whiley (1804), 2 Leach C.C. 983; R. v. Forster, Dears. 456.

*Time.*]—Sec. 552 declares that any one found committing the offence mentioned in "sec. 477, uttering counterfeit current coin," may be arrested without warrant by any one. This is an error in the Code, as this section relates merely to uncurrent copper coin and not counterfeit coin, and the offence is a comparatively trivial one. It is submitted that the language of sec. 552 does not have the effect of applying its provisions to either this section (477), or to the sections which relate to counterfeit coin (474 and 475.

**475. Uttering light coins, medals, counterfeit copper coins, etc.**—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 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.

**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.

**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 an 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.

*Previous conviction.*]—It is not necessary that any judgment should have been pronounced against the prisoner on the first conviction. R. v. Blaby, [1894] 2 Q.B. 170.

Secs. 628 and 676 as to the procedure where a previous conviction is charged seem to imply that the second offence must have been committed subsequently to the first conviction.

PART XXXVI.

## ADVERTISING COUNTERFEIT MONEY.

SECT.



*(Amendment of 1900).*

**479. Counterfeit token.**—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.

The section formerly ended at the words "deceptive designation the same may be described." The amendment consists in the addition of the words which follow them, and is particularly directed against frauds in passing bills of defunct banks and notes of the "Confederate States" of America.

*Counterfeit token.*]—A paper which is a spurious imitation of a government treasury note is a counterfeit, or what purports to be a counterfeit token of value under this section, although there is no original of its description. R. v. Corey (1895), 1 Can. Cr. Cas. 161 (N.B.).

Before the Code it had been held that a person indicted for offering to purchase counterfeit tokens of value could not be convicted on evidence shewing that the notes which he offered to purchase were not counterfeit, but genuine bank notes unsigned, though he believed them to be counterfeit, and offered to purchase them under such belief. R. v. Attwood (1891), 20 Ont. R. 574. The present definition includes such paper where there is knowledge by the accused that it was of no value and a fraudulent intent in dealing with it.

**480. Advertising counterfeit money and other offences connected therewith.**—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 possession of or in any way uses, or offers to purchase, exchange, accept, take possession of or in any way use, or negotiates or offers to negotiate 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 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.

*Evidence.*]—In Jones' case (1779), 1 Doug. 300, a prisoner was indicted for having in his custody a certain forged and counterfeited paper-writing *purporting* to be a bank note, and a special verdict was returned therein that the paper-writing was forged, and that the prisoner well knowing it not to be a bank note averred it to be a good bank note, and disposed of it as such with intent to defraud.

It appeared that the document was made in the form and appearance of a bank note, but was not signed. Lord Mansfield, in directing the prisoner's discharge, said: —

"The representations of the prisoner after the note was made could not alter the purport, which is what appears on the face of the instrument itself. Such representations might make the party guilty of a fraud or cheat."

Section 480 of the Code covers not only the case of counterfeit money, i.e., false tokens purporting to be bank notes, etc., but false tokens purporting to be *counterfeit* tokens.

The words "what purports to be" in sec. 480 (formerly 51 Vict. (Can.), ch. 40) import what appears on the face of the instrument; and therefore what was said to the prisoner, or what he thought or believed, would not be of any moment. Per Rose, J., R. v. Attwood (1891), 20 Ont. R. 574, 578.

When a person exhibits to another bank notes representing them as counterfeit, when in fact they are not so, the offer to purchase such notes cannot be an offence under the Act, as the prisoner was offering to purchase that which the party had to sell, which were not counterfeit tokens of value. Per MacMahon, J., R. v. Attwood (1891), 20 Ont. R. 574, 581.

In the last named case, the defendant was prosecuted for offering to purchase bank notes which were shewn to him as counterfeit, but were in fact genuine bank notes unsigned.

Doubt was also expressed in the Attwood case as to whether the section applies to counterfeit tokens not in esse, MacMahon, J., saying that it may be that the clause of the statute would require to be amended in order to reach a person offering to purchase such.

A paper which is a spurious imitation of a government treasury note is a counterfeit, or what purports to be a counterfeit, token of value, although there is no original of its description. R. v. Corey (1895), 1 Can. Cr. Cas. 161 (N.B.).

As to evidence of admissions made by the accused, see note to sec. 592.

*Fraudulent scheme.*]—On the trial of any person charged with the offences above mentioned, 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 prima facie evidence of the fraudulent character of such scheme or device. Sec. 693.

PART XXXVII.

# MISCHIEF.

SECT.

**481. Preliminary.**—Every one who causes any event by an act which he knew would probably cause it, being reckless whether 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 of 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.

(3)—*With intent to defraud.*]—D. was charged with having set fire to a building, the property of J. H., "with intent to defraud." The case opened by the Crown was that prisoner intended to defraud several insurance companies, but legal proof of the policies was wanting, and an amendment was allowed by striking out the words "with intent to defraud." The evidence shewed that several persons were interested in the premises as mortgagees, and J. H. as owner of the equity of redemption. The jury found prisoner intended to injure those interested. It was held that the amendment was authorized and proper, and the conviction warranted by the evidence. An indictment for arson is good without alleging any intent. R. v. Cronin (1875), 36 U.C.Q.B. 342.

It is necessary where the setting fire is to a man's own house, to prove an intent to injure and defraud. R. v. Bryans (1862), 12 U.C.C.P. 161.

**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 His Majesty's stores or munitions of war. R.S.C. c. 168, ss. 2 to 5, 7, 8, 19, 28, 46 and 47.

As to necessity of proving an intent to defraud if the building belonged to the accused, see sec. 481 (3).

At common law if the house were the prisoner's it was necessary to shew that his attempt to set fire to it was unlawful and malicious. R. v. Greenwood (1864), 23 U.C.Q.B. 250.

And this was supplied by proof that the act might or would be an injury to or a fraud upon any person, and that the accused acted with intent to do such injury. R. v. Bryans (1862), 12 U.C.C.P. 166.

In R. v. Gray (1866), 4 F. & F. 1102, the accused was charged with setting fire to his house with intent to defraud an insurance company, and evidence was offered to shew that the prisoner had previously occupied two other houses in succession which had been insured, that fires had broken out in both, and that the prisoner had made claims on the insurance com-

panies, for the losses occasioned. There was no other evidence offered to shew that the fires in the two houses had been set by the prisoner, yet the evidence was received as tending to prove that the fire set as charged in the indictment was the result of design, not of accident.

*Arson at common law.*]—Arson at common law was the malicious burning of another's house. 1 Bishop Cr. Law 414. It was an offence against the security of the habitation rather than of the property. 2 Bishop 24. A man was not guilty of arson by the common law if he burned a house of which he was in possession as owner or as tenant from year to year; R. v. Pedley, 1 Leach 242; or which he held under an agreement for a lease; R. v. Breeme, 1 Leach 220; or as mortgagor in possession. R. v. Spalding, 1 Leach 218, 2 East P.C. 1025.

*Sets fire.*]—It is sufficient if the wood has been at a red heat. R. v. Parker, 9 C. & P. 45. But the mere scorching the wood black is not enough. R. v. Russell, Car. & M. 541. It is not necessary that there should have been a flame. R. v. Stallion, 1 Moo. 398.

*Any stack.*]—Straw packed on a lorry ready for market has been held not to be a "stack." R. v. Satchwell, 28 Eng. L.T. 569; R. v. Avis, 9 C. & P. 348.

*Evidence.*]—A burning done by mischance or negligence is not arson. 3 Inst. 67. And the same is true where the burning results accidentally from the intentional commission of a mere civil trespass. 2 East P.C. 1019.

But if a person intending to burn the house of a particular person accidentally burns another's he commits the offence. 3 Inst 67; 2 Bishop Cr. Law 27.

The offence must have been committed without legal justification or excuse and without colour of right. Sec. 481 (2).

A man is presumed to intend the natural and probable consequences of his own voluntary act. Therefore, if one kindles a fire in a stack situated so that it is likely to communicate and does communicate in fact to an adjoining building, he is chargeable with burning the building. R. v. Cooper, 5 C. & P. 535.

But where a sailor entered a part of a vessel to steal rum there stored, and while he was tapping a cask a lighted match, which he held, came in contact with the rum and a fire resulted which destroyed the vessel, it was held that it was not arson. R. v. Faulkner, 13 Cox C.C. 550.

*Damaging property.*]—See sec. 499 as to the indictable offence of mischief by wilfully destroying or damaging property; and see sec. 511 as to summary conviction for malicious injury to property where the damage is less than $20.

**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.

*Attempts to set fire.*]—If B., under A.'s direction, arranges a blanket saturated with oil so that if it is set on fire the flame will be communicated to a building and then lights a match and holds it until it is burning well and then puts it down to within an inch or two of the blanket, when the match goes out; A. is guilty of an attempt to set fire to the building. R. v. Goodman, 22 U.C.C.P. 338.

**484. Setting fire to crops.**—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.

In R. v. Dossett (1846), 2 C. & K. 306, the accused was indicted for setting fire to a rick of straw. The rick was set on fire by the prisoner having fired a gun very near to it, and evidence was offered to shew that the rick had been on fire the day previous, and that the prisoner was then close to it with a gun in his hand. There was no other evidence offered to shew that the prisoner had on the day previous fired the gun or set fire to the rick. The evidence, however, was received as tending to shew that the rick was fired at the time charged wilfully.

*Colour of right.*]—See sec. 481 (2).

**485. Attempt to set fire to crops.**—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 knows that anything mentioned in the last preceding section is likely to catch fire therefrom. R.S.C. c. 168, s. 20.

**486. Recklessly setting fire to forest, 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, etc.**—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.

Threats verbally made to burn the complainant's buildings are not indictable under the Criminal Code, and give rise only to proceedings to force the offender to give security to keep the peace. Ex parte Welsh (1898), 2 Can. Cr. Cas. 35 (Que.).

*Binding over to keep the peace.*]—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 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. Sec. 959 (2).

**488. Attempt to damage by gunpowder.**—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 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.

*Explosive substance.*]—This expression 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. Sec. 3 (*i*).

**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 matter 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.

See also secs. 250 and 251 and note to sec. 511.

Where 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 is a bar to such subsequent indictment. Sec. 633 (1).

*Evidence.*]—The act must have been done without legal justification or excuse and without colour of right, Sec. 481 (2). It will be observed that the term "wilfully" does not appear except in sub-paragraph (f) in the first part of the section.

**490. Obstructing railways.**—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.

To constitute an offence the act must be done without legal justification or excuse and without colour of right. Sec. 48, (2).

A drunken man got upon the railway and altered the signals and thereby caused a luggage train to pull up and proceed at a very slow pace. It was held upon a case reserved, that this was the causing of an engine and carriage using a railway to be obstructed. R. v. Hadfield, 11 Cox C.C. 574. A person improperly went upon a line of railway and purposely attempted to stop a train approaching, by placing himself on the space between two lines of rails, and holding up his arms in the mode adopted by inspectors of the line when desirous of stopping a train; it was held also to be the offence of unlawfully obstructing an engine or carriage using a railway. R. v. Hardy, 11 Cox C.C. 656.

**491. Injuries to packages in the 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, etc.**—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.

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.

To constitute an offence the act must be done without legal justification or excuse and without colour of right. Sec. 48, (2.)

**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 immediate 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. Attempting to wreck.**—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.**—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 the 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*).

*Wreck.*]—This term includes the cargo, stores and tackle of any vessel and all parts of a vessel separated therefrom, and also the property of shipwrecked persons. See. 3 (*dd*).

**497. Injuries to rafts of timber and works used for the transmission thereof.**—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 apparatus, 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.

*Colour of right.*]—If the act be done with a colour of right it is no offence. Sec. 481 (2); R. v. Matthews, 14 Cox C.C. 5.

*Apparatus, building or erection.*]—A trunk of wood used to convey water to wash the earth from the ore is an "erection" belonging to the mine within this section. Barwell v. Winterstoke, 14 Q.B. 704; and so is 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. R. v. Whittingham, 9 C. & P. 234.

The legislation in the several provinces for the protection of persons employed in mines is as follows:—

*Nova Scotia.*—Revised Statutes of Nova Scotia, fifth series, 1884, Title 3, Chapter 8, 'Of the Regulation of Mines'; as amended by Chapter 6 of the Acts of 1885; by Chapter 9 of Acts of 1891; Chapter 4 of Acts of 1892; Chapter 10 of Acts of 1893; Chapter 54 of the Acts of 1899 (62 Viet. ch. 54).

*New Brunswick.*—Certain provisions in the General Mining Act, R.S.N.B., 1877, Chapter 18; 54 Viet., Chapter 16; and the amending Acts, 55 Viet., Chapter 10, 59 Viet., Chapter 27, and 62 Viet., Chapter 26; 56 Viet., Chapter 11.

*Quebec.*—The Act of 1892, 'An Act to Amend and Consolidate the Mining Laws,' 55-56 Viet., Chapter 20, as amended by the Act of 1900, 63 Viet., Chapter 17; and 63 Viet., Chapter 33.

*Ontario.*—R.S.O., 1897, Chapter 36; as amended in 1899 by 62 Viet., Chapter 10; and in 1900 by 63 Viet., Chapter 13.

*Manitoba.*—'The Mines Act, 1897,' 60 Viet., Chapter 17.

*British Columbia.*—R.S.B.C., 1897, Chapter 134, 'An Act for securing the Safety and Good Health of Workmen engaged in or about the Metalliferous Mines in the Province of British Columbia,' as amended by 62 Viet., Chapter 49; and R.S.B.C., 1897, Chapter 138, 'An Act to make Regulations with respect to Coal Mines,' as amended in 1899 by 62 Viet., Chapter 47.

Another amendment of 1899 to the latter Act, 62 Viet., Chapter 46, was disallowed on April 24, 1900. Can. Gazette, May 12, 1900, p. 2366.

**499. Mischief.**—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

(*b*) a bank, dyke or wall of the sea, or of any inland water, natural or artificial, or any work in 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 the killing, maiming, poisoning or wounding.

(*C*) To seven years' 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 years' 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 and 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 paterns 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.

See note to sec. 511.

**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.

**501. Injuries to other animals.**—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.

As to injuries to cattle see sec. 499 (B) (*b*), and the statutory definition of the word cattle in sec. 3, sub-sec. (*d*).

*Punishment on indictment.*]—See sec. 951 as to offences under the second sub-section.

*Punishment on summary conviction.*]—See sec. 872.

**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.

Under sec. 499 it is an indictable offence to wilfully destroy or damage any cattle, *or the young thereof*, by killing, maiming, poisoning or wounding, and by sec. 3 (*d*) the term "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. This definition seems wide enough of itself to include the young of any of the animals of the classes mentioned. It will be observed that threats to kill a dog or other animals not being cattle (see sec. 501) are not within this section.

**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 by tenants.**—Every one is guilty of an indictable offence and liable to five years' imprisonment who, being possesed 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.

See also sec. 322.

**505 Injuries to land marks indicating muncipal divisions.**—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. Injuries to other land marks.**—Every one is guilty of an indictable offence and liable to five years' imprisonment who wilfully defaces, alters or removes any mound, landmark, 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.

*(Amendment of 1893).*

**507A. Natural bar to harbour.**—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.

**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.

By sec. 907 it is provided that 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 this section 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 is not 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. See. 907.

Where the expression "over and above the amount of injury done," is used, it does not mean that the penalty "over and above, etc.," is to go to the Crown and the sum assessed as "the amount of injury done" is to go to the party aggrieved. It is not intended that there shall be two penalties, but that the amount of the whole penalty shall be arrived at by ascertaining the damages and then adding thereto such sum, not exceeding $50, as the justice may deem proper. By sec. 511 provision is made whereby the justice may award a sum not exceeding $20 in the cases there mentioned, as "compensation" to be paid in the case of private property to the person aggrieved. If it had been intended that the "amount of injury done" mentioned in sec. 508 should be ascertained and paid as compensation to the aggrieved person, it is fair to expect it would have so stated. Why the justice should fix the penalty by first ascertaining the amount of damage done is explained by reference to sec. 861, which authorizes the justice for a first offence to discharge the offender from his conviction upon his paying the aggrieved person the damages and costs, or either, as ascertained by the justice. R. v. Tebo (1889), 1 Terr. L.R. 196.

**509. Injuries to vegetable productions growing in gardens, 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 note to sec. 508.

**510. Injuries to cultivated roots and plants growing elsewhere.**—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 note to sec. 508.

**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.

*Colour of right.*]—To constitute an offence under this Part of the Code the act must have been done without legal justification or excuse and without colour of right. See. 481 (2).

*Assertion of right; excess.*]—In R. v. Clemens, [1898] 1 Q.B. 556, the Court for Crown cases reserved (Russell, C.J., and Grantham, Wright, Bigham and Darling, JJ.), laid down that the proper direction to be given to a jury on an indictment for malicious injury to property where it is claimed by the defendant that the act was done in the assertion of a right, is: Did the defendants do what they did in exercise of a supposed right? And if they did, but on the facts before them the jury are of opinion that the defendants did more damage than they could reasonably suppose to be necessary for the assertion or protection of the alleged right, then that the jury ought to find them guilty of malicious damage. In this case two wooden structures were erected on a piece of meadow land on the sea shore, over which the defendants claimed to have certain rights of user for recreation and for mending and drying nets, etc., and the defendants in the assertion of these rights pulled down the buildings and threw them into the sea. The court held that this was an excess of damage for which they might properly be convicted.

On a prosecution for malicious damage to property, the accused cannot claim that they were acting under a fair and reasonable supposition that they had a right to do the act complained of, if it appears that the supposed right was one which, under the circumstances, could not exist in law although the accused had a bona fide belief that these acts were legal. White v. Feast, 36 J.P. 36; Brooks v. Hamlyn (1899), 63 J.P. 215.

Under this section the magistrate's jurisdiction in respect of a charge of wilful injury to property is not ousted unless the act was done under a fair and reasonable supposition of right, and the magistrate has jurisdiction to summarily try the charge notwithstanding the mere belief of the accused that he had a right to do the act complained of. R. v. Davy (1900), 4 Can. Cr. Cas. 28 (Ont. C.A.).

*Uncertainty in conviction.*]—A conviction which alleged that the defendant unlawfully and maliciously committed damage, injury and spoil to and upon the real and personal property of the prosecutor, but did not allege the particular act done and the nature and quality of the property damaged, was held bad for uncertainty. Re Donelly, 20 U.C.C.P. 165; R. v. Spain (1889), 18 Ont. R. 385.

A conviction under this section should clearly shew whether the damage, injury or spoil complained of, is done to real or personal property, stating what property, and what is the amount which the justice has ascertained to be reasonable compensation. R. v. Caswell (1870), 20 U.C.C.P. 275.

*Evidence.*]—In Gayford v. Chouler, [1898] 1 Q.B. 316, the defendant walked across the respondent's field after notice to desist, and injured the high grass to the extent of 6d., and it was held by Day and Lawrance, JJ., that this constituted a malicious injury to property, for which the appellant could properly be convicted.

In Roper v. Knott, [1898] 1 Q.B. 686, the defendant was a milk carrier in the employment of the prosecutor, and the alleged offence consisted in adding water to the milk delivered to him for carriage to the prosecutor's customers. The magistrate found that the addition was made for the purpose of enabling the defendant to make a profit for himself by selling the surplus milk and not accounting for it, but that there was no intention to injure the prosecutor. The Court for Crown Cases reserved held that an intention to injure the owner of the property was not essential to the offence and that the defendant should be convicted.

*Railway property.*]—Sub-section 2 of sec. 273 of The Railway Act, Statutes of Canada, 1888, ch. 29, as amended (1899, ch. 37, sec. 4) provides as follows:—Every person who wilfully breaks down, injures, weakens or destroys any gate, fence, erection, building or structure of a company, or removes, obliterates, defaces or destroys any printed or written notice,

direction, order, by-law or regulation of a company, or any section of or extract from this Act or any other Act of Parliament, which a company or any of its officers or agents have caused to be posted, attached or affixed to or upon any fence, post, gate, building or erection of the company, or any car upon any railway, shall be liable on summary conviction to a penalty not exceeding fifty dollars, or, in default of payment, to imprisonment for a term not exceeding two months. Sec. 273 (2).

PART XXXVIII.

## CRUELTY TO ANIMALS.

SECT.



*(Amendment of 1895.)*

**512. Cruelty to animals.**—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, ill-treats, 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.

*Unnecessarily beats, etc.*]—"Unnecessarily" here means "without good reason." Ford v. Riley, 23 Q.B.D. 203; Murphy v. Manning, 2 Ex. D. 307; R. v. McDonagh, 28 L.R.Ir. 204.

[1] The use of an overdraw check rein on a horse is ordinarily not an offence under this section although it causes discomfort to the animal. Society v. Lowry (1894), 17 Montreal Legal News 118.

The cutting of the combs of cocks to fit them for fighting or winning prizes at exhibitions has been held to be cruelty. Murphy v. Manning, L.R. 2 Ex. D. 307; but as to dishorning cattle the better opinion appears to be that it is not an offence; Callaghan v. Society, 11 Cox C.C. 101; although it was held to be in Ford v. Wiley, L.R. 23, Q.B.D. 203.

The spaying of sows is not cruelty. Lewis v. Fermor, L.R. 18 Q.B.D. 532.

*Appeal.*]—Where an information is laid in the name of an individual describing himself as the agent of a society named, the society does not thereby become a party to the proceedings and it has no locus standi to appeal from the justices' order dismissing the charge; the notice of appeal must in such case be taken in the name of the agent personally, otherwise it may be quashed. Canadian Society, etc. v. Lauzon (1899), 4 Can. Cr. Cas. 354 (Que.).

*Penalty.*]—This and sec. 513 of the Code are taken from the Act respecting Cruelty to Animals, R.S.C., ch. 172, and sec. 7 of that statute remains unrepealed (Code sec. 983) and must be read in conjunction with Code secs. 512 and 513. It 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."

*Time.*]—The prosecution must take place within three months from the commission of the offence. Sec. 551 (*e*).

**513. Keeping cockpit.**—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 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 said cock-pit is situated. R.S.C. c. 172, s. 3.

*Time.*]—The prosecution must be commenced within three months from the commission of the offence. Sec. 551 (*e*).

**514. The conveyance of cattle.**—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 railway 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 litter 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.

*Time.*]—By sec. 551 (*e*) it is provided that no prosecution for this offence, or action for penalties or forfeiture shall be commenced after the expiration of three months from the commission of the offence.

**515. Search of premises.**—Any peace officer or constable may, at all times, enter any premises where he has reasonable grounds 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 grounds 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.

*Time.*]—A prosecution against a railway company for refusing to admit the peace officer to the car must be commenced within three months from the commission of the offence. See 551 (*e*).

PART XXXIX.

## OFFENCES CONNECTED WITH TRADE AND BREACHES OF CONTRACT.

SECT.



---

**516. Conspiracies 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.

**517. What acts done 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.

*Trade union.*]—As sec. 517 is taken from the Trade Unions Act, R.S.C. 1886, ch. 131, the definition of the term contained in that Act will apply. The expression "trade union" is there declared to mean (unless the context otherwise requires) 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 that statute, have been deemed to be an unlawful combination by reason of some one or more of its purposes being in restraint of trade. R.S.C. ch. 131, sec. 2.

**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.

*Doing an act, etc.*]—The expression "act" here includes a default, breach or omission. Sec. 519.

It being proved that a member of a trades union had conspired to injure a non-union workman by depriving him of his employment, this was held not to be excepted as an "act for the purpose of trade combination," and a conviction for a conspiracy was sustained. R. v. Gibson (1889), 16 O.R. 704.

**519. "Trade combination;" "act;" interpretation.**—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.

*(Amendments of 1899 and 1900).*

**520. Trade combines.**—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, or, if a corporation, is liable to a penalty not exceeding ten 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.

Section 520 originally contained the word "unlawfully" before the subsections (*a*) to (*d*) inclusive and the word "unduly" appeared in paragraphs (*a*), (*c*) and (*d*) as it does in this amendment, and the word "unreasonably" before the word "enhance" in paragraph (*c*). The section was amended in 1899 (Canada Statutes, 1899, ch. 46, sec. 1) by striking out the words "unduly" and "unreasonably," but the word "unlawfully" which applied to all of the paragraphs was retained. 2 Can. Cr. Cas. 605 (Appendix). The present amendment re-inserts the words "unduly" and "unreasonably" in their former position, but strikes out the word "unlawfully."

Sub-sec. 2 is new. It applies not only to regularly organized trade unions as that term is defined by the Trade Union Act, R.S.C. ch. 131, but to any voluntary organization of labourers. Senate Debates, 1900, page 1044. As to trade unions there is a provision in that statute as follows: (Sec. 22). "The purposes of any trade union shall not by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise, or so as to render void or voidable any agreement or trust."

It is not an unlawful combination for a manufacturer to agree with a number of dealers to sell to them exclusively. R. v. American Tobacco Co. (1897), 3 Revue de Jurisprudence 453.

Secs. 4 and 5 of the Act for the Prevention and Suppression of Combinations formed in restraint of Trade, 52 Vict., ch. 41, still remain in force (Code sec. 983). They are as follows:

(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.

**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 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 combination 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 His Majesty's mails, or to carry passengers or freight, or with His Majesty, or any one on behalf of His Majesty, in connection with a Government railway on which His 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 his 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 His 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.

*Malice.*]—"A term which is truly a legal enigma": Harris Cr. Law, p. 13.

The terms "malice" and "malicious" are practically eliminated from the code owing to the confusion of ideas connected with them. "Malice" only appears in two places; here and in sec. 676 where the expression "mute of malice" is retained. Mr. Hoyles' article on The Criminal Law, 38 C.L.J. 231.

**522. Posting up copies of provisions 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 rasonable 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 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.

*Intimidates.*]—A threat made by workmen to their employer that they will strike if he employs a non-union man is not intimidation. Connor v. Kent, [1891] 2 Q.B. 545.

*Besetting house or other place.*]—Sub-section (*f*) is adapted from sec. 7 of the Conspiracy and Protection of Property Act (Imp.), 38-39 Vict., ch. 86. Under that statute it has been held that the words "or other place" include a pier or landing stage. Charnock v. Court, [1899] 2 Ch. 35.

In Lyons v. Wilkins, [1899] 1 Ch. 255, the plaintiffs sought by a civil action to restrain the defendants, members of a trades union, from watching and besetting the works of the plaintiffs, and also the works of a third person who worked for the plaintiffs, for the purpose of persuading workpeople, and such third person, to abstain from working for the plaintiffs; and a perpetual injunction was granted restraining the defendants from watching and besetting the plaintiff's premises for the purpose of persuading, or otherwise preventing, persons working for them, or for any purpose except merely to obtain or communicate information; and also from watching or besetting the premises of the third person for the purpose of persuading or preventing him from working for the plaintiffs, or for any purpose except merely to obtain or communicate information. This judgment was affirmed by the Court of Appeal (Lindley, M.R., and Chitty and Williams, L.JJ.).

**524. Intimidation of any person to prevent him from working at any trade.** — 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 any person to prevent him dealing in wheat, etc.; unlawfully preventing seamen from working.**—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, 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. 49.

**526. Intimidation of any person to prevent him bidding for 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.

PART XL.

## ATTEMPTS—CONSPIRACIES—ACCESSORIES.

SECT.



---

**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.

*What is conspiracy?*]—An agreement between two or more persons for any of the purposes following will constitute criminal conspiracy:

1. Falsely to charge another with a crime punishable by law, either from a malicious or vindictive motive or feeling toward the party, or for the purpose of extorting money from him.

2. Wrongfully to injure or prejudice a third person or any body of men, in any other manner.

3. To commit any offence punishable by law.

4. To do any act with intent to pervert the course of justice. Archbold's Crim. Plead. (1893), 21st Ed., 1100.

The existence of a bad motive in the case of an act which is not in itself illegal will not convert that act into a civil wrong for which reparation is due. A wrongful act done knowingly and with a view to its injurious consequences may in the sense of law be malicious; but such malice derives its essential character from the circumstance that the act done constitutes a violation of the law. Allen v. Flood (1898), A.C. 1, per Lord Watson at p. 92. In order to constitute legal malice the act done must, apart from bad motive, amount to a violation of law. Ibid.

*Intention and agreement.*] — 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 by unlawful means. So long as such a design rests in *intention only*, it is not indictable. But where two agree to carry it into effect, the very plot is an act in itself and is the act of each of the parties, promise against promise, actus contra actum, capable of being enforced if lawful, punishable if for a criminal object or for the use of criminal means. Mulcahy v. R., L.R. 3 H.L., Eng. and Ir. App. 306, 317; Archbold's Crim. Evid., 21st Ed., 1104.

The conspiracy itself is the offence, and whether anything has been done in pursuance of it or not is immaterial. R. v. Gill (1818), 2 B. & Ald. 204; R. v. Seward (1834), 1 A. & E. 706; R. v. Richardson (1834), 1 M. & Rob. 402; R. v. Kenrick (1843), 5 Q.B. 49.

*Indictment.*]—An indictment for a conspiracy may be tried in any county in which an overt act has been committed in pursuance of the original illegal combination and design. R. v. Connolly (1894), 25 Ont. R. 151, 169.

The date mentioned in the indictment as the day when the conspiracy took place is not material, but in form some day before the indictment preferred, must be laid; evidence is not thereby precluded in respect of an earlier date. R. v. Charnock (1698), 12 Howard's State Trials, 1397.

*Evidence.*] It is not necessary to prove that the defendants actually met together and concerted the proceeding; it is sufficient if the jury are satisfied from the defendants' conduct either together or severally, that they were acting in concert. R. v. Fellowes (1859), 19 U.C.R., 48, 58.

It must be left to the jury to estimate the weight of the evidence of an accomplice according to their opinion of the motives, character and credibility of the witness, and of the probable nature of his statement. And if it has had the effect of convincing them without doubt of the guilt of the accused they are at liberty to act upon their conviction. Per Robinson, C.J. R. v. Fellowes and others (1859), 19 U.C.Q.B. 48.

Conspiracy is not chargeable against a husband and wife alone, for they are in law one person and are presumed to have but one will. 1 Hawk., ch. 72, sec. 8.

If A. and B. conspire together, each is guilty of an offence, and each may be indicted separately, tried alone and convicted, although both be living and within the country and county at the time of the indictment, trial and conviction. R. v. Frawley (1894), 1 Can. Cr. Cas. 253 (Ont.).

In a charge of conspiracy when the existence of the common design on the part of the defendants has been proved, evidence is then properly receivable as against both of what was said or done by either in furtherance of the common design. R. v. Connolly (1894), 1 Can. Cr. Cas. 468 (Ont.).

And evidence is admissible of what was said or done in furtherance of the common design by a conspirator not charged, as against those who are charged, after proof of the existence of the common design on the part of the defendants with such conspirator. Ibid.

The charge of Coleridge, J., in R. v. Murphy (1837), 8 C. & P., at p. 310, conveniently summarizes the usual method of proving a charge of conspiracy: "Although the common design is the root of the charge, it is not necessary to prove that the parties came together and actually agreed in terms to have this common design, and to pursue it by common means, and so carry it into execution. This is not necessary, because in many cases of the most clearly established conspiracies there are no means of proving any such thing, and neither law nor common sense requires that it should be proved. If you find that these two persons pursued by their acts the same object, often by the same means, one performing one part of an act, and the other another part of the same act so as to complete it with a view to the attainment of the object which they were pursuing, you will be at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object. The question you have to ask yourselves is, 'Had they this common design, and did they pursue it by these common means—the design being unlawful?'" R. v. Connolly (1894), 1 Can. Cr. Cas. 468 (Ont.); R. v. Fellowes, 19 U.C.Q.B. 48.

At the hearing of a charge of conspiracy in relation to corrupt practices at an election, before a county judge sitting as police magistrate, evidence given before a special committee of the House of Commons, and taken down by stenographers, was tendered before the magistrate, and refused by him; it was held that the court had no jurisdiction to grant a mandamus to the magistrate directing him to receive such evidence. R. v. Connolly (1891), 22 Ont. R. 220.

*Treason.*]—As to treasonable conspiracy see sec. 66.

**528. Attempting to commit certain 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.

*Evidence.*]—Where on an indictment for a principal offence and for an attempt to commit such an offence, the evidence is wholly directed to the proof of the principal offence, the jury's verdict of guilty of the attempt only, will not be set aside although there were no other witnesses in respect of the attempt than those whose testimony, if wholly believed, shewed the commission of the greater offence. R. v. Hamilton (1897), 4 Can. Cr. Cas. 251 (Ont).

It is within the province of the jury, to believe, if it sees fit to do so, a part only of a witness's testimony and to disbelieve the remainder of the same witness's testimony, and it may therefore credit the testimony in respect of a greater offence only in so far as it shews a lesser offence. Ibid.

**529. Attempting to commit other indictable offences.**—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 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.

An indictment, charging that the accused unlawfully attempted to steal from the person of an unknown person the property of such unknown person, without giving the name of the person against whom the offence was committed, or the description of the property the accused attempted to steal, is sufficient. And where a prisoner is indicted for an attempt to steal, and the proof establishes that the offence of larceny was actually committed, the jury may convict of the attempt, unless the court discharges the jury and directs that the prisoner be indicted for the complete offence (Code sec. 712). R. v. Taylor (1895), 5 Can. Cr. Cas. 89 (Que.).

**530. Attempting to commit 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 defendant charged with offering money to a person to swear that A., B. or C. gave him a certain sum of money to vote for a candidate at an election, was admitted to bail and the recognizance taken by one justice of the peace. It was held that the offence was not an attempt to commit the crime of subornation of perjury, but something less, being an incitement to

give false evidence or particular evidence regardless of its truth or falsehood, and was a misdemeanor at common law, and that the recognizance was properly taken by one justice, who had power to admit the accused to bail at common law, and that sec. 601 of the Code did not apply. R. v. Cole (1902), 38 C.L.J., 266 (Ont.).

The common law jurisdiction as to crime is still operative, notwithstanding the Code, and even in cases provided for by the Code, unless there is such repugnancy as to give prevalence to the later law. Ibid.

**531. Accessories after the fact to certain indictable offences.**—Every 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.

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. Sec. 63. But 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. Sec. 63 (2).

At common law the term accessory after the fact only applied to felonies for in misdemeanours all were principals. R. v. Tisdale, 20 U.C.Q.B. 273; R. v. Campbell, 18 U.C.Q.B. 417; R. v. Benjamin, 4 U.C.C.P. 189.

Where the power of a court of General or Quarter sessions is excluded, as to which see sec. 540, such court has no jurisdiction to try a charge of being accessory after the fact to such offence. Sec. 540.

An accessory after the fact may be indicted whether the principal offender 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. Sec. 627 (1).

Where an indictment contains two counts, one charging the accused as a principal offender and the other charging him with being an accessory after the fact to the same offence, the prosecution will be compelled to elect upon which count they will proceed. R. v. Brannon (1880), 14 Cox C.C. 394.

Where several persons are tried upon one indictment, some as principals in murder others as accessory after the fact to the murder, and the principals are convicted of manslaughter only, the prisoners charged as accessories after the fact may be convicted on the same indictment as such accessories to the manslaughter. R. v. Richards (1877), 2 Q.B.D. 311, 13 Cox C.C. 611.

But on an indictment charging a man with the principal offence only, he cannot be convicted thereunder of being an accessory after the fact. R. v. Fallon (1862), L. & C. 217, 32 L.J.M.C. 66; Richards v. R. (1897), 61 J.P. 389.

*Evidence.*]—See note to sec. 63.

**532. Accessories after the fact to other indictable offences.**—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.

See notes to secs. 63 and 531.

# TITLE VII.

## PROCEDURE.

### PART XLI.

### GENERAL PROVISIONS.

SECT.



---

**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 the making thereof, and shall also be published in the Canada Gazette. 52 V., c. 40.

*(Amendment of 1900).*

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.

*British Columbia Rules of Court.*]—In the Province of British Columbia rules and orders of court have been passed under this section, known as the "Supreme Court Rules, 1896 (Crown side), and the same appear in The Canada Gazette (1900), Vol. 33, p. 2110. They are adapted principally from the English Crown Office Rules of 1886. Where no other provision is made in the Rules the former procedure and practice remains in force, and as to matters not provided for, the practice shall, as far as may be, be regulated by analogy to such Rules. B.C. Crown Rules (1896) No. 65.

**534. Civil remedy not suspended though act is a criminal offence.**—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.

The operation of this section is left in doubt by reason of the constitutional questions involved. Can the Dominion Parliament declare that a civil remedy shall not be suspended? Paquet v. Lavoie (1898), R.J. Que., 7 Q.B. 277. Have not the provincial legislatures by reason of their exclusive jurisdiction as to civil rights the right to control the suspension of the civil remedy pending the criminal prosecution?

To an action, before the Code, for assault and battery defendant pleaded that before action brought the plaintiff laid an information before a magistrate charging defendant with feloniously, etc., wounding the plaintiff with intent to do him grievous bodily harm, thereby charging defendant with felony; that defendant was brought before the magistrate and committed for trial which had not yet taken place; that the subject of both the civil and criminal prosecutions was the same, and that plaintiff's civil right of action was suspended until the criminal charge was disposed of. Held, on demurrer, that the plea was good; and an order was made staying the civil action in the meantime. Taylor v. McCulloch (1885), 8 Ont. R. 309.

The former rule, excepting in the Province of Quebec, was that on grounds of public policy if it appeared on the trial of a civil action that the facts amounted to felony, the judge was bound to stop the civil proceedings and non-suit the plaintiff in order that public justice might first be vindicated by a criminal prosecution. Walsh v. Nattress, 19 U.C.C.P. 453; Livingstone v. Massey, 23 U.C.Q.B. 156; Williams v. Robinson, 20 U.C.C.P. 255; Pease v. McAloon, 1 Kerr (N.B.) 111. The civil remedy was held to be suspended until the defendant charged with the felony should be either acquitted or convicted thereof. Brown v. Dalby, 7 U.C.Q.B. 162.

**535. Abolition of distinction between felony and misdemeanor.**—After the commencement of this Act the distinction between felony and misdemeanour 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.

A provincial statute prior to Confederation, providing for the discharge from imprisonment in default of indictment of an accused person committed for a "felony" will apply equally to cases which were misdemeanors before the abolition by the Criminal Code of Canada of the distinction between felony and misdemeanor. R. v. Cameron (1897), 1 Can. Cr. Cas. 169 (Que.).

A person admitted to bail is technically in custody, so as to entitle him to the benefit of such a statute. Ibid.

Enactments regulating the procedure in courts are usually deemed imperative, and not merely directory. Maxwell on Statutes, 456; Taylor v. Taylor, 1 Ch. D. 426, 3 Ch. D. 145; R. v. Riel (No. 2) (1885), 1 Terr. L.R. 23, 44.

**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 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 Act 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.

SECT.



---

**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.

*New Brunswick.*]—County Courts in New Brunswick are not courts of oyer and terminer and general gaol delivery, as the circuits of the Supreme Court are. Criminal jurisdiction is given to the County Courts by statute, but nothing is said to the effect that they are courts of general gaol delivery. R. v. Wright, 2 Can. Cr. Cas. 88 (N.B.).

*(Amendment of 1893).*

**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.

The courts here mentioned have their power limited by sec. 540.

The judgments of the Courts of General Sessions in Ontario are public records, and the clerk of the peace holds them as their statutory custodian in the interests of the public generally and not as a deputy officer of the Crown. Any person interested in the indictments and records of the Court of General Sessions is entitled of right to inspect them. R. v. Scully (1901), 5 Can. Cr. Cas. 1 (Ont.).

An accused person tried and acquitted in such court is entitled to a copy of the record of such acquittal and of the indictment without the fiat of or intervention by the Attorney-General of the province, and a mandamus will lie to the clerk of the peace to compel the delivery to him of certified copies. Ibid.

**540. Jurisdiction in certain cases.**—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 65, treason; 67, accessories after the fact to treason; 68, 69 and 70, treasonable offences; 71, assault on the King; 72, inciting to mutiny; 77, unlawfully obtaining and communicating official information; 78, communicating information acquired by holding office.

Part VII.—Sections 120, administering, taking, or procuring the taking of oaths to commit certain crimes; 121, administering, taking or procuring the taking of other unlawful oaths; 124, seditious offences; 125, libels on foreign sovereigns; 126, spreading false news.

Part VIII.—Piracy; any of the sections in this part.

Part IX.—Sections 131, judicial corruption; 132, corruption of officers employed in prosecuting offenders; 133, frauds upon the Government; 135, breach of trust by a public officer; 136, corrupt practices in municipal affairs; 137 (*a*), selling and purchasing offices.

*(Amendment of 1894.)*

Part XVIII.—Sections 231, murder; 232, attempts to murder; 233, threats to murder; 234, conspiracy to murder; 235, accessory after the fact to murder.

Part XXI.—Sections 267, rape; 268, attempt to commit rape.

Part XXIII.—Defamatory libel; any of the sections in this part.

Part XXXIX.—Section 520, combinations in restraint of trade.

Part XL.—Conspiring or attempting to commit, or being accessory after the fact to any of the foregoing offences.

*(Amendment of 1900.)*

Or any indictment for bribery or undue influence, personation or other corrupt practice under The Dominion Elections Act.

**541. Exercising 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.

Where a statute declares that the jurisdiction of a county stipendiary magistrate shall extend throughout the "whole of the county," it is to be construed as including jurisdiction in any incorporated town within the county limits notwithstanding the fact that there is a stipendary magistrate for such town alone, unless the latter's jurisdiction is made exclusive. R. v. Giovanetti (1901), 5 Can. Cr. Cas. 157.

PART XLIII.

## PROCEDURE IN PARTICULAR CASES.

SECT.



---

**542. Offences within the jurisdiction of the Admiralty of England.**—Proceedings for trial and punishment of a person who is not a subject of His Majesty, and who is charged with any offence committed 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 laying of the information is the institution of the proceedings. Thorpe v. Priestnell, [1897] 1 Q.B. 159.

In a recent case in the Supreme Court of Nova Scotia, the accused, an articled seaman of foreign nationality, was committed for trial at Halifax on a charge that he "did on the 9th day of December, A.D. 1901, on the high seas on board a British foreign sea going ship on a voyage from St. Kitts, British West Indies, to Halifax via Bermuda (he then being an articled seaman on board said ship), unlawfully endeavour to make a revolt in said ship, for which he has not been tried before being brought to Canada, where he now is, in the port of Halifax."

The information charging the said offence and the depositions, consisting only of the evidence of the captain and the first officer, taken thereon by the committing magistrate being on the files of the court, having been transmitted there under the authority of sec. 600 of the Criminal Code were by the permission of the learned judges read by the prisoner on his said applications. The evidence disclosed that the prisoner when on the high

seas on board said ship, between 3½ and 9 miles after leaving the Island of St. Kitts, British West Indies, being intoxicated, struck the first officer who came into the forecastle to search for stowaways. It was not clear whether the blow was inflicted unprovokingly by the prisoner or in self-defence, as it was given during an altercation between him and the mate. Shortly afterwards in another altercation between another drunken seaman and the said officer, the prisoner was said to have encouraged by words the other seaman to defend himself, and on that seaman's request to have passed him something that looked like a knife. There was no evidence that the prisoner had done any act in furtherance of any design to interfere with the supreme command and management of the ship.

Ritchie, J., held that ch. 73 of 41 and 42 Vict. (Imp.) was not applicable, as it refers solely to offences committed within a marine league of the coasts of His Majesty's Dominions, and that if the Crown were obliged to proceed under sec. 128 of the Code alone, it could not be done until the consent of the Governor-General had been obtained in accordance with sec. 542. But he held further that full provision is made for the trial and punishment of such offences under sec. 686 of The Merchant Shipping Act, 1894 (Imperial), and that no restriction or conditions are imposed with reference to the procedure or trial as in the Criminal Code.

That statute confers power on a British colonial court of criminal jurisdiction *to try* a foreigner or a British subject found within its jurisdiction for any offence committed by him on board of a British ship on the high seas, provided such colonial court could have tried such a person if the offence had been committed within the limits of its ordinary jurisdiction. But Weatherbe, J., held that such an offender when he comes within the jurisdiction of the colonial court is subject to the general law of the place regulating the procedure for trying such offences; that the Admiralty Offences Act of 1849, 12 & 13 Vict. (Imperial), ch. 96, must receive a like construction; and that if such a person were to be tried in Canada, proceedings with that end in view would still require the consent spoken of in sec. 542 of the Code. The latter judge accordingly made an order for the prisoner's discharge on habeas corpus. R. v. Heckman (1902), not yet reported.

*Indictment.*]—No count shall be deemed objectionable or insufficient 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. Sec. 613 (*b*).

**543. Disclosing official secrets.**—No person shall be prosecuted for the offence of unlawfully obtaining and communicating official information, as defined in sections 77 and 78, without the consent of the Attorney-General or of the Attorney-General of Canada. 53 V., c. 10, s. 4.

*Attorney-General.*] — The expression "Attorney-General" means the Attorney-General or Solicitor-General of any Province in Canada in which any proceedings are taken under the Code; and, with respect to the North-West Territories and the district of Keewatin, the Attorney-General of Canada. Sec. 3 (*b*).

The indictment need not allege the consent here mentioned. [Sec. 613 (*b*).

**544. Judicial corruption.**—No one holding any judicial office shall be prosecuted for the offence of judicial corruption, as defined in section 131, without the leave of the Attorney-General of Canada.

*Leave of Attorney-General of Canada.*]—Sections 543 and 545 use the term "consent" while here the word is "leave"; but they are probably interchangeable terms and sec. 613 (*h*) would apply as well to this offence as to those referred to in secs. 543 and 545.

*British Columbia.*]—With the exception of ex-officio informations filed by the Attorney-General on behalf of the Crown, no criminal information or information in the nature of a quo warranto shall be exhibited or received in the Supreme Court without an express order of a Judge of the Supreme Court, nor shall any process be issued upon any information until the person procuring such information to be exhibited, shall have filed in the registry of the Supreme Court a recognizance in the penalty of $100, effectually to prosecute such information, and to abide by and observe such orders as the court shall direct; such recognizance to be entered into before some Justice of the Peace or Registrar of the Supreme Court. (Rule 9.)

No application shall be made for a criminal information against a Justice of the Peace for misconduct in his magisterial capacity unless a notice containing a distinct statement of the grievances or acts of misconduct complained of be served personally on him or left at his residence with some member of his household six days before the time named in it for making the application. (Rule 10.)

The application for a criminal information shall be made to the court by a motion for an order nisi within a reasonable time after the offence complained of, and if the application be made against a Justice of the Peace for misconduct in his magisterial capacity, the applicant must depose on affidavit to his belief that the defendant was actuated by corrupt motives, and further, if for an unjust conviction, that the defendant is innocent of the charge. (Rule 11.)

**545. Making explosive substances.**—If any person is charged before a justice of the peace with the offence of making or having explosive substances, as defined in section 100, no further proceedings 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.

See note to sec. 543.

*(Amendment of 1893.)*

**546. Sending unseaworthy ships to sea.**—No person shall be prosecuted for any offence under sections 256, or 257, without the consent of the Minister of Marine and Fisheries.

**547. Trustee fraudulently disposing of money.**—No proceeding or prosecution against a trustee for a criminal breach of trust, as defined in section 363, shall be commenced without the sanction of the Attorney-General. R.S.C. c. 164, s. 65.

**548. Fraudulent acts of vendor or mortgagor.**—No prosecution for concealing deeds and encumbrances, as defined in section 370, 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 proceeding or prosecution for the offence of uttering defaced coin, as defined in section 476, shall be taken without the consent of the Attorney-General.

*(Amendment of 1894).*

**550. Trial of minors.**—The trials of all 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.

The amendment made in 1894 of the above section was made by statute of Canada, 57-58 Vict., ch. 58, entitled an Act respecting Arrest, Trial and Imprisonment of Youthful Offenders, which begins with a recital 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."

It also makes the following provisions:—

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. 57-58 Vict., ch. 58, sec. 2.

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. Ibid. sec. 3.

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 shewn 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. Ibid. s. 4.

Wherever 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. Ibid. s. 5.

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 fosterhome; 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 fosterhome. But this section shall not apply to the care of children in a temporary home or shelter, established under the Act of Ontario, 56 Vict., ch. 45, 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. Ibid. sec. 6.

*Commencement of prosecution.*]—Laying the information is the commencement of a prosecution. Thorpe v. Priestnell, [1897] 1 Q.B. 159; Vaughton v. Bradshaw, 9 C.B.N.S. 103, following Tunnicliffe v. Tedd, 5 C.B. 553. Where, therefore, a statute provided that all prosecutions thereunder should be commenced within twenty days after the commission of the offence, and an information was taken on 30th December laying the offence on 16th December, but no summons was issued on the information till 15th January, it was held that the prosecution was commenced in time. R. v. Lennox (1878), 34 U.C.Q.B. 28.

*(Amendment of 1900).*

**550A. Excluding public from court room.**—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.

The following are the subjects dealt with by the sections above referred to:—Sec. 174, Unnatural offence; 185, Attempt to commit sodomy; 176, Incest; 177, Indecent acts; 178, Acts of gross indecency; 181, Seduction of girls under 16; 182, Seduction under promise of marriage; 183, Seduction of ward, servant, etc.; 184, seduction of passengers on vessels; 185, Procuring; 186, Parent or guardian procuring; 187, Householders permitting defilement on premises; 188, Conspiracy to defile; 189, Carnally knowing idiots, etc.; 190, Prostitution of Indian women; 195 to 198, Keeping disorderly house; 207 (*i*), (*j*) and (*k*), Being common prostitute; keeping house of ill-fame; frequenting such house; 259, Indecent assault on females; 260, indecent assault on males; 267, Rape; 268, Attempt to commit rape; 269, Defiling children under 14; 270, Attempting to defile child; 271, Killing unborn child; 272, Procuring abortion; 273, Woman procuring her own miscarriage; 274, Supplying noxious drugs, etc.; 281, Abduction of woman; 282, Abduction of heiress.

The Solicitor General (Hon. Mr. Fitzpatrick), made the following statement with regard to the object of this section, when it came up for discussion in the Commons:—"Under the general law, the courts are open to the general public, but by sec. 550 the trials of all persons under the age of sixteen years shall, as far as practicable, take place without publicity. Our intention is to extend substantially the provisions of sec. 550 to the cases provided for in 550a. In the trial of charges for indecent offences and things of that kind, we leave it discretionary with the judge to declare that for the purpose of such trials the court shall not be a public court, and that he shall have power to determine who shall have access." Commons Sessional Debates 1900, page 5266.

**551. Time within which proceedings shall be commenced in certain cases.**—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 His Majesty or where the overt act alleged is an attempt to injure the person of His Majesty (Part IV., section 65);

(ii.) treasonable offences (Part IV., section 69);

(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 133);

(ii.) a corrupt practice in municipal affeairs (Part IX., section 136);

(iii.) unlawfully solemnizing marriage (Part XXII., section 279); 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 83);

(ii.) refusing to deliver weapon to justice (Part VI., section 113);

(iii.) coming armed near public meeting (section 114);

(iv.) lying in wait near public meeting (section 115);

(v.) seduction of girl under sixteen (Part XIII., section 181);

(vi.) seduction under promise of marriage (section 182);

(vii.) seduction of a ward, etc., (section 183);

(viii.) unlawfully defiling women (section 185);

(ix.) parent or guardian procuring defilement of girl (section 186);

(x.) householders permitting defilement of girls on their premises (section 187); nor

(*d*) after the expiration of six months from its commission, if the offence be—

(i.) unlawful drilling (Part V., section 87);

(ii.) being unlawfully drilled (section 88);

(iii.) having possession of arms for purposes dangerous to the public peace (Part VI., section 102);

(iv.) proprietor of newspaper publishing advertisement offering reward for recovery of stolen property (Part X., section 157, paragraph (*d*); nor

(*e*) after the expiration of three months from its commission, if the offence be cruelty to animals under sections 512 and 513 (Part XXXVIII); nor

(ii.) railways violating provisions relating to conveyance of cattle (Part XXXIX., section 514);

(iii.) refusing peace officer admission to car, etc. (section 515);

(*f*) after the expiration of one month from its commission, if the offence be

(i.) improper use of offensive weapons (Part VI., sections 103, and 105 to 111 inclusive).

2. No person shall be prosecuted, under the provisions of s. 65 or s. 69 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.

In a New Brunswick case under The Canada Temperance Act, there was a conviction for a sale on Nov. 20th, 1896. The information was laid on Feb. 19th, 1897, but the summons was not issued until March 22nd, 1897, more than three months after the alleged offence. It was held that the laying of the information was the commencement of the prosecution within the meaning of sec. 106 of The Canada Temperance Act. Ex parte George Wallace (1897), 33 Can. Law Jour. 506.

**552. Arrest without warrant.**—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:

Part IV.—Sections 65, treason; 67, accessories after the fact to treason; 68, 69 and 70, treasonable offences; 71, assaults on the King; 72, inciting to mutiny.

Part V.—Sections 83, offences respecting the reading of the Riot Act; 85, riotous destruction of buildings; 86, riotous damage to buildings.

Part VII.—Sections 120, administering, taking or procuring the taking of oaths to commit certain crimes; 121, administering, taking or procuring the taking of other unlawful oaths.

Part VIII.—Sections 127, piracy; 128, piratical acts; 129, piracy with violence.

Part XI.—Sections 159, being at large while under sentence of imprisonment; 161, breaking prison; 163, escape from custody or from prison; 164, escape from lawful custody.

Part XIII.—Section 174, unnatural offence.

Part XVIII.—Sections 231, murder; 232, attempt to murder; 235, being accessory after the fact to murder; 236, manslaughter; 238, attempt to commit suicide.

Part XIX.—Sections 241, wounding with intent to do bodily harm; 242, wounding; 244, stupefying in order to commit an indictable offence; 247 and 248, injuring or attempting to injure by explosive substances; 250, intentionally endangering persons on railways; 251, wantonly endangering persons on railways; 254, preventing escape from wreck.

Part XXI.—Sections 267, rape; 268, attempt to commit rape; 269, defiling children under 14.

Part XXII.—Section 281, abduction of a woman.

Part XXV.—Section 314, receiving property dishonestly obtained.

*(Amendment of 1895).*

Part XXVI.—Sections 319, theft by clerks and servants, etc.; 320, theft by agents, etc.; 321, public servant refusing to deliver up chattels, etc.; 322, theft by tenants and lodgers; 323, theft of testamentary instruments; 324, theft of documents of title; 325, theft of judicial or official documents; 326, theft of postal matter; 327, theft of postal matter; 328, theft of postal matter; 329, theft of election documents; 330, theft of railway tickets; 331, theft of cattle; 334, theft of oysters; 335, theft of things fixed to buildings or land; 344, stealing from the person; 345, stealing in dwelling-houses; 346, stealing by picklocks, etc.; 347, stealing in manufactories; 349, stealing from ships, etc.; 350, stealing from wreck; 351, stealing on railways; 355, bringing stolen property into Canada.

Part XXIX.—Sections 398, aggravated robbery; 399, robbery; 400, assault with intent to rob; 401, stopping the mail; 402, compelling execution of documents by force; 403, sending letter demanding with menaces; 404, demanding with intent to steal; 405, extortion by certain threats.

Part XXX.—Sections 408, breaking place of worship and committing an indictable offence; 409, breaking place of worship with intent to commit an indictable offence; 410, burglary; 411, housebreaking and committing an indictable offence; 412, housebreaking with intent to commit an indictable offence; 413, breaking shop and committing an indictable offence; 414, breaking shop with intent to commit an indictable offence; 415, being found in a dwelling-house by night; 416, being armed, with intent to break a dwelling-house; 417, being disguised or in possession of housebreaking instruments.

Part XXXI.—Sections 423, forgery; 424, uttering forged documents; 425, counterfeiting seals; 430, possessing forged bank notes; 432, using probate obtained by forgery or perjury.

Part XXXII.—Sections 434, making, having or using instrument for forgery or uttering forged bond or undertaking; 435, counterfeiting stamps; 436, falsifying registers.

Part XXXIV.—Section 458, personation of certain persons.

Part XXXV.—Sections 462, counterfeiting gold and silver coin; 466, making instruments for coining; 468, clipping current coin; 470, possessing clipping of current coin; 472, counterfeiting copper coin; 473, counterfeiting foreign gold and silver coin; 477, uttering counterfeit current coin.

Part XXXVII.—Sections 482, arson; 483, attempt to commit arson; 484, setting fire to crops; 485, attempting to set fire to crops; 488, attempt to damage by explosives; 489, mischief on railways; 492, injuries to electric telegraphs, etc.; 493, wrecking; 494, attempting to wreck; 495, interfering with marine signals; 498, mischief to mines; 499, mischief.

*(Amendment of 1895).*

2. A peace officer may arrest without warrant any one who has committed or who is found committing any of the offences mentioned in the said sections or in the following sections, that is to say:

Part XXVII.—Sections 359, obtaining by false pretense; 360, obtaining execution of valuable securities by false pretense.

Part XXXV.—Sections 465, exporting counterfeit coin; 471, possessing counterfeit current coin; 473, paragraph (*b*), possessing counterfeit foreign gold or silver coin; 473, paragraph (*d*), counterfeiting foreign copper coin.

Part XXXVII.—Sections 497, cutting booms, or breaking loose rafts or cribs of timber or saw-logs; 500, attempting to injure or poison cattle.

Part XXXVIII.—Sections 512, cruelty to animals; 513, keeping cock-pit.

*(Amendment of 1895).*

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.

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.

*(Amendment of 1895).*

5. The owner of any property on or in 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.

6. Any officer in His 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 s. 119 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.

*At common law.*]—The law is stated in Hale's Pleas of the Crown, Vol. 2, 76, that "when a private person, that is, a person not by office a keeper of the peace, or a justice, or a constable, takes upon himself to arrest another, without a warrant for a supposed offence, he must be prepared to prove that a felony has been committed, for in that respect he acts on his own peril." Mere suspicion that there has been a felony committed by some one will not do; though if he is prepared to shew that there really has been a felony committed by some one, then he may justify arresting a particular person, upon reasonable grounds of suspicion that he was the offender; and mistake on that point, when he acts sincerely upon strong grounds of suspicion, will not be fatal to his defence to an action for trespass and false imprisonment. McKenzie v. Gibson (1851), 7 U.C.Q.B. 100. Sub-sec. 4 of the above sec. 552 extends the common law rule.

*Loitering at night.*]—Sub-sec. 1 (7*a*) applies only to cases coming within sub-sec. 7, and it is not necessary in other cases to bring the person arrested before a justice of the peace before noon of the day following the arrest. R. v. Cloutier (1898), 2 Can. Cr. Cas. 43 (Man.).

Unsworn statements made to the officer, to the effect that the person had committed a larceny on the previous day, are insufficient to justify a constable in the service of a municipality in taking a person into custody and depriving him of his liberty, on a criminal charge, without any sworn complaint having been made, and without a warrant issued by competent authority, more especially where there was no reason to suspect that he would attempt to evade arrest. Musseau v. City of Montreal, Q.R. 12 S.C. 61.

PART XLIV.

## COMPELLING APPEARANCE OF ACCUSED BEFORE JUSTICE.

SECT.



---

**553. Magisterial jurisdiction.**—For the purposes of this Act, the following provisions shall have effect with respect to the jurisdiction of justices:

*(Amendment of 1900).*

(*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 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.

*Magistrate's jurisdiction.*]—The general rule is that the magistrate or justice of the peace has jurisdiction either by reason of the residence or presence of the accused in his district, or by reason of the commission of the offence within its limits. There is, however, an enlargement of this general rule in sec. 553, whereby, when an offence is begun within one magisterial jurisdiction and completed within another, such offence may be considered as having been committed in either of them. R. v. Hogle (1896), 5 Can. Cr. Cas. 53, R.J.Q. 5 Q.B. 59.

This section is derived from the Imperial Act, 7 Geo. IV., ch. 64, sec. 12.

In Rex v. Girdwood (1776), 2 East P.C. 1120, 1 Leach's Crown Cases 169, it was held on a case reserved, that a person writing a threatening letter in one county and delivering it to another person in that county, by whom it was posted at the writer's request to an address in another county, was properly tried and convicted in the latter country.

In R. v. Esser (1767), 2 East P.C. 1125, Lord Mansfield held that the sending of a letter by post directed to a person in another county was sending also in the latter county, and that the whole was to be considered as the act of the defendant to the time of the delivery in that county. 3 Russell on Crimes, 6th ed., 722 (*p*).

If the accused person, "wherever he may be," (i.e., within Canada), is charged with having committed an indictable offence within the limits over which a justice of the peace has jurisdiction, the justice is empowered to issue a warrant or summons to compel the attendance of the accused person

before him for the purpose of preliminary enquiry; Cr. Code, sec. 554 (*b*); and the accused may be arrested upon such warrant in any part of Canada upon the warrant being "endorsed" by a justice within whose jurisdiction the accused may be found; Cr. Code 565 and Code form H. The "endorsement" is to be made only upon proof, by oath or affirmation, of the handwriting of the justice who issued the same, and when made is sufficient authority to the person bringing such warrant, to carry the person against whom the warrant is issued, when apprehended, before the justice who issued the warrant or before other justices at the place from which the warrant came. Cr. Code 565.

The courts will take judicial notice of the local divisions, such as counties, municipalities and polling sections, into which their country is divided for purposes of political government. Ex parte Macdonald (1896), 3 Can. Cr. Cas. 10 (S.C. Can.).

Where the offence charged was the making, circulation and publication of false statements of the financial position of a company, and it appeared that the statements were mailed from a place in Ontario to the parties intended to be deceived in Montreal, the offence, although commenced in Ontario, is completed in the Province of Quebec by the delivery of the letters to the parties to whom they were addressed. R. v. Gillespie (No. 2) (1898), 2 Can. Cr. Cas. 309 (Que.).

In such case, the courts of the Province of Quebec have jurisdiction to try the accused, if he has been duly committed for trial by a magistrate of the district. Ibid.

The offence of fraudulent conversion of the proceeds of a valuable security may consist in a continuity of acts—the reception of the valuable security, the collection of the proceeds, the conversion of the proceeds, and lastly the failure to account for them; and where the beginning of the operation is in one district and the continuation and completion are in another district, the accused may be proceeded against in either district. R. v. Hogle (1896), R.J.Q. 5 Q.B. 59; 5 Can. Cr. Cas. 53.

Magistrates cannot give themselves jurisdiction or retain jurisdiction by finding a particular fact one way, if the evidence is clearly the other way. White v. Feast (1872), L.R. 7, Q.B. 353; R. v. Davy (1900), 4 Can. Cr. Cas. 28, 33 (Ont. C.A.).

A prohibition may issue to a court exercising criminal jurisdiction as well as to a civil court. Per Cockburn, C.J., in R. v. Herford, 3 El. & El. p. 136. And there is no doubt that prohibition can issue to a Justice of the Peace to prohibit him from exercising a jurisdiction which he has not. Chapman v. Corporation of London (1890), 19 Ont. R. 33.

*Keepers of the peace.*]—In 1327, 1 Edward 3, ch. 16, it was enacted that "For the better keeping and maintenance of the peace, the King will that in every county good men and lawful, which be no maintainers of evil or barrators in the country, shall be assigned to keep the peace." By 4 Edw. 3, ch. 2, they were to send their indictments to be tried by the justices of assize, but later it was further provided that two or three of the best reputation in the counties should be assigned keepers of the peace by the King's Commission. (18 Edw. 3, stat. 2, ch. 3.) The statute 34 Edw. 3, ch. 1, giving them further powers, first designated them as "justices."

**554. When 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, wherever he may be, is accused of having committed an indictable offence within such limits;

(*c*) If such person is alleged to have anywhere unlawfully received property which was unlawfully obtained within such limits;

(*d*) If such person has in his possession, within such limits, any stolen property.

*Preliminary enquiry.*]—A party applying to a magistrate for a warrant to arrest another for an alleged offence is deemed only to appeal to the magistrate to exercise his jurisdiction, and is not liable in trespass for an arrest under the warrant, but if he goes beyond this and interferes in the exercise of the ministerial powers under the warrant he will be liable. Kingston v. Wallace (1886), 25 N.B.R. 573.

If there was a complaint proved and the person informed against was present, the magistrate might rightly proceed, though such person did not appear on summons, or did not require compulsion to make him appear. His actual presence is all that is required; the manner of his getting there is of no consequence to the investigation. R. v. Mason (1869), 29 U.C.Q.B. 431.

The power conferred on a magistrate under sec. 557 of ordering the accused person brought before him, charged with an offence committed out of his territorial jurisdiction, to be taken before some justice having jurisdiction in the place where the offence was committed, is permissive only. A magistrate may hold a preliminary enquiry in respect of an indictable offence committed in the same province outside of his territorial jurisdiction, if the accused is, or is suspected to be, within the limits over which such magistrate has jurisdiction, or resides or is suspected to reside within such limits. Re the Queen v. Burke (1900), 5 Can. Cr. Cas. 29 (Ont.).

See also notes to sec. 553 and 609.

*Service of summons.*]—Where the door of the defendant's house was fastened, and the constable spoke to him through a closed window, explaining the nature of the process and then placed a copy of it under the door, informing the defendant thereof, after which he returned to the window and shewed the original summons to the defendant, who said, "That will do," it was held a sufficient service of the summons. Ex parte Campbell (1887), 26 N.B.R. 590. But it would seem that but for what the defendant then said, it would have been set aside. Ibid.

**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 inquired 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 trial 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 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.

**556. Offences committed in the district of Gaspe.**—Whenever any offence is committed in the district of Gaspe, 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 King'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. Offence committed out of justices' jurisdiction.**—The preliminary enquiry 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, 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 thereupon furnish such constable with a receipt or certificate in the form B in schedule one hereto, 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.

FORM A.—

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 .

FORM B.—

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 (*&c., 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.)*

The power conferred on a magistrate under this section of ordering the accused person brought before him, charged with an offence committed out of his territorial jurisdiction, to be taken before some justice having jurisdiction in the place where the offence was committed, is permissive only. R. v. Burke (1900), 5 Can. Cr. Cas. 29 (Ont.).

*(Amendment of 1895).*

**557A.—District of Montreal.**—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. 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, or to the like effect.

FORM C.—

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 His Majesty's justices of the peace in and for the said county of , who saith that (*etc., stating the offence*).

Sworn before (*me*), the day and year first above mentioned, at .

J. S.,
*J. P., (Name of County.)*

*Information before justices.*]—The Sovereign is supposed by law to be the person who is injured by every infraction of the criminal law, and criminal prosecutions which have for their object the well-being of the people, and not merely private redress, are therefore carried on in the name of the King. As the King cannot appear in person to demand the punishment of offences against the good order of the community, he has to be represented before the courts by a public officer, and that officer is the Attorney-General.

Before the criminal courts the Sovereign is therefore the prosecutor, and is represented either by the Attorney-General himself, or by crown prosecutors who are named by the Attorney-General as his substitutes.

But as offences generally affect some private individual in particular, the person so injured or affected usually commences the proceedings for bringing the offender to justice, although anyone who has reasonable or probable ground for believing that any person has been guilty of a crime may take proceedings and put the law in motion against him. R. v. St. Louis (1897), 1 Can. Cr. Cas. 141, 144 (Que.).

The information is the commencement of a criminal proceeding analogous to an indictment; the summons is the act of the magistrate on behalf of the public; the party who begins a criminal proceeding cannot withdraw from it leaving it pending, the party charged has the right to force it on to a conclusion; and if at the time for concluding the case, the informant offers no evidence in support of his charge, it ought to be dismissed, and such dimissal is a hearing. Vaughton v. Bradshaw, 9 C.B.N.S. 103; Re Conklin (1871), 31 U.C.Q.B. 160.

A summons may be issued upon an information before a justice of the peace for an offence punishable on summary conviction, although the information has not been sworn; but before a warrant can be issued to compel the attendance of the accused, there must be an information in writing and under oath. R. v. William McDonald (1896), 3 Can. Cr. Cas. 287 (Ont.).

The magistrate taking an information under oath ought not to receive from the complainant a mere affidavit made out in the words of the statute creating the offence; but he ought, in the first place, to swear the complainant and his witnesses, if any, and have their statements and answers written down in their own words and have them sign it. This when so completed is what is known as a "written information under oath." Ex parte Boyce (1885), 24 N.B.R. 347, 354. The practice of taking down the statements of the witnesses without their being sworn and afterwards swearing them to the truth of same is disapproved. Mills v. Collett (1829), 6 Bing. 85; R. v. Kiddy, 4 D. & R. 734; Caudle v. Seymour, 1 Q.B. 889.

An information should give a concise and legal description of the offence charged, and should contain the same certainty as an indictment, and the description of the charge must include every ingredient required by the statute to constitute the offence, and the statement of the offence may be in the words of the enactment describing it or declaring the transaction charged to be an indictable offence. R. v. France (1898), 1 Can. Cr. Cas. 321 (Que.).

The absence or the insufficiency of particulars does not vitiate either an indictment or an information; but if it be made to appear that there is a reasonable necessity for more specific information, the court or magistrate may, on application of the accused person, order that further particulars be given, but such an order is altogether within the judicial discretion of the judge or the magistrate. Ibid.

An information may be amended, but if on oath, it must be re-sworn. Re Conklin (1871), 31 U.C.Q.B. 160.

If a magistrate's summons is issued on an information purporting to have been 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 because it is afterwards shewn that the information was not in fact sworn at such time and place. Ex parte Sonier (1896), 2 Can. Cr. Cas. 121 (N.B.).

Where an information was entitled in the name of an incorporated company but was signed in his own name by the manager of the company, and sworn to by him, it was held in an Australian case that it was the information of the manager individually and that a warrant might issue upon it. Colonial Mutual Life Co. v. Robertson (1897), 18 Australian Law Times 257.

*Defect or irregularity in information.*]—It is not a matter within the discretion of the magistrates whether a man shall be put on his trial without

any proper preliminary proceedings; and in administering justice summarily, strict regularity must be observed. Blake v. Beach (1876), L.R. 1 Ex. D. 320, 334, 335. A man is not to be put at the mercy of the magistrates in granting delay where he has a right not to be put upon his trial; if he waives the want of information and summons, and *by his own assent* is properly before the magistrates, it would be in their discretion to grant or refuse delay in order to prepare his defence. Ibid, p. 334.

It was established by the decision in R. v. Hughes, 4 Q.B.D. 614, by the Full Court of Criminal Appeal that when a person is before justices who have jurisdiction to try the case, they need not inquire how he came there, but may try it. In commenting upon that decision in Dixon v. Wells (1890), 25 Q.B.D. 249, Lord Coleridge, C.J., said (p. 256):—

"I do not, however, feel able to decide in his (appellant's) favour on that point alone (i.e., that objection had been taken before the magistrate), for, although the fact of his protest ought to be a complete answer to the assumed jurisdiction, I cannot disguise from myself the fact that from the language of many of the judges in R. v. Hughes, 4 Q.B.D. 614—although, perhaps, not necessary for the decision of the case—and the judgments of Erle, C.J., and Blackburn, J., in R. v. Shaw, 34 L.J.M.C. 169, they seem to assume that if the two conditions precedent, of the *presence of the accused* and *jurisdiction over the offence*, were fulfilled, his protest would be of no avail. It would have been easy to say that a protest would have made a difference; but I find no such qualification in R. v. Hughes, although something like that is said in one of the cases; it is an important question well worth consideration in the Court of Appeal."

The warrant of a magistrate is only prima facie evidence of the fact recited therein that an information on oath and in writing had been laid. Friel v. Ferguson (1865), 15 U.C.C.P. 584.

An information should include a statement of the following particulars: (1) the day and year when exhibited, (2) the place where exhibited, (3) the name and style of the justice or justices before whom it is exhibited, and (4) the charge preferred. Pritchard's Q.S. Prac. (1875), 1058.

A complaint or information is essential as the foundation of summary proceedings, and without it the justice is not authorized in intermeddling, except where he is empowered by statute to convict on view. Paley on Convictions, 7th ed., 72; 1 Wms. Saunders, 262, n. 1; R. v. Justices of Bucks, 3 Q.B. 800, 807; R. v. Bolton, 1 Q.B. 66; R. v. Fuller, 1 Ld. Raym. 509; R. v. Millard, 17 Jur. 400, 22 L.J.M.C. 108.

A complaint or information in matters to be summarily tried by a justice of the peace may be made either by the complainant personally or by his counsel or attorney or other person authorized in that behalf. Cr. Code 845 (3).

The proceeding which forms the groundwork of a "conviction" is termed laying or exhibiting an *information*, while the proceeding for the obtaining of an "order" of justices is termed making a *complaint*. Paley on Convictions, 7th ed., 73.

By Cr. Code, sec. 845 (2), an information or complaint for any offence or act "punishable on summary conviction" need not be under oath unless specially required by the particular Act or law. The statute which authorizes summary proceedings against a tenant for the fraudulent removal of goods is one of these, and specially requires that the complaint be made in *writing* by the landlord, his bailiff, servant, or agent; 11 Geo. II. (Imp.), ch. 19, sec. 4; and a conviction under that Act must shew that the complaint was so made. R. v. Fuller, 2 D. & L. 98; Coster v. Wilson, 3 M. & W. 411; R. v. Davis, 5 B. & Ad. 551.

A *variance* between the information and the evidence adduced in support thereof at the hearing, in a matter to which the summary convictions

clauses of the Code apply, will not invalidate a conviction based on the evidence unless (1) objection was made before the convicting justice, or (2) an adjournment of the hearing was refused notwithstanding that it was "shewn to such justice" that by such variance the defendant had been deceived or misled. Cr. Code 882. If any *variance* between the information and the evidence adduced in support thereof as to the place in which the offence is alleged to have been committed, or any *other* variance between the information and the evidence, appears to the justice 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. Cr. Code 847. The intention of the adjournment is that the accused may be prepared to meet the varied charge disclosed by the evidence, and the better practice is to have the information amended and re-sworn by the complainant. These provisions as to variance do not, however, extend to a case where the information has been laid and the party summoned for one offence, and the justices have convicted him of another and different offence punishable in another and a different way. Martin v. Pridgeon (1859), 28 L.J.M.C. 179, 1 E. & E. 778; R. v. Brickhall, 33 L.J.M.C. 156.

And a conviction is not to be quashed on certiorari, although it does not describe an offence against the law, ex. gr., by reason of an omission to state scienter of the accused, if the court, upon perusal of the depositions, is satisfied that an offence of the nature described in the conviction has been committed. Code sec. 889; R. v. Crandall (1896), 27 Ont. R. 63.

In R. v. Hughes (1879), 4 Q.B.D. 614, the facts shewn were that the justice had issued a warrant of arrest informally and without oath. The defendant, having no knowledge of the defect, made no objection to the hearing of the charge.

The Queen's Bench Division (Lopes, Hawkins, Lindley, Manisty, Denman and Field, JJ., and Pollock, B., and Huddleston, B.), held that the irregularity in the progress of bringing the defendant before the court had no effect on the jurisdiction, and that the defendant and a person who committed perjury on the hearing were rightly convicted.

In many cases the word "charge" in no way involves a written information, and it is sufficient to shew that a person is brought before the magistrate somehow or other, and all that is necessary to give the magistrate jurisdiction is to shew that the person, being once before him, the crime with which the accused is charged is within the jurisdiction of the magistrate. Per Pollock, B., in Re Maltby (1881), 7 Q.B.D. 18 at page 28, citing R. v. Hughes, supra.

The case of R. v. Hughes, 4 Q.B.D. 614, was followed in Gray v. Commissioners of Customs (1884), 48 J.P. 343, by Lord Coleridge, C.J., and Pollock, B., the former referring to it as "a case of great authority, decided by no less than nine judges, and only one of those judges dissented from the judgment." In Gray's case the court affirmed the rule that "where a defendant is actually charged and appears before justices, and those justices have jurisdiction, and though the defendant may have been brought before the justices by illegal process, yet inasmuch as the justices have jurisdiction and they adjudicate on the case, that adjudication cannot afterwards be disputed by raising objections to the arrest." 48 J.P. 343, 344.

But where a summons for an offence under a statute relating to adulteration of food and drugs had been signed by a magistrate who had not actually heard the information, and the limitation of time within which the statute required that the summons under it should be served had expired before the hearing, and both parties appeared at the hearing, but the defendant objected to the irregularity, the conviction was quashed by the Queen's Bench Division upon the ground that there was no valid summons, and that,

as the provisions of the statute had not been complied with, there was no jurisdiction. Dixon v. Wells (1890), 25 Q.B.D. 249.

Although the irregularity of defendant's appearance may be waived, it is necessary that he should be told what the charge is before conviction. Re Daisy Hopkins (1892), 56 J.P. 263, 274.

In conformity with the decisions above referred to, it has been held by the Supreme Court of New Brunswick that if a magistrate's summons is issued on an information purporting to have been 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 because it is afterwards shewn that the information was not in fact sworn at such time and place. Ex parte Sonier, 2 Can. Cr. Cas. 121.

Although an arrest has been illegally made under an invalid warrant, jurisdiction attaches to the magistrate when the person arrested is brought before him; and the subsequent detention and commitment may be justified under the order then made by the magistrate. McGuiness v. Dafoe (1896), 3 Can. Cr. Cas. 139 (Ont.).

An information under oath which on its face purports to be the information of a person other than the person who has signed and sworn to the same is bad. Where a warrant of arrest based upon such defective information has been issued to enforce the attendance of the accused before a magistrate, and the magistrate at the opening of the trial amends the information by inserting therein, in the presence of and with the consent of the person who had signed and sworn to the information, the latter's name in the place of the name so appearing on the face of the information, it is necessary that the information should be re-sworn. Where the defendant has been arrested under the warrant and when brought before the magistrate takes objection to the amended information upon the ground that it should be re-sworn after the amendment, and has the objection noted, he does not waive the objection by proceeding with the trial and cross-examining witnesses. R. v. McNutt, 3 Can. Cr. Case 184 (N.S.).

*False accusation.*]—Where an information for rape or other offence under Code sec. 405 is laid with the sole intent to extort money or property from the person against whom the charge is made, the informant thereby "accuses" such person with intent to extort or gain something from him under Cr. Code 405; and commits an indictable offence thereunder. R. v. Kempel, 3 Can. Cr. Cas. 481 Ont.).

**559. Hearing on information.**—Upon receiving any 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 the offender may be arrested without warrant. R.S.C. c. 174, s. 30.

*Discretion as to warrant of arrest.*]—The combined effect of secs. 559 and 843 of the Code is that it is discretionary with the magistrate to issue either a summons or a warrant as he may deem best. R. v. McGregor (1895), 2 Can. Cr. Cas. 410, 413.

The issue of a summons, whether in relation to an offence punishable summarily or to an indictable offence, is a judicial act. R. v. Ettinger (1899), 3 Can. Cr. Cas. 387, 32 N.S.R. 176.

Except where the charge is of a very serious nature a warrant ought not to be issued when a summons will be equally effectual. O'Brien v. Brabner, 4 J.P. 227, 78 Eng. L.T. 409.

A justice of the peace could always issue a warrant on the information of others having cause of suspicion, for the justice was competent to judge of the sufficiency of the evidence. 2 Hale P.C. 107. When he examined the complainant and his witnesses touching his reasons for the suspicion, it would if well founded become the justice's suspicion as well as that of the complainant. Ex parte Boyce (1885), 24 N.B.R. 347, 353. But the mere statement of a person, even under oath, that he suspects and believes that another person has committed a certain crime was not sufficient at common law to justify a warrant to apprehend, for unless the justice has the facts on which the informant's belief is founded, he has no proof at all on which he would be justified in founding his own belief. Ibid. p. 355, per Palmer, J.

Depositions taken ex parte by the magistrate on the application to him for process against the accused cannot be afterwards used as evidence on the preliminary enquiry and do not form a part of the record of proceedings against the accused. Weir v. Choquet, 6 Rev. de Jurisp. 121.

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 the consideration of the complainant's allegations he is of opinion that a case for so doing is not made out. A magistrate refusing to issue a warrant on an information for an indictable offence, is not bound to state his reason for so doing; 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. That a magistrate did not properly appreciate the evidence submitted upon an application for the issue of a warrant of arrest for an indictable offence is not a ground for a mandamus to compel him to grant a warrant against his opinion, formed in good faith. Thompson v. Desnoyers, 3 Can. Cr. Cas. 68, R.J.Q. 16 S.C. 253 (Que.).[1]

Where a 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 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. Re E. J. Parke, 3 Can. Cr. Cas. 122 (Ont.).

*Time.*]—As to the time within which certain prosecutions must be brought see secs. 551 and 841.

**560. Warrant in cases of offences committed on the seas, etc.**—Whenevever any indictable offence is committed 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, 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.

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.*

**561. Arrest of suspected deserter.**—Every one who is reasonably suspected of being a deserter from His 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 like manner as other penalties under this Act. R.S.C. c. 169, s. 7.

**562. Contents and service of summons.**—Every one mons 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, 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 be conveniently 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.

FORM E.—

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 His 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.)*

*Substitutional service.*]—The proof of service of a magistrate's summons served substitutionally must shew that the defendant could not be conveniently served in person, and that the adult person substitutionally served for him at the defendant's place of abode is an inmate thereof. Re Barron (1897), 4 Can. Cr. Cas. 465 (P.E.I.).

Where proof of the substitutional service becomes necessary in order to enable the magistrate to proceed with the trial, and is defective in both of such particulars, the conviction will be quashed on certiorari, nor will evidence be received in the certiorari proceedings to supplement the proof of service given before the magistrate. Ibid.

Service of a summons to appear before a magistrate to answer a charge of having committed an offence punishable by summary conviction is not validly made although left with the defendant's wife at his usual place of abode, if the defendant was then absent from Canada and remained away until after the hearing. The magistrate in such a case acquires no jurisdiction over the person of the defendant, and a conviction made in the defendant's absence upon such service will be quashed. Ex parte Donovan (1894), 3 Can. Cr. Cas. 286 (N.B.).

In an English case a summons served at 8 a.m. to appear at a petty sessions eight miles distant on the following day to answer a charge of assault was held to be well served, although the defendant was not at home when the summons was left and did not return home until 11 p.m. of the day of service; and on the non-appearance of the accused the justices were justified in proceeding ex parte. Ex parte Williams, 21 Eng. L.J. 46. But where a summons was left on March 10th with defendant's mother at his usual place of abode, requiring him to appear on March 12th, but defendant, a fisherman, described in the summons as a stonemason, had gone to sea on March 9th and did not return until April 19th, a conviction made ex parte was quashed. Re William Smith, L.R. 10 Q.B. 604.

*Summons against corporation.*]—The procedure of the Criminal Code of Canada as to summary convictions applies as well to corporations as to natural persons. 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. R. v. Toronto Ry. Co. (1898), 2 Can. Cr. Cas. 471.

Notice to a corporation of a summons by justices may be given in a manner similar to a notice of indictment under Cr. Code 637. Ibid.

**563. Warrant for apprehension 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 s. 558, may in the form F in schedule one hereto, 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 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. R.S.C. c. 174, ss. 43, 44 and 46.

FORM F.—

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 His 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.)*

FORM G.—

WARRANT WHEN THE SUMMONS IS DISOBEYED.

Canada,
County of , }
Province 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 His 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 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 His 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.)*

A written and sworn information is essential before a warrant can be legally issued. Friel v. Ferguson (1865), 15 U.C.C.P. 584.

Where the information on which a warrant to arrest has been issued was in fact taken on oath, the omission to state that fact in the warrant is at most an irregularity only, which would be cured by sec. 578. Kingston v. Wallace (1886), 25 N.B.R. 573.

And if a warrant be irregularly issued without oath and the defendant on arrest thereon makes no objection to the hearing of the charge, the irregularity does not deprive the justice of jurisdiction to proceed thereunder, although the accused had no knowledge of the defect at the time. R. v. Hughes (1879), L.R. 4 Q.B.D. 614; Grey v. Commissioners, 48 J.P. 343.

**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 a constable.

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.

It would seem that a warrant of commitment following a summary conviction is not within sub-sec. (3); and an arrest on Sunday for default in payment of a fine under the Canada Temperance Act was held void. Ex parte Freeker (1897), 33 C.L.J. 248 (N.S.).

**565. Proceeding when offender is not within the jurisdiction of the justice issuing the warrant.**—If the person 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 handwriting 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. R.S.C. c. 174, s. 49.

FORM H.—

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 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 county aforesaid.

J. L.,
*J. P., (Name of County.)*

**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.

A person summoned but not arrested for trespassing on a railway track, is not liable to be tried elsewhere than in the local jurisdiction wherein the offence was committed. R. v. Hughes (1895), 2 Can. Cr. Cas. 332.

Section 283 of the Railway Act (Can.), 51 Vict., ch. 29, authorizing a railway constable to "take" persons offending against the provisions of that Act, and punishable summarily, before a justice for any county, etc., within which such railway passes, and giving such justice jurisdiction to deal with such a case, as though the offence had been committed "within the limits of his own local jurisdiction," applies only were the offender has been *arrested* by railway constable. Ibid.

Semble, the provisions of sec. 283 of the Railway Act apply only to arrests made by a railway constable without a warrant under the provisions of that Act, and not to a case where an information is laid and a warrant is issued instead of a summons to bring the offender before the justice to answer the charge. Ibid.

**567. Disposal of person apprehended on warrant.**—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 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.

*Coroner's inquisitions.*]—A coroner's inquisition or the finding of a coroner's jury is no longer sufficient to alone place the accused on trial before a petit jury for the offence charged in such finding. Sec. 642. There must first be a true bill found by a Grand Jury before that can be done.

A coroner's court is a court of record, and the coroner is a judge of a court of record. Thomas v. Churton (1862), 2 B. & S. 475; Jervis on Coroners, 5th ed., p. 62; Boys on Coroners, 2nd ed., pp. 2, 208; Davidson v. Garrett (1899), 5 Can. Cr. Cas. 200 (Ont.), 35 C.L.J. 502; but a coroner is not a "justice" within the meaning of sec. 687, which provides for using upon a trial the depositions of a witness absent from Canada taken by a justice in the preliminary or other investigation of any charge. R. v. Graham (1898), 2 Can. Cr. Cas. 388 (Que.).

A coroner's court is a criminal court, as well as a court of record, and proceedings before the coroner are within the jurisdiction of the Federal Parliament, although no one is there charged with the offence of causing the death of the deceased. R. v. Hammond (1898), 1 Can. Cr. Cas. 373 (Ont.); R. v. Herford (1860), 3 E. & E. 115.

A coroner has power to himself summon the coroner's jury by a mere verbal direction to the jurors. Davidson v. Garrett (1899), 5 Can. Cr. Cas. 200 (Ont.).

A post-mortem examination may be directed by the coroner, and proceeded with under such direction, before the impanelling of the jury; the matter is one of procedure to be determined on the facts of each case by the coroner in the exercise of his discretion. Ibid.

Although the surgeon making the post-mortem examination may not be bound to do so without the coroner's written direction, yet if he proceeds on a verbal direction the latter constitutes a legal justification. Ibid.

*Disqualification of coroner.*]—In a recent case in the Territories an application was made on behalf of M. J. Haney, manager of construction of the Crows' Nest Railway, for a writ of prohibition to prohibit Dr. H. R. Mead, of Pincher Creek, from further proceeding with an inquest in connection with the deaths of two men from diphtheria, employed by a contractor on the said railway. The grounds upon which the application was made were: (1) That the coroner had no jurisdiction to hold such inquest. (2) That he was a necessary and material witness upon said investigation and inquest. (3) That he was directly and personally interested in said inquest and investigation. The facts as set out in the affidavits read on the application were that the two men in question were brought in the company's ambulance to the end of the track, and Dr. Mead, the said coroner, was immediately called in to attend them. Both men died the night after their arrival while under Mead's care. Mead then proceeded to hold an inquest upon the said deaths, although it had been pointed out to him by counsel (C. E. D. Wood) for applicant that having been in professional attendance upon the men at the time of their death, he would be a necessary witness, and it was not proper for him to act in the dual capacity of judge and witness. It was held that Mead was disqualified from acting as coroner and a writ of prohibition was granted. The same person cannot be both a witness and a judge in a cause which is on trial before him; and that in this case the coroner was a necessary

witness. In delivering judgment Rouleau, J., said: "In this case there is a dangerous precedent to be avoided. A physician, who is at the same time a coroner, in order to avoid prosecution for malpractice, would have only to call a jury and hold an inquest on the body of his victim and the law would be powerless to prevent him." Re Haney v. Mead (1898), 34 C.L.J. 330.

See also R. v. Farrant, 57 L.J.M.C. 17; Greenleaf on Evidence, 14th ed., s. 369; R. v. Sproule, 14 O.R. 375; R. v. Brown, 16 O.R. 41; People v. Miller, 2 Park. Crim. Rep. 197; People v. Dohring, 59 N.Y. 374.

**569. Search warrant.**—Any justice who is satisfied by information upon oath in the form J in schedule one hereto, 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 justice 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, 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 116 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 produced, 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 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 purposes 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.

FORM I.—

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 .

FORM J.—*(As amended 1900.)*

INFORMATION TO OBTAIN A SEARCH WARRANT.

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, etc.*) 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, etc.*), 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.*)

The amended form merely corrects a manifest slip in the position of the words ("*describe things to be searched for and offence in respect of which search is made*") which were printed after the words "in and for the county" in the Code of 1892.

*Search warrants.*]—In a recent English case it was held that the goods for which search is to be made under the warrant need not be stated in detail and with particularity in the warrant or in the information therefor. Jones v. German, [1896] 2 Q.B. 418; [1897] 1 Q.B. 374; 66 L.J.Q.B. 281. Action was there brought against a justice of the peace for trespass for having issued a search warrant under which the plaintiff's goods were searched. It was claimed that the warrant was illegaly issued because the information did not allege that the goods had been stolen, or shew that the informant believed they had been stolen, nor state specifically the goods believed to be in the possession of the suspected person. Lord Russell, C.J., before whom the action was tried, held that the information was sufficient as shewing reasonable grounds for suspecting that the goods in question were being feloniously dealt with by the plaintiff, and that it was unnecessary to specify the goods. This section of the Code requires the justice to be satisfied by information "that there is reasonable ground for believing that there is in any building, receptacle or place, anything upon or in respect of which any offence against the Act has been or is suspected to have been committed," and form J demands a description of the things to be searched for, and also a statement of the cause of suspicion. The English case would probably on that account be held inapplicable to the Code.

There is no procedure for "endorsing" a search warrant so as to make it effective outside of the territorial jurisdiction of the magistrate granting it. If it be desired to search in another county or district a new search warrant should be applied for upon oath.

Where, under a search warrant of a justice of the peace of the county of Haldimand, the constable seized and conveyed the horse, in respect of which it was issued, into the adjoining county of Brant, it was held that the taking was tortious; and that the constable was a trespasser ab initio, and could neither justify the detention, nor resist replevin of the animal in Brant. Hoover v. Craig, 12 Ont. App. 72.

Lord Hale in his Pleas of the Crown, vol. 2, p. 150, says: "I do take it that a general warrant to search in all suspected places is not good, but only to search in such particular places where the party assigns before the justice his suspicion and the probable cause thereof; for these warrants are judicial acts and must be granted on an examination of the fact."

A search warrant directing the constable to search a particular house "or any other house at ——— if there is any suspicion that said goods, etc., be in such house," is bad as it delegates to the constable the duties of the justice, by enabling him to act on suspicions arising in his mind after the issue of the warrant, and it is also void for uncertainty. McLeod v. Campbell (1894), 26 N.S.R. 458.

*Building, receptacle or place.*]—An enclosed yard or ground, whether roofed over or not and however large its dimensions may be, is a "place": Stroud's Judicial Dictionary. Eastwood v. Miller, L.R. 9 Q.B. 440; R. v. McGarry (1893), 24 Ont. R. 52.

*Disqualification of constable.*]—In Condell v. Price, 1 Han. 333, it was held that a constable could not act or hold a defendant in arrest in his own case. Allen, J., says: "It is true that the defendant may in fact have been a constable, but the alleged acting as a constable was in a case where he was the plaintiff, and therefore he could not act as constable." And he was therefore held not entitled to notice of action. That case decided that he had no jurisdiction to act; had he had jurisdiction, and reasonably thought he was acting as constable, he would have been entitled to notice of action. In Hamilton v. Calder, 23 N.B.R. 373, it is said that some one (the owner, if he is complainant), who can point the goods out, usually accompanies the officer in the execution of the warrant for the purpose that on his own pointing and declaration the officer may judge whether or not they are the goods mentioned in the warrant. The constable's duty is to judge and determine them to be such goods before he takes or removes them.

In the case of Reg. v. Hefferman, 13 O.R. 616, Robertson, J., held that, though objectionable, the informer, if a police officer, may execute his own warrants of search and destruction under The Canada Temperance Act. His reasons for holding such a case to be outside the principles, which at common law prevent officers, such as sheriffs, etc., from executing their own processes or those obtained by their kin, are that he, acting in an official and public capacity, had no private or pecuniary interest to serve, and he should suppose that the fact of his being the chief constable of the city would afford some guarantee that he would discharge the duty imposed upon him with decorum and in the least offensive way possible. Hanington, J., in a recent New Brunswick case, Ex parte McCleave (1900), 5 Can. Cr. Cas. 115, thus comments on the decision in the Hefferman case: "I can not agree that any such supposed guarantee is enough to allow any prosecutor (personally liable to costs if his prosecution fails, and for damages if his conduct is illegal, either of which facts would disqualify any high sheriff) to say that they do not disqualify an officer of the police of the city. If he, as such public officer, undertakes the prosecution, he could have no difficulty in getting a sheriff or constable to execute the warrants and orders.

and I think he should do so. If, as Mr. Justice Robertson says, it is objectionable, it is well, I think, to adhere to the common law principles, which, if followed, would leave nothing to be objected to. Under a warrant of this description the executive officer has great powers, even to breaking outside doors, has to exercise discretion, and to determine and adjudge that he has found the liquor complained of. Any official clothed with such powers and duties should, I think, be entirely free from interest, bias or prejudice, which he in law can not be when he is interested in fact, executing his own warrants and orders."

**370. 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 383, 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 is 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.

**371. Search warrant for 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, 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 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.

**372. Search for timber, etc., unlawfully detained.**—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 lum-

ber, 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 liquors near His Majesty's vessels.**—Any officer in His 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 His Majesty's ships or vessels mentioned in section 119, 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.

**574. Search for women in house of ill-fame.**—Whenever there is reason to believe that any woman or girl mentioned in section 185, 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 or 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.

*(Amendments of 1894 and 1895.)*

**575. Search in gaming house.**—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, incoroporated 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 196 and 197, 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 205, whether admission thereto is limited to those possessed of entrance keys or otherwise, the said commissioners or commissioner, 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.

The Parliament of Canada has the constitutional power to authorize a magistrate to adjudge forfeiture to the Crown of moneys, etc., found in a common gaming house, and to declare the keeping of a gaming house a criminal offence; and the judgment of confiscation is not an interference with "property and civil rights," the jurisdiction in regard to which belongs to the provinces, although the party claiming the money was not a party to the proceedings in which the confiscation was decreed. O'Neil v. Attorney-General (1896), 1 Can. Cr. Cas. 303 (S.C. Can.).

In an action to recover from the constable and the clerk of the peace the moneys so seized, the rules of evidence in force in the province in civil matters will apply, and not the Canada Evidence Act. Ibid.

It never was intended that after a complaint made and an order for search given, the order should be filed away without any attempt to enforce it for years, and yet it remain operative. The premises may no longer be used for an improper purpose and "it would be contrary to justice that the stringent provisions of this section should be put in force when or how the police thought proper." Per Drake, J., in R. v. Ah Sing (1892), 2 B.C.R. 167.

*Compelling evidence of persons found in gaming house on search.*]—Sections 9 and 10 of R.S.C. 1886, ch. 158, are excepted from the repeal of that chapter, Code sec. 981, and schedule thereto. They provide as follows:—

(9.) 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 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 any wise 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.

(10). 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.

*Prima facie evidence.*]—See secs. 702 and 703.

**576. Search for vagrant.**—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.

PART XLV.

## PROCEDURE ON APPEARANCE OF ACCUSED.

SECT.

**577. Inquiry 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.

*The matters charged.*]—It is essential that whatever words may be used in the information they should be sufficient to give the accused notice of the offence with which he is charged, and to identify the transaction referred to. The absence or the insufficiency of particulars does not vitiate an indictment nor an information; but if it should be made to appear that there is a reasonable necessity for more specific information, the court or magistrate may, on the application of the accused person, order that further particulars be given, but such an order is altogether within the judicial discretion of the judge or magistrate. R. v. France (1898), 1 Can. Cr. Cas. 321, 329 (Que.).

It is not competent for magistrates where an information charges an offence under the Code, which they have no jurisdiction to try summarily, to convert the charge into one against a municipal by-law, which they have jurisdiction to try summarily, and to so try it on the original information. R. v. Dungey (1901), 5 Can. Cr. Cas. 38 (Ont.).

When 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 to be associated with the summoning justice, except at the latter's request. R. v. McRae (1897), 2 Can. Cr. Cas. 49.

Until the prisoner is brought before the magistrate, he has no absolute right to the assistance of counsel; but it is usual for the Crown to accede the privilege except under very peculiar circumstances.

**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.

The omission to state in a warrant of arrest that the information was taken under oath is merely an irregularity and would be cured by this section. Kingston v. Wallace (1886), 25 N.B.R. 573.

Where a warrant charges no offence known to the law, neither it nor a remand thereon is validated by this section. R. v. Holley (1893), 4 Can. Cr. Cas. 510 (N.S.).

**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.

FORM K.—*(As amended 1895.)*

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. *(etc., 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)*: 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.)*

**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.

**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 to any other justice in order to testify as aforesaid.

2. The warrant may be in the form L in schedule one hereto, 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 565, 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 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.)

FORM L.—

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. (*etc., 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.)*

---

FORM PP.—

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 shewn 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 His 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.*

**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, or to the like effect, and may be executed anywhere within the jurisdiction of such justice, or, if necessary, endorsed as provided in section 565, and executed anywhere in the Province, but out of such jurisdiction. R.S.C. c. 174, s. 62.

FORM M.—

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 (*etc., 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.)*

A warrant against a witness is not wholly a civil process or subject to the limitations which attach to civil process, but is a substitute for an attachment. Messenger v. Parker (1885), 6 N.S.R. 237. The constable executing it is justified, if the witness escapes after his arrest, in breaking into a dwelling house where he is and re-arresting him if done in fresh pursuit. Ibid.

**584. Procuring attendance of witnesses beyond justice's jurisdiction.**—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 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 or to the like effect. If necessary, it may be endorsed in the manner provided by section 565, and executed in a district, county or place other than the one therein mentioned.

FORM N.—

WARRANT WHEN A WITNESS HAS NOT OBEYED THE SUBPOENA.

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. (*etc., 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 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.)*

**585. 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, 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, if 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.

FORM O.—

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

(*etc., 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 you 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.)*

**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;

(*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: 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.

FORM P.—

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 (*etc., 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 His 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.)*

*Verbal remand.*]—Where on a preliminary enquiry a remand is desired for a time exceeding three clear days, the justice may remand only by warrant (Code Form P.), declaring that it appears to be necessary to remand the accused; and an informal remand endorsed upon the warrant is insufficient. R. v. Holley (1893), 4 Can. Cr. Cas. 510, per Townshend, J. (N.S.).

(*c*.)—*Remand before another justice.*]—Where the evidence on a preliminary inquiry was commenced before one justice of the peace and finished before him and another justice who joined in the hearing of the case after the evidence of a material witness had been taken and the case adjourned to a subsequent day, a committal made by the two justices jointly was held to be irregular, as both had not heard all of the evidence. Re Nunn (1899), 2 Can. Cr. Cas. 429 (B.C.), per Walkem, J.

The case of Re Guerin (1888), 16 Cox C.C. 596, was an extradition matter in which some of the depositions were taken before one magistrate and the inquiry was continued and the remaining depositions taken before another magistrate, who made the commitment.

The illegality of a commitment made after such a change of magistrates is not cured by a statute empowering justices, in cases where it is necessary or advisable to defer the examination or further examination of witnesses, to remand the accused and to order him to be brought before "the same or such other justice or justices as shall be there acting at the time appointed for continuing such examination." Such an enactment is to be construed merely as providing for the case of the first magistrate dying or resigning and it does not enable one magistrate in ordinary cases to take up a case where another left off; he must hear the case de novo. Re Guerin (1888), 16 Cox C.C. 506, 601.

The Code form P. gives, in the form of warrant remanding a prisoner, a direction that he be brought before the remanding justice "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," etc. And by sec. 588 the justice may, before the expiry of the time of remand, order the accused person to be brought before him or *before any other justice* for the same territorial division. So also under the special provision contained in Cr. Code 586 (*c*) regarding verbal remands for a time "not exceeding three clear days," the accused may be brought "before the same or such other justice as shall be there acting at the time appointed for continuing the examination." These provisions must, therefore, on the principle enunciated in Re Guerin, supra, be construed as allowing another magistrate to continue the proceedings without rehearing the depositions already taken, only in case of the death or resignation of the first magistrate.

This will, however, not prevent the use at the trial, under Cr. Code 687, of the deposition of an ill or absent witness taken before a magistrate having jurisdiction to hold the preliminary enquiry, other than the one before whom the charge was laid and the committal made, if the deposition was taken in the presence of the prisoner and with full opportunity of cross-examining, and if the formalities of the Code are complied with as to the manner of taking and signing depositions. R. v. De Vidal (1861), 9 Cox C.C. 4 (Blackburn, J.), approved in Re Guerin (1888), 16 Cox 596 (Wills and Grantham, JJ.).

*Substituting another charge.*] — Magistrates conducting a preliminary enquiry in respect of an indictable offence, may not on its conclusion convict of a lesser offence, over which they have summary jurisdiction, although proved by the evidence adduced, if no complaint was laid before them, nor the accused called upon to defend in respect of such lesser offence. R. v. Mines (1894), 1 Can. Cr. Cas. 217 (Ont.).

**587. Bail on remand.**—If the accused is remanded under the next preceding section the justice may discharge him, upon his entering in a recognizance in the form Q in schedule one hereto, 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.

FORM Q.—

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 Lord the King, his 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 Lord the King, his 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 (*etc., 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.

Every individual may in criminal cases become bail who is a housekeeper and possessed of property equal to the responsibility incurred. Petersdorff on Bail, 505. A justice may, as a substitute for bail, take money in deposito. Moyser v. Gray, Cro. Car. 446; Petersdorff on Bail, 506.

Any indemnity given to the bondsmen, whether by the prisoner or by a third person, is illegal. Consolidated Exploration & Finance Co. v. Musgrave, [1900] 1 Ch. 37.

**588. Hearing may 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.

*(Amendment of 1900).*

**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 recognizance the non-appearance of such accused person, in the form R in schedule one hereto, 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 prima facie evidence of the non-appearance of the accused person.

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 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.

FORM R.—

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.)*

By the amendment made in 1900 the practice upon breach of recognizances given on remands is made similar to the practice as to forfeited recognizances in summary conviction matters; see sec. 878.

In proceedings under sec. 589 of the Cr. Code, for breach of recognizance on remand, the certificate of the justice of the peace of non-appearance of the accused, indorsed on the back of the recognizance, shall be transmitted by the justice of the peace to the registrar of the court where if committed the accused would be bound to appear, and be proceeded upon by order of the judge presiding at the Assizes, if he thinks proper, in like manner as other recognizances. B.C. Rule 46.

The change made by the addition of the second sub-section in 1900, adopts the practice under the Summary Convictions clauses of the Code. See Code sec. 878, as amended in 1895.

See note to sec. 586.

**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, 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 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.

FORM S.—

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 the 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 , &c., 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, etc., etc.*)

(*The signature of the justice may be appended as follows*):

The depositions of X., Y., Z., &c., 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.)*

The magistrate is not required to take down the evidence himself, but the law requires in effect that the witnesses must be before him, and that he must see them and hear them when testifying, and then their testimony may be taken down either at length by a clerk or in shorthand by a stenographer. R. v. Traynor (1901), 4 Can. Cr. Cas. 410 (Que.).

Non-compliance with this section as to the signing of the depositions by the witness is not a matter affecting the jurisdiction of the magistrates to convict. Ex parte Doherty (1894), 3 Can. Cr. Cas. 310, 32 N.B.R. 479.

It was held in the Manitoba case of R. v. Hamilton (1898), 2 Can. Cr. Cas. 390, per Killam, J., that the deposition of a deceased witness may be used in evidence apart from sec. 687, Cr. Code, although it does not "purport to be signed by the justices by or before whom the same purports to have been taken," but, where it is not admissible by virtue of sec. 687, it must be affirmatively shewn that all the formalities required to be observed in taking depositions (Cr. Code 590) have been complied with.

Where on a preliminary inquiry before a magistrate the witnesses were sworn by him and were then taken into another room and their evidence in chief taken by a stenographer and not in the presence of the magistrate, such depositions are illegally taken, although the prisoner's counsel had the opportunity of afterwards cross-examining the witnesses before the magistrate. R. v. Traynor (1901), 4 Can. Cr. Cas. 410 (Que.); R. v. Watts, 33 L.J.M.C. 63.

The objection to the irregularity is not waived by the cross-examination of the witnesses on the prisoner's behalf on their return to the magistrate's presence, if the objection is taken by the prisoner's counsel before he proceeds to cross-examine. Ibid.

Both the commitment for trial and the indictment founded on such illegal depositions are invalid and should be set aside. Ibid.

The expressions "entitled to cross-examine" and "full opportunity to cross-examine" as used in secs. 590 and 687, 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 the witness, and to mark his expression and demeanor while testifying. R. v. Lepine (1900), 4 Can. Cr. Cas. 145 (Que.).

When depositions in a preliminary enquiry, to which the accused was not a party, and, consequently, taken in his absence, are read to the same witness in a case against the accused, and the witness, after being sworn in the presence of the accused, either affirms that his former deposition contains the truth, or makes corrections, as the case may be, and then affirms its truth as corrected, the prosecutor, being then 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. Ibid.

*Principal rules of evidence.*]—The following statement of the leading rules of evidence applicable to proceedings before justices of the peace is taken from Stone's Justices' Manual, 34th ed. (1902), p. 263:—

That a person is presumed to be innocent until the contrary is proved;

That a party shall not be allowed to put leading questions, that is, questions in such a form as to suggest the answer desired, to his own witness;

That hearsay evidence is inadmissible;

That the statement of one prisoner is not evidence either for or against another prisoner;

That conversations which have taken place out of the hearing of the party to be affected cannot be given in evidence;

That the evidence of an accomplice is admissible, but ought not to be fully relied upon, unless it be corroborated by some collateral proof;

That in general, the opinion of a witness as to any fact in issue is inadmissible, unless upon questions of skill and judgment;

That the onus probandi lies upon the party asserting the affirmative;

That the best evidence should be given of which the nature of the case is capable;

That secondary evidence is, therefore, inadmissible unless some ground be previously laid for its introduction by shewing the impossibility of procuring better evidence;

That parol testimony is not receivable to vary or contradict the terms of a written instrument;

That a person shall not be allowed to speak to the contents of a written instrument, unless it be first proved that such document is lost or destroyed (or out of the jurisdiction of the court, e.g., in a foreign country. Tichborne Case, November 27th, 1873), or if in the possession of the adverse party, that notice has been given for its production;

That a witness may be allowed to refresh his memory by reference to an entry or memorandum made by himself shortly after the occurrence of which he is speaking, although the entry or memorandum could not itself be received in evidence;

That a witness may also refresh his memory from entries made by another person, if those entries were referred to in prisoner's presence at the time of the occurrence in question. R. v. Langton, 41 J.P. 134; 46 L.J. 136; 2 Q.B.D. 296; 35 L.T. 527; 13 Cox C.C. 345;

That when positive evidence of the facts cannot be supplied, circumstantial evidence is admissible;

That circumstantial evidence should be such as to produce nearly the same degree of certainty as that which arises from direct testimony, and to exclude a rational probability of innocence;

That a witness speaking two languages should be examined in the one he understands best. Tichborne Case, April 30th, 1873.

**391. 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, or to the like effect, and shall be signed by the justice and kept with the depositions of the witnesses, and dealt with as hereinafter mentioned. R.S.C. c. 174, ss. 70 and 71.

FORM T.—

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, not-"withstanding 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.)*

An information was laid charging the applicant with an assault causing actual bodily harm. A warrant having been issued, and the applicant arrested, the magistrate conducted the hearing as a preliminary examination under the provisions of part 45 of the Code, binding over all the witnesses to give evidence in a superior court, and at the conclusion of the examination of the witnesses for the prosecution addressing the defendant as provided by this section. Then after hearing evidence in behalf of the defendant, the magistrate, without objection by the defendant or his counsel, convicted the defendant of a common assault and fined him. It was held on motion to make absolute a rule nisi for certiorari, that the conviction was bad. Ex parte Duffy (1901), 37 C.L.J. 202 (N.B.).

**592. Confession or admission of accused.**—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 and admissions as evidence.*]—An admission of guilt made by a party charged with a crime to a person in authority under the inducement of a promise of favour, or by reason of menaces or under terror, is inadmissible in evidence. R. v. Pah-cah-pah-ne-capi (1897), 4 Can. Cr. Cas. 93 (N.W.T.).

The Indian Agent, appointed under the Indian Act, R.S.C. 1886, ch. 43, for the Indian Reserve upon which an accused Indian lives, is a person in authority; and to allow in evidence a confession made to him it must appear that no inducement was offered to the accused to make it. Ibid.

The onus of proving that the alleged confession was not made under an inducement or threat is on the Crown. Ibid.

Smith was a clerk in a post office. Stephen J. King was inspector of this office. He discovered irregularities and questioned Smith about them. Smith admitted that he delayed letters. The inspector said, "If you have tampered with the contents it will go hard with you." Smith then made a confession. The trial judge (McLeod, J.,) refused to allow evidence of confessions subsequent to the threat. R. v. Smith (1897), 33 C.L.J. 331.

Admissions made by a prisoner to a police officer in respect of the charge upon which he is in custody, are admissible in evidence although made in response to questions put by the officer, if the trial judge finds that the answers were not unduly or improperly obtained having regard to the circumstances of the particular case. R. v. Elliott (1899), 3 Can. Cr. Cas. 95 (Ont.).

In the course of conversation between the prisoner and a detective relative to the purchase of counterfeit money, the prisoner asked the detective whether he had received a letter written by the prisoner stating his desire to purchase counterfeit money, and upon the detective shewing the prisoner the letter he admitted it was his; it was held that the letter was properly received in evidence, as part of the history of the case, and as, in a sense, forming part of the subject matter of conversation. R. v. Attwood (1891), 20 Ont. R. 574.

Where a prisoner made an admission of guilt, being induced to do so by a police officer who said "The truth will go better than a lie. If any one prompted you to do it you had better tell about it," it was held (following R. v. Fennell (1881), 7 Q.B.D. 147) that the inducement invalidated the admission. R. v. Romp (1889), 17 Ont. R. 567; R. v. Bates, 11 Cox 606.

The reason why the statement of a prisoner under oath is to be rejected rests upon two grounds: first, that the confession must be voluntary, and it is contended that a statement under oath is not so; secondly, that a prisoner shall not be compelled to criminate himself; and to this it may be added that it is harsh and inquisitorial, and for that reason an examination of the prisoner so had should be rejected. But after the examination of the charge against the prisoner has been concluded, and he has been committed for trial on it, if he is allowed to make a charge against another person, and his testimony is properly receivable against such other person, and no inducements have been held out to him to make any statement whatever in relation to the matter, no principle of law is violated in receiving the statements so made as evidence against himself. R. v. Field (1865), 16 U.C. C.P. 98.

In the last mentioned case the prisoner after his committal for trial, and while in the custody of a constable, made a statement, upon which the latter took him before a magistrate, when he laid an information on oath charging another person with having suggested the crime, and asked him to join in it, which he accordingly did. Upon the arrest of the accused the prisoner made a full deposition against him, at the same time admitting his own guilt. Both information and deposition appear to have been voluntarily made, uninfluenced by either hope or threat; but it also appeared that the prisoner had not been cautioned that his statements as to the other might be given in evidence against himself, though he had been duly cautioned when under examination in his own case. Held, that both the information and deposition were properly received in evidence as being statements which appeared to have been voluntarily made, uninfluenced by any promises held out as an inducement to the prisoner to make them, and that, too, though they had been made under oath, for that the rule of law excluding the sworn statements of a prisoner under examination applied only to his examination on a charge against himself, and not when the charge was against another; for that in the latter case a prisoner was not obliged to say anything against himself, but if he did volunteer such a statement it would be admissible in evidence against him. R. v. Field (1865), 16 U.C.C.P. 98.

Prisoner was convicted of arson. On the trial the judge allowed a confession or admission of the prisoner to be read. The evidence of the confession was that of a constable who stated that after prisoner had been in a second time before the coroner he stated there was something more he could tell; the constable asked what it was, but not to say what was not true; he said he went over to the house, got in at the window and set the place on fire; the constable did not recollect any inducement being held out; the constable asked him if he wanted to go in and state that before the jury; he said he did. It further appeared that on the third day after he had been taken into custody he told the jury he wished to confess; the coroner said to him that anything he said might be used against him, not to say anything unless he wished, just the ordinary caution. He then made a second statement. He had only been absent a few minutes when he returned and made the last written confession, after the constable had informed the coroner of the prisoner's desire. Held, that the statement made to the constable was prima facie receivable, and that the judge was warranted in receiving as voluntary the confession made to the coroner after due warning by him. R. v. Finkle (1865), 15 U.C.C.P. 453.

But another essential element that has to be considered in deciding whether a confession is voluntary or not is the position of the person who held out the inducement, for it is now clearly established that it is only an inducement held out by a person in authority that will make a confession involuntary. In R. v. Thompson, [1893] 2 Q.B. 12, Cave, J., said a confession must be free and voluntary. "If it flows from hope or fear, excited by a person in authority, it is inadmissible."

A person in authority means, generally speaking, anyone who has authority or control over the accused or over the proceedings or the prosecution against him. And the reason that it is a rule of law that confessions made as the result of inducements held out by persons in authority are inadmissible is that the authority that the accused knows such persons to possess may well be supposed in the majority of instances both to animate his hopes of favour on the one hand and on the other to inspire him with awe, and so in some degree to overcome the powers of his mind; Greenleaf on Evidence, sec. 222. If, therefore, the prisoner when he made the admission was without notice or knowledge of any facts that could constitute either of two men to whom it was made persons in authority, it could not be contended that as to the prisoner they were persons in authority. R. v. Todd (1901), 4 Can. Cr. Cas. 514, 527, per Bain, J.

In R. v. Row (1809), R. & R. 153, where a prisoner had been arrested for theft and some of his neighbours had admonished him to consider his family and tell the truth, the judges were of the opinion that evidence of a confession he afterwards made was admissible, "because the advice to confess was not given or sanctioned by any person who had any concern in the business." However, in R. v. Spencer (1835), 7 C. & P. 776, Parke, B., said there was a difference of opinion among the judges whether a confession made to one who had no authority ought to be received; and the cases shew that there was no uniformity in the practice in admitting or excluding evidence of such confessions. But in R. v. Taylor (1839), 8 C. & P. 733, Patteson, J., said that it was the opinion of the judges that evidence of any confession is receivable unless there has been some inducement held out by some person in authority; and in R. v. Moore (1852), 2 Den. C.C. 522, this opinion was embodied in a considered judgment. There it was held that where an inducement in reference to the charge was held out to the accused by the wife of the person in whose house an offence was committed that did not concern the master or mistress and that was in no way connected with the management of the house, the mistress was not a person in authority, and that evidence of the confession was admissible. Parke, B., in delivering the judgment of the court, said: "One element in the consideration of the question as to the confession being voluntary is, whether the threat or

inducement was such as to be likely to influence the prisoner. Perhaps it would have been better to have held (when it was determined that the judge was to decide whether the confession was voluntary) that in all cases he was to decide that point upon his own view of all the circumstances, including the nature of the threat or inducement and the character of the person holding it out together, not necessarily excluding the confession on account of the character of the person holding out the inducement or threat. But a rule has been laid down by which we are bound that, if the inducement or threat has been held out, actually or constructively, by a person in authority, it cannot be received, however slight the threat or inducement; and the prosecutor, magistrate and constable is such a person, and so the master or mistress may be. If not held out by one in authority, they are clearly admissible." In 6 A. & E. Ency. of Law 548, it is said "The doctrine in England at present and the prevailing doctrine in the United States, is that evidence of any confession is receivable unless there has been some inducement held out by some person who had, or was supposed to have authority to secure the accused the promised good."

The well known rule as to the admission or rejection of a confession made by a prisoner is to the effect that no confession by the prisoner is admissible which is made in consequence of any threat or inducement of a temporal nature, having reference to the charge against the prisoner, made or held out by a person in authority; and, as stated by Roscoe, in his work on Criminal Evidence, the tendency of the present decisions seems to be to admit any confessions which do not come within this proposition. But the strict application of that rule is more or less influenced by the peculiar circumstances of each case; and in each instance a good deal is left to the discretion of the judge trying the cause. Taylor on Evidence, sec. 796; Russell on Crimes, 4th ed., vol. 3, p. 368; R. v. Todd (1901), 4 Can. Cr. Cas. 514, 519, per Dubuc, J.

The general rule is that a free and voluntary confession made by a person accused of an offence is receivable in evidence against him as the highest and most satisfactory proof of guilt, because it is fairly presumed that no man would make such a confession against himself if the facts confessed were not true. R. v. Lambe (1791), 2 Leach C.C. 625.

While the general principle is clear that a confession by a prisoner is not admissible against him unless it is shewn that it was made freely and voluntarily, it is not possible to settle as a rule of law the facts and circumstances that shall be deemed sufficient in all cases to make a confession a voluntary one or the reverse; and, as the question must always be a mixed one of law and fact, the reported cases are not always consistent, and do not mark out precisely the grounds of admission and rejection. It may be taken to be settled, however, as a general proposition, that no confession is admissible which is made in consequence of an inducement of a temporal nature, having reference to the charge against the prisoner, held out by a person in authority.

Sir James Stephen, in his Digest of the Laws of Evidence (Article 22), says: "A confession is not involuntary only because it appears to have been caused by an inducement collateral to the proceedings, or by inducements held out by a person not in authority."

A confession is not involuntary only because it was brought about by an inducement that is not connected with the charge; but, as pointed out by Bain, J., in R. v. Todd (1901), 4 Can. Cr. Cas. 514, 525, this still leaves the question an open one, whether the judge, if he considers that the inducement, though it did not refer to the charge, was of such a nature as to be likely to produce an untrue confession, should reject the evidence of the confession as an involuntary one, or must he admit the evidence and leave the jury to decide as to its credibility?

In R. v. Day (1890), 20 O.R. 209, the prisoner, who was charged with murder, had been first cautioned by the detectives against saying anything, and had then been questioned by them, and evidence of the statements made by him in answer to such questions was admitted at the trial before Rose, J., who reserved a case for the consideration of the Queen's Bench Division of the High Court (Armour, C.J., Falconbridge, and Street, JJ.). In delivering the judgment of the court, Armour, C.J., said:—

"We think, although we reprehend the practice of questioning prisoners, that we cannot come to the conclusion that evidence obtained by such questioning is inadmissible. The great weight of authority in England and Ireland, and all the cases in which the point has been considered by a court for Crown cases reserved, go to shew that the evidence is admissible. We must leave it to the Legislature to determine whether the practice of cross-examining prisoners is legally to obtain hereafter. We hold the evidence admissible and affirm the conviction."

R. v. Miller (1895), 18 Cox C.C. 54, was a decision by Hawkins, J., at the Liverpool Assizes. Miller was not in custody at the time that the questions were put to him. The charge was one of murder, and evidence was given in support of the indictment, proving that a detective had called upon Miller 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 had then questioned Miller as to all his movements on the night of the murder and on the following morning, and had asked him to produce his clothes, and when they were produced, to account for blood-stains upon them; and had, at the end of the conversation, taken the accused into custody upon the charge of murder. The prosecution then proposed to give evidence of the answers which were given by Miller to the questions asked him by the detective, and also to give evidence that subsequent inquiries which had been made tended to shew that the statements made by him in answer to the detective's questions were untrue. Counsel for the prisoner objected to the evidence being received, upon the authority of R. v. Brackenbury (1893), 17 Cox 628; R. v. Thompson (1893), 2 Q.B. 12; and R. v. Male and Cooper (1893), 17 Cox 689.

Hawkins, J., admitted the evidence, and held that no inducement was held out to the prisoner to make any admission, and no threat uttered or any duress exercised towards him, and that therefore his answers were admissible, and that they were voluntary statements which the prisoner was under no obligation to make. It was impossible to discover the facts of a crime without asking questions, and these questions were properly put. He did not express dissent from any of the cases cited for the prisoner, but every case must be decided according to the whole of its circumstances. The evidence to the effect that the prisoner's answers were untrue was also admitted, and the prisoner was found guilty.

In R. v. Morgan (1895), 59 J.P. 827, Mr. Justice Cave held that answers to questions by the police could not be given in evidence. He also ruled that where prisoners are taken into custody at their house, what they said, in answer to the charge at the police station, could not be given in evidence against them, as it was not right, when once a prisoner was in custody, to charge him again at the police station in the hope of getting something out of him. 59 J.P. 827.

But where one of two prisoners in custody on a charge against them jointly, offers while in custody to make a statement, and voluntarily makes and signs a statement implicating the other, and such statement is read over to the prisoner implicated, and the latter, after being cautioned, makes a confession which is taken down in writing and is signed by him, such confession is a voluntary one and is admissible in evidence against the person making it. R. v. Hirst (1896), 18 Cox C.C. 374 (per Dugdale, Q.C., Special Commissioner at Manchester Assizes, after conferring with Cave, J.).

The onus of proving that admissions made by the accused were made voluntarily and without improper inducement or threats is upon the prosecution. R. v. Thompson, [1893] 2 Q.B. 12; R. v. Rose (1898), 67 L.J.Q.B. 289; R. v. Jackson (1898), 2 Can. Cr. Cas. 149.

Beyond the right the accused person undoubtedly has to have the whole of the conversation in which the alleged admission was made given in evidence (Roscoe, 11th ed., p. 51), to make a confession by a prisoner admissible it must be affirmatively proved that such confession was free and voluntary, that it was not preceded by any inducements to the prisoner to make a statement held out by a person in authority or that it was not made until after such inducement had clearly been removed. R. v. Ockerman (1898), 2 Can. Cr. Cas. 262.

*Admissions on interrogation by person in authority.*]—In R. v. Thompson, [1893] 2 Q.B. 12, it was held on a case reserved by a court consisting of Coleridge, C.J., Hawkins, Day, Wills and Cave, JJ., that before a confession can be received in evidence of criminality, it must be proved *affirmatively* that it was free and voluntary, and was not preceded by any inducement held out by any person in authority. The onus is upon the Crown of proving that the statement was free and voluntary and not as has heretofore been frequently supposed upon the prisoner to prove that the statement was given not voluntarily but under pressure of threats or inducements. The rule was there stated to be that a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.

The inducement need not be held out to the prisoner direct, and, where it was held out by his employer to the relatives of the prisoner, it may be inferred that it was communicated to the prisoner. R. v. Thompson, [1893] 2 Q.B. 12. If, however, there is no suggestion of threat or inducement, or of a disposition on the part of the prosecutor to manufacture evidence, the evidence is admissible. Rogers v. Hawken, 1898, 33 Eng. Law Jour. 174. (Russell, L.C.J., and Mathew, J.).

In a case where the person in authority to whom the admission was made would not swear that he did not hold out any threat or inducement to the prisoner to make the statement, it was held that such onus is not satisfied by the evidence of the interpreter who said that he remembered that "any statement the prisoner made was voluntary," since it was not shewn that the interpreter knew what was in law a voluntary statement. R. v. Charcoal (1897), 34 C.L.J. 210 (N.W.T.).

A confession induced by false statements of the officer as to the knowledge already obtained in regard to the alleged offence is not a free and voluntary confession. So where an accused was charged with stealing a post letter, and had made admissions in presence of a detective and a post office inspector, after the latter had said to him, "There is no use your denying it. You were seen taking the letters out of the box. You may as well tell us what you did with them, as have it brought out in a court of law," and it was admitted by the Crown that there was no evidence that accused was seen taking letters, it was held that the evidence was inadmissible, not only because of the threat implied in the statement of the inspector, but because the admission had been improperly obtained by means of a false statement by a person in authority. R. v. McDonald (1896), 32 C.L.J. 783 (per Scott, J., S.C. N.W.T.).

When a statement of one accused of murder is induced by words of a police officer which, under all the circumstances of the case, must give rise to some fear or hope of favour in the mind of the accused, such statement is not properly admitted in evidence against him. Bram v. United States, (1898), 18 S.C.R. (U.S.) 183. In that case, Bram was convicted of murder on the high seas. His arrest was effected on the arrival of the vessel at

Halifax, and he was taken to the office of a police detective, and stripped and searched. In the course of the search, the detective said to him: "Bram, we are trying to unravel this horrible mystery; your position is rather an awkward one. I have had Brown in this office, and he made a statement that he saw you do the murder." Bram replied: "He could not have seen me; where was he?" The detective said: "He states he was at the wheel." Bram then said: "Well, he could not see me from there." The detective then said: "Now, look here, Bram. I am satisfied that you killed the captain, from all I have heard from Mr. Brown; but some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders." Bram replied; "Well, I think—and many others on board the ship think—that Brown is the murderer; but I don't know anything about it." Bram was extradited to the United States; and evidence of the detective as to the above admissions having been admitted at the trial, the Supreme Court of the United States held that a new trial should be granted, and that the alleged admissions were obtained by undue influence, although the strict meaning of the detective's words were neither to threaten nor to promise.

There is much conflict of authority in England as to the admission of statements made by a prisoner to a police officer in answer to the latter's enquiries. It was held by Mr. Justice Smith in R. v. Gavin (1885), 15 Cox Cr. Cas. 656, that when a prisoner is in custody the police have no right to ask him questions. The same view was expressed by Cave, J., in R. v. Male (1893), 17 Cox Cr. Cas. 689, in which he said that the law does not allow the judge or jury to put questions in open court to a prisoner, and it would be monstrous if it permitted a police officer, without anyone present to check him, to put a prisoner through an examination and then produce the effects of it against him. The police officer should keep his mouth shut and his ears open, should listen and report, neither encouraging nor discouraging a statement, but putting no questions. The same learned judge is also reported as having stated at a nisi prius trial that he would exclude all evidence obtained by a system of private interrogation of accused persons by the police, and that he believed most of the judges agreed with his opinion. 20 Montreal Legal News 272.

The opposite view is, however, taken by Day, J., in R. v. Brackenbury (1893), 17 Cox Cr. Cas. 628, where he admitted evidence of statements made by the accused in answer to questions put by the police immediately prior to the arrest, and expressed his dissent from the decision in R. v. Gavin, supra. See also R. v. Jarvis (1867), L.R. 1 C.C.R. 96, and R. v. Reeve (1872), L.R. 1 C.C.R. 362.

**593 Evidence for the defence.**—After the proceedings required by section 591 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.

**594. Discharge of accused.**—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.

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. R. v. Lee (1897), 2 Can. Cr. Cas. 233.

A conviction recorded by justices in such a case upon a plea of guilty to the charge as reduced, is not a bar to an indictment for unlawfully wounding, based upon the same state of facts, and does not support a plea of autrefois convict. Ibid.

In Lee's case the complainant had objected to the charge being "reduced," and the justices had therefore no summary jurisdiction in the matter, and were bound to either discharge the accused, if upon the whole of the evidence they were of opinion that no sufficient case was made out to put the accused upon his trial (sec. 594), or commit him for trial by a warrant of commitment (Code form V., sched. 1) if they thought that the evidence was sufficient "to put the accused on his trial." See. 596.

**595. Copy of depositions.**—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 the 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, or to the like effect.

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.

FORM U.—

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.)*

The person filling the office of Commissioner of the Dominion Police has, as such, no legal capacity to represent and act on behalf of Her Majesty the Queen, and in laying an information in which he designated himself as such Commissioner of the Dominion Police he acted as a private individual and not as the legal representative of the Crown, although he declared that he was acting as such commissioner on behalf of Her Majesty the Queen. R. v. St. Louis (1897), 1 Can. Cr. Cas. 141 (Que.).

The accused having been discharged, and 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 bill of indictment, the commissioner was held, under sec. 595 of the Code, to be personally liable for the costs incurred by the accused on the preliminary inquiry and before the court of Queen's Bench.

An order made by the presiding judge of a criminal superior court awarding costs against the 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. R. v. Mosher (1899), 3 Can. Cr. Cas. 312; 32 N.S.R. 139.

Where the application for such an order has been made on the last day of the term of the criminal court and judgment reserved thereon the order may be legally made out of term nunc pro tunc as of the date of application, the delay in such case being the act of the court and not being due to the neglect or fault of the applicant. Ibid.

**596. Committal of accused 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 made in the form V in schedule one hereto, or to the like effect. R.S.C. c. 174, s. 73.

FORM V.—

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 His 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 goal*) 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.)*

When the accused is committed for trial and the offence is one of a public nature, the prosecution is then carried on by the Government, acting through the Attorney-General or his substitutes; but where the offence is not so much against public order as against the interest of a private individual, the management of the case may be left in his hands as a private prosecutor, although it still remains under the supervision of the law officers of the Crown.

By the Act of Confederation, the administration of justice in each of the Provinces is entrusted to the Provincial Government, and it is therefore the provincial law officers of the Crown whose duty it is to conduct or to supervise, as the case may be, all criminal prosecutions. R. v. St. Louis (1897), 1 Can. Cr. Cas. 141, 145 (Que.).

Depositions taken before one magistrate should not be considered by another magistrate sufficient evidence to commit a prisoner upon, without having seen the demeanour of the witnesses when they were giving their

evidence, and so being in a position to judge for himself of the truth of their statements. Re Guerin, 16 Cox C.C. 596.

*Committal for trial.*]—The phrase "committed to prison" does not necessarily mean "received into prison," but, both in common parlance and in legal phraseology, means "when the order is made under which the person is to be kept in prison." Lord Blackburn in Mullins v. Surrey (1882), 51 L.J., Q.B. 145, 149.

The word "committal" signifies the act of the magistrate who issues the warrant of committal, and not the act of the officer who executes it by delivering the person therein named into the custody of the gaoler. Mews v. The Queen (1882), 8 App. Cas. 332, 344 (H.L.).

Sec. 765 makes provision for the speedy trial under Part LIV. with the prisoner's consent before the "County Court Judge's Criminal Court" (see sec. 764) of any person "committed to gaol for trial" on a charge of being guilty of any of the offences which are mentioned in sec. 539 as being within the jurisdiction of the Court of General Sessions, and for such purpose a person who has been bound over by a justice under sec. 601 and has either been unable to find bail or has been surrendered 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. Sec. 765 (2).

**597 Copy 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 the custody thereof, on payment of a reasonable sum, not to exceed five cents for each folio of one hundred words. R.S.C. c. 174, s. 74.

The object of a statutory provision giving prisoners the right to a copy of the depositions is to enable them to know what they have to answer on their trial, and the magistrate should therefore take down all that took place before him with respect to the charge. R. v. Grady (1836), 7 C. & P. 650; R. v. Thomas, 7 C. & P. 718.

**598. Recognizances 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 the street in which it may be, and whether he is owner or tenant thereof or a lodger therein.

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, or to the like effect, and shall be acknowledged by the person entering into the same, and be sub-

scribed 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.

FORM W.—

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 Lord the King, his 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 Sovereign Lord the King, his 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.)*

CONDITION TO PROSECUTE.

The condition of the written ( *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.

FORM X.—

COGNIZANCE TO PROSECUTE AND GIVE EVIDENCE.

(*Same as the last form, to the asterisk,* and then thus*): And there duly prosecute 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.

FORM Y.—

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.

**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, 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 AA in the said schedule, or to the like effect. R.S.C. c. 174, ss. 78 and 79.

FORM Z.—

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.)*

FORM AA.—

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 for 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.)*

**600. Transmission of documents.**—The following documents shall, as soon as may be after the committal of the accused, be transmited 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.

It has been held by the Supreme Court of Nova Scotia that where the accused is admitted to bail under Cr. Code 601 without being committed for trial, the depositions need not be transmitted by the justice, under sec. 600, to the officer of the court in which an indictment is to be preferred. R. v. James Gibson (1896), 3 Can. Cr. Cas. 451.

Semble, an accused person may, upon a preliminary enquiry, waive the preliminary examination into the charge and consent to be committed for trial without any depositions being taken; but as the "charge" in the County Judges' Criminal Court must be prepared from the depositions (Cr. Code 767), the accused, committed without depositions having been taken, has no right to elect to be tried at the County Judges' Criminal Court. Ibid.

**601. Rule as to bail.**—When any person appears before any justice charged with an indictable offence punishable by imprisonment or 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 insure 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 commited 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 default of such person procuring sufficient bail, such justice or justices may com-

mit 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. R.S.C. c. 174, s. 81.

*(Amendment of 1900.)*

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 court of criminal jurisdiction capable of trying the offence intervenes.

FORM BB.—*(As amended 1900.)*

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 Lord the King, his 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, land and tenements respectively, to the use of our said Sovereign Lord the King, his 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.)*

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 (*etc., as in the warrant*); if, therefore, the said A. B. appears at the next superior court of criminal jurisdiction (*or* court of gen-

eral 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 in and 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.

Before the addition of the third sub-section in 1900, it was doubtful whether the procedure thereby adopted could formerly be followed, and as a consequence petty cases were frequently sent to the Assizes which might very well be tried by the Sessions.

To deny or obstruct a party from being bailed where that security ought to be accepted and has been actually tendered is an offence punishable by indictment as well as by action at law. Petersdorff on Bail, 513.

Where the accused was committed for trial, and bail taken for his appearance at the next sittings of a court of competent jurisdiction, but he was not called at that sittings, but at the next following, when he failed to appear, it was held that an estreat of the bail was invalid. Re Cohen's Bail (1896), 32 C.L.J. 412 (Armour, C.J., Falconbridge and Street, JJ.).

A defendant charged with offering money to a person to swear that A., B. or C. gave him a certain sum of money to vote for a candidate at an election, was admitted to bail and the recognizance taken by one justice of the peace. It was held that the offence was not an attempt to commit the crime of subornation of perjury, but something less, being an incitement to give false evidence or particular evidence regardless of its truth or falsehood and was a misdemeanour at common law, and that the recognizance was properly taken by one justice, who had power to admit the accused to bail at common law, and that section 601 of the Code did not apply. R. v. Cole (1902), 38 C.L.J. 266 (Ont.).

The common law jurisdiction as to crime is still operative, notwithstanding the Code, and even in cases provided for by the Code, unless there is such repugnancy as to give prevalence to the later law. Ibid.

See also note to secs. 600 and 603.

**602. Bail after committal.**—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. R.S.C. c. 174, s. 82.

FORM CC.—(*As amended 1900.*)

WARRANT OF DELIVERANCE ON BAIL BEING GIVEN FOR A PRISONER ALREADY COMMITTED.

Canada,
County of , }
Province 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 said county of , to answer our Sovereign Lord the King, for that (*etc., as in the commitment*), for which he was taken and committed to your said common gaol: These are, therefore, to command you, in His 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.)*

The old courts of Oyer and Terminer and General Gaol Delivery have been done away with in most of the provinces. The amendment consists in the substitution of the expression "superior court of criminal jurisdiction" for the words "court of oyer and terminer or general gaol delivery" which were used in the old forms BB. and CC.

**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 King's Bench or Superior Court. R.S.C. c. 174, s. 83.

See note to sec. 604.

**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 commited, or one of the judges thereof, or the judge of the County Court, if it is intended to apply to such judge, under section 602, for an order to the justice to admit such prisoner to bail,—whereupon such committing justice shall, as soon as may be, transmit 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 provisions 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.

*Admitting to bail.*]—Where there is danger that accused persons, committed for trial, may purposely allow their 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. R. v. Stewart (1900), 4 Can. Cr. Cas. 131 (Man.).

The propriety of admitting to bail a prisoner charged with an offence which was formerly a felony is to be determined with the probability of his appearing to take his trial and not with reference to the guilt or innocence of the party. Short & Mellor's Crown Prac. 376.

Where a prisoner committed for trial on a charge of manslaughter would ordinarily be admitted to bail, bail will not be refused because the Crown prosecutor swears to a belief that he can prove the offence to have been murder. R. v. Spicer (1901), 5 Can. Cr. Cas. 229.

Bail is a delivery or bailment of a person to his sureties, upon their joining, together with himself, in sufficient security for his appearance, he being supposed to continue in their friendly custody instead of going to jail. Blackstone's Com. Vol. 4, p. 296: "He that is bailed is, in supposition

of law, still in custody, and the parties that take him to bail are in law his keepers, and may re-seize him to bring him in at any time." 2 Hawkins, P.C. 124.

"If a person be bailed by insufficient sureties he may be required, either by him who took the bail, or by any one who hath power to bail him, to find better sureties, and on his refusal may be committed, for insufficient sureties are as none." Bacon's Abridg., title "bail." So, where it was sworn that bail was fictitious and utterly worthless, and the accused refused to state who they were, or where they were to be found, or that they had any existence, an order was made requiring him to find other sureties within four days, and put in good and sufficient bail before the judge making the order, and that otherwise the accused should be recommitted to jail. R. v. Mason (1869), 5 Ont. Pr. 125, per Morrison, J.

The reason for committing persons to prison before trial is for the purpose of ensuring their appearance to take their trial, and the same principle is to be adopted on an application for bailing a person committed to take his trial, and it is not a question as to the guilt or innocence of the prisoner. Hughes, Co. J., Elgin, in R. v. Brynes (1862), 8 U.C.L.J. 76; R. v. Seaife, 9 Dowl. P.C. 553. But it is necessary to see whether the offence is serious, and whether the evidence is strong, and whether the punishment for the offence is heavy. So where on a charge of arson the evidence was strongly presumptive of guilt, and there was evidence that the prisoner had endeavoured to purchase his escape from the custody of the constable who had arrested him, the judge's discretion is properly exercised by refusing bail. Ibid. The probability of the accused voluntarily appearing to take his trial does not, in contemplation of law, exist when the crime charged is of the highest magnitude, the evidence in support of the charge strong, and the punishment the highest known to the law. In such case the judge will not interfere to admit to bail. Baronnet's Case (1852), 1 E.& B. 1; but when either of these ingredients is wanting, the judge has a discretion which he will exercise. Ex parte Maguire (1857), 7 L.C.R. 57, per Power, Circuit Judge, for the district of Quebec. But if these elements be combined in any case bail will be refused. Ex parte Corriveau (1856), 6 L.C.R. 249; Ex parte Robinson (1854), 25 Eng. Law & Eq. R. 215.

If a true bill has been found by the grand jury, that fact will have great weight in the question of admitting to bail, but it is not conclusive as to the prisoner's right to bail; and if upon reading the depositions against him, they are found to create but a very slight suspicion of the prisoner's guilt, he should be admitted to bail, notwithstanding the refusal of the Crown officers to consent. Ex parte Maguire (1857), 7 L.C.R. 57.

If the depositions afford a presumption of guilt, at least so strong that a grand jury would in the opinion of the judge hearing the application for bail, find a true bill for murder against the accused, the application should be refused. R. v. Mullady and Donovan (1868), 4 Ont. Pr. 314, per Draper, C.J. Prisoners charged with murder will not be admitted to bail unless it be under very extreme circumstances, as where facts are brought before the court to shew that the indictment cannot be sustained. R. v. Murphy (1853), 2 N.S.R. 158. But the court has undoubted power to admit to bail in cases of murder. Re Bartlemy (1852), 1 E. & B. 8.

The object to be kept in view is the ensuring the appearance of the parties and not the punishment, but the court cannot overlook the magnitude of the crime charged, and the probable testimony to be adduced in support. And in Newfoundland some of the persons charged with murder alleged to have been committed during a riot were admitted to bail on the postponement of their trial, where the witnesses for the defence, numbering about seventy, were engaged to prosecute their employment in the sea fishery and their detention would deprive them of their means of livelihood at the only season when they could earn it for themselves, the court discriminating as

to the parties to be liberated on an analysis of the testimony. R. v. Coady (1885), Morris' Newfoundland Decisions 58.

In Ex parte Baker (1872), 3 Revue Critique (Que.) 46, a verdict of wilful murder has been returned at a coroner's inquest, and a true bill subsequently found by the grand jury against the accused. He was tried and the jury differed in opinion and were discharged. It did not appear how the jury were divided, or what was the precise obstacle to their unanimity. Application was made by the prisoner's counsel for permission to give bail for his appearance to take another trial, and on the return of a writ of habeas corpus before the full Court of Queen's Bench (Duval, C.J., Caron, Drummond, Badgley and Monk, JJ.,) the accused was admitted to bail, himself in £500, and two sureties for £250 each.

The mere circumstance that the accused is able to give any reasonable amount of bail which may be asked of him is not per se a ground for the application. R. v. McCormick, 17 Irish Common Law Rep. 411.

It is for the court to exercise a sound discretion, and if satisfied that notwithstanding the ordering of bail, the prisoners are, in view of all the circumstances, likely to be forthcoming at the proper time to answer the charge, bail may be ordered. R. v. Keeler (1877), 7 Ont. Pr. 117, 120, per Harrison, C.J.; R. v. Wood, 9 Ir. L.R. 71; R. v. Gallagher, 7 Ir. C.L. 19; R. v. McCartie, 11 Ir. C.L. 188.

If the offence be not very serious and the depositions disclose no more than slender grounds of suspicion, bail may be allowed. R. v. Jones, 4 U.C.R. (O.S.) 18.

The court should not, on an application for bail, weigh and decide the question of credibility of witnesses. R. v. Keeler (1877), 7 Ont. Pr. 117, 123.

Where a habeas corpus has been issued, the court has power to admit persons to bail when accused of any felony, including murder. R. v. Fitzgerald, 3 U.C.R. (O.S.) 300; R. v. Higgins, 4 U.C.R. (O.S.) 83.

By 32 & 33 Vict. (Can.), ch. 30, secs. 61 and 62 (now Cr. Code 604), any judge of a court of superior criminal jurisdiction in Ontario was empowered to act on an application for bail as if the party were brought before the full court for that purpose under a writ of habeas corpus. R. v. Chamberlain, 1 C.L.J. 157. In habeas corpus proceedings, when the prisoner, with the depositions and warrant of commitment and the habeas corpus, are duly returned, the court are to consider whether they will discharge, bail, or remand him: and they may take a reasonable time for that purpose, and may bail him de die in diem, or direct him to be detained in custody until they shall have come to decision. Chitty's Criminal Law, Vol. 3, p. 128. And if the court ascertain that there was no pretence for imputing to the prisoner any indictable offence, they will discharge him. Ibid. A judge cannot ascertain if there was a pretence for imputing an indictable offence unless the depositions are before him that he may judge whether the charge of the prisoner having committed such offence is well or ill founded; and a writ of habeas corpus should not issue where no depositions have as yet been taken by the magistrate, and the accused remains in custody on remand pending a preliminary inquiry before the magistrate, such remand having been granted to enable the prosecution to supply evidence in support of the charge. R. v. Cox (1888), 16 Ont. R. 228, per McMahon, J. In the same case it was held that, although the statutory power of superior court judges to admit any person accused of felony or misdemeanour to bail "when they think it right to do so" (Criminal Procedure Act, R.S.C. 174, sec. 83), gives authority to admit to bail in cases where the accused has not been finally committed for trial, bail should not be granted after the refusal of the magistrate to grant same, unless the court can say that he had not exercised a sound discretion in refusing it, or unless the depositions of the witnesses have been taken, by a perusal of which the court could judge of the nature of the case likely to be presented at the trial in case the prisoner were commited for trial. R.

v. Cox (1888), 16 Ont. R. 228, 232, per McMahon, J. Sec. 83 of the Criminal Procedure Act was the basis of the present sec. 605 of the Code, and although the saving clause, containing the words quoted, has not been repeated in the Code enactment, it would seem that its omission had made no change in the law.

The Habeas Corpus Act, 31 Car. II., ch. 2, sec. 7, provides as follows:—

"That if any person or persons shall be committed for high treason or felony, plainly and specially expressed in the warrant of commitment, upon his prayer or petition in open court, the first week of the term, or first day of the sessions of oyer and terminer and general gaol delivery to be brought to his trial, shall not be indicted some time in the next term, sessions of oyer and terminer or general gaol delivery after such commitment, it shall and may be lawful to and for the judges of the Court of King's Bench and justices of oyer and terminer or general gaol delivery, and they are hereby required upon motion to them made in open court the last day of the term, sessions or general gaol delivery, either by the prisoner or anyone on his behalf, to set at liberty the prisoner upon bail, unless it appears to the judges and justices upon oath made, that the witnesses for the King could not be produced the same term, sessions or general gaol delivery, and if any person committed as aforesaid, upon his prayer or petition in open court the first week of the term or first day of the sessions of oyer and terminer and general gaol delivery, to be brought to his trial shall not be indicted and tried the second term, sessions of oyer and terminer and general gaol delivery after his commitment, or upon his trial shall be acquitted, he shall be discharged from his imprisonment."

Under this statute the Crown is not obliged to do more than indict at the first assize after commitment, and have the prisoner tried at the second assize thereafter. R. v. Bowen, 9 C. & P. 509; R. v. Keeler (1877), 7 Ont. Pr. 117, 123.

The assignment of that period by the statute is a declaration that in the absence of any special reason to the contrary, the prosecutor having had his vigilance excited by the prayer of the defendant in open court, should be allowed that period for preparing and getting up the case for the Crown, without having the safe custody of the prisoner interfered with. R. v. McCartie, 11 Ir. C.L. 194.

**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 or lodged with such keeper, he shall forthwith obey the same. R.S.C. c. 174, s. 84.

**606. Warrant for the arrest of a 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.

**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 his 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. R.S.C. c. 174, s. 85.

FORM DD.—

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.*

PART XLVI.

## INDICTMENTS.

SECT.



---

**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.

**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.

*Venue.*]—The visne of the place of trial—the venue—is regularly the visne of the place of the crime, i.e., the same county, district or place; and the trial then takes place by a jury of that county or district taken from a panel summoned by the sheriff of the same. Malott v. R. (1886), 1 B.C.R., pt. 2, p. 212; Sproule v. R., 1 B.C.R., pt. 2, p. 219, and sub nom; Re Sproule, 12 Can. S.C.R. 140. But by reason of the extended jurisdiction of justices to hold preliminary enquiries in certain cases although the offences were not within the territory for which they were commissioned to be justices (see secs. 553-556), a committal for trial, and consequently the trial itself may be in another district. A justice has under sec. 554 jurisdiction to compel the attendance of an accused person for the purpose of a preliminary inquiry to be held by him if the charge against the person accused is that he has committed an indictable offence in any part of the same province, and is, or is suspected to be, or resides, or is suspected to reside, within the territorial limits of the justice's district. See. 554. Jurisdiction also attaches on a charge of receiving stolen property, if the theft took place within the justice's limits, or if the accused has the stolen property within such limits in his possession, although stolen or unlawfully acquired or unlawfully received elsewhere. See. 554. If, however, an accused person is brought before a justice charged with an offence committed out of the limits of the latter's jurisdiction but over which he has jurisdiction by reason only of such special provisions, the justice has a discretion after hearing both the prosecution and the defence on the question of removal, and at any stage of the preliminary enquiry, to order the accused to be taken by a constable before a justice whose territorial jurisdiction extends over the place where the offence was committed. See. 557.

*Objection to venue.*]—An objection to the jurisdiction in respect of venue had formerly to be raised by a special plea to the indictment. R. v. O'Rourke, 1 O.R. 464, which plea was required to be duly verified by affidavit or otherwise. R. v. Malott (1885), 1 B.C.R., pt. 2, p. 207; Malott v. R. (1886), 1 B.C.R., pt. 2, p. 212; but see. 631 abolishes that form of special plea, and any such ground of defence may now be relied on under the plea of not guilty. See. 631 (2).

*Change of venue.*]—See sec. 609.

**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.

3. Any mistake in the heading shall, upon being discovered, be forthwith amended, and whether amended or not, shall be immaterial.

FORM EE.—

In the (*name of the court in which the indictment is found*).

The jurors for our Lord the King present that

(*Where there are more counts than one, add at the beginning of each count*):

"The said jurors further present that ."

**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 sub-section 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.—

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; &c.

*or*

(*e*) The said A. committed perjury on the trial of B. at a Court of Quarter Sessions, held at Ottawa, on for an 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*).

*Sufficiency of the indictment.*]—The examples in Code Form FF, of the description of offences in indictments are intended to illustrate the provisions of Code sec. 611, relating to the form of counts; and the operative effect of Form FF under sec. 982 is not restricted to the validating of counts in respect only of the particular offences for which examples are given in the Form, but extends to counts for other offences. R. v. Skelton (1898), 4 Can. Cr. Cas. 467 (N.W.T.).

An indictment only states the legal character of the offence and does not profess to furnish the details and particulars. These are supplied by the depositions and the practice of informing the prisoner or his counsel of any additional evidence not in the depositions what it may be intended to produce at the trial. Mulcahey v. R. (1868), L.R. 3, H.L. 306. Per Willes, J.: Downie v. R. (1888), 15 Can. S.C.R. 358, 375.

Each count of an indictment must contain a statement of all the essential ingredients which constitute the offence charged. R. v. Weir (No. 5) (1900), 3 Can. Cr. Cas. 499 (Que.).

An indictment is sufficient in form if it contains all the allegations essential to constitute the offence and charges in substance the offence created by the statute; and 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. 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, with intent to deceive, sufficiently charges the offence, under section 99 of The Bank Act, of having made "a wilfully false or deceptive statement *in* any return or report" with such intent. R. v. Weir (No. 1), 3 Can. Cr. Cas. 102, R.J.Q. 8 Q.B. 521.

A count in an indictment charging that the defendant acting under a power of attorney fraudulently sold certain bank shares and fraudulently converted the proceeds "and did thereby steal the said proceeds" is not bad as charging two offences, and the reference to the fraudulent sale and fraudulent conversion are to be taken as descriptive of the means whereby the offence of stealing under a power of attorney was committed. R. v. Fulton (1900), 5 Can. Cr. Cas. 36 (Que.).

It is not necessary that an indictment which sufficiently describes that which is by statute an indictable offence should conclude with the words "against the form of the statute in such case made and provided, and against the peace of Our Lady the Queen, her Crown and dignity." R. v. Doyle (1894), 2 Can. Cr. Cas. 335 (N.S.).

Where two or more names are laid in an indictment under an alias dictus it is not necessary to prove them all. R. v. Jacobs (1889), 16 Can. S.C.R. 433. J. was indicted for the murder of A.J., otherwise called K.K. On the trial it was proved that the deceased was known by the name of K.K., but there was no evidence that she ever went by the other name. Held, that this variance between the indictment and the evidence did not invalidate the conviction of J. for manslaughter. Ibid.

As a general rule the name of the person against whom an offence has been committed should be given, and any property which has been the subject of an offence should be described. But to prevent a crime going unpunished where it is impossible to give the name of the party, it is in such cases sufficient, as an exception to the general rule, for the grand jury to state that it has been committed against a person to the jurors unknown. R. v. Taylor (1895), R.J.Q. 4 Q.B. 226.

An indictment charging that the accused unlawfully attempted to steal from the person of an unknown person the property of such unknown person without giving the name of the person against whom the offence was committed or the description of the property the accused attempted to steal, is sufficient. R. v. Taylor (1895), R.J.Q. 4 Q.B. 226.

An indictment that does not set up in the statement of the charge all the essential ingredients, is defective and cannot be sustained. So where an indictment charging the publication of a defamatory libel, did not state that the same was likely to injure the reputation of the libelled person by exposing him to hatred, contempt or ridicule, or was designed to insult him, it was held bad by reason of the omission of an essential ingredient of the offence. Such an indictment cannot be amended and must be set aside and quashed as the defect is a matter of substance. R. v. Cameron (1898), 2 Can. Cr. Cas. 173 (Wurtele, J.).

It is not necessary to allege in an indictment facts which the law will necessarily infer from the proof of other facts which *are* alleged. So where an indictment for unlawfully writing and publishing a defamatory libel omitted to allege that the libel was published maliciously, it was held that the indictment was nevertheless good inasmuch as, upon proof of the publication of the libel, the legal inference, until rebutted by the defendant, was that it was published maliciously; and the allegation that the publication

was malicious was not, therefore, a necessary averment. R. v. Munslow (1895), 18 Cox C.C. 112 (Lord Russell, C.J., Pollock, B., Wills, Charles and Lawrence, JJ.).

Where a person charged before a court of summary jurisdiction has a right to elect to be tried by a jury in respect of an offence punishable summarily and not originally indictable, and by statute the court is thereupon to deal with the case as if the accused were charged with an indictable offence and not with an offence punishable on summary conviction, it has been held that, upon an indictment being preferred accordingly, the fact that the indictment is preferred in consequence of the defendant's claim to be tried by a jury is not a necessary averment therein. R. v. Chambers (1896), 18 Cox C.C. 401, 75 Eng. L.T. 76 (Lord Russell, C.J., Pollock, B., Hawkins, Grantham and Lawrance, JJ.).

The absence or the insufficiency of particulars does not vitiate an indictment; but if it should be made to appear that there is a reasonable necessity for more specific information, the court may, on the application of the accused person, order that further particulars be given, but such an order is altogether within the judicial discretion of the judge. R. v. France (1898), 1 Can. Cr. Cas. 321, 329 (Q.B. Montreal).

Judge Taschereau, in his book on the Criminal Code (1893), p. 675-678, says: "The first sub-section of this sec. 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. . . . Sub-sec. 2 of sec. 611 may perhaps dispense with, for instance, the word "burglariously" in indictments for burglary, but leaves it necessary to aver all matter necessary to be proved. . . . Sub-sec. 3 will probably not receive a wider construction than the same enactment as reproduced in sec. 734, as to indictments for any offence against this Act, has heretofore received. . . . Sub-sec. 2 of this sec. 611 assumes negatively that all matter 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."

There is a difference between an indictment which is bad for charging an act which as laid is no crime, and an indictment which is bad for charging a crime defectively; the latter may be aided by verdict, the former cannot. R. v. Waters (1848), 1 Den. C.C. 356. If a substantial ingredient of the offence does not appear on the face of the indictment, the court will arrest the judgment. Sec. 733 (2); R. v. Carr, 26 L.C. Jur. 61; R. v. Lynch, 20 L.C. Jur. 187. If the indictment is in such a form that it does not charge an offence, the court cannot allow an amendment to remedy the defect. R. v. Flynn, 18 N.B.R. 321; R. v. Norton (1886), 16 Cox C.C. 59; R. v. James (1871); 12 Cox C.C. 127; R. v. Morrison, 18 N.B.R. 682. Nor is an amendment to be made if it change the nature and quality of the offence. R. v. Wright (1860), 2 F. & F. 320.

If the indictment charges no crime, the defect is a matter of substance and not amendable, and the court is obliged to arrest the judgment. R. v. Carr, 26 L.C. Jur. 61; R. v. Wheatley (1761), 2 Burr. 1127; R. v. Turner (1830), 1 Moo. 239; R. v. Webb (1848), 1 Den. C.C. 338. And a plea of guilty is not a waiver, and does not prevent the defendant from moving in arrest of judgment as to defects apparent on the record. R. v. Brown (1890), 24 Q.B.D. 357.

But if the defect is one which the court has the power to amend, sec. 629 of the Code then applies, and the objection must be raised before plea. R. v. Mason, 22 U.C.C.P. 246.

*Amending the indictment.*]—See sec. 723.

**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, 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 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 counts.**—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:

*(Amendment of 1893).*

(*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.

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.

*Sufficiency of indictment.*]—See note to sec. 611, and as to alleging property in one of several joint owners named "and others" and other details of description in certain cases specified, see sec. 619.

*Particulars.*]—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. Sec. 617 (2). When a particular is delivered in pursuance of an order, the accused is entitled to have a copy supplied to himself or to his solicitor without charge therefor. Sec. 617. The trial proceeds as if the indictment had been amended in conformity with the particulars delivered. Ibid.

**614. Indictment for treason.**—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 libel.**—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 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 the 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 innuendo.

*Particulars.*]—The power here given to order the delivery of particulars in cases of libel, etc., is in addition to the general powers conferred by sec. 613.

**616. Indictment for perjury and certain other offences.**—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 s. 611. R.S.C. c. 174, s. 107.

It is submitted that the second sub-section does not mean that the false pretence need not be set out at all. While Meredith, C.J., in his judgment in R. v. Patterson (1895), 2 Can. Crim. Cas. 339, speaks of the "addition of the words unnecessarily setting out in what the false pretences consisted," and expresses the view that the indictment would have been fully authorized by sec. 641 if laid "without alleging in what the false pretence consisted," it will be observed that Rose, J., limits his opinion to the case of an indictment in which the false pretence is not set out in detail. See note to sec. 611.

**617. Particulars.**—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 entered 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 secs. 613 and 615.

**618. Indictment for pretending to send money, etc., in letter.**—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. Indictments in certain cases.**—An indictment shall be deemed insufficient 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 334, 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.

**620. Property of body corporate.**—All property, real and personal, whereof any body corporate has, by law, the management, 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 343 or 375 of this Act, it shall be sufficient to lay the property in His 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 His Majesty. R.S.C. c. 174, s. 124.

**622. Indictment for offences 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 His 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 the authority of the Legislature whereof it was issued or prepared for issue. R.S.C. c. 174, s. 125.

**623. Indictments against public servants.**—In every case of theft or fraudulent application or disposition of any chattel, money or valuable security under ss. 319 (*c*) and 321 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 His Majesty, or in the municipality, as the case may be. R.S.C. c. 174, s. 126.

**624. Indictments for offences respecting letter bags, 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 His Majesty, if the same is the property of His Majesty, or if the

loss thereof would be borne by His 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.

**625. Indictment for stealing 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.

**626. Joinder of counts and proceedings thereon.**—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, or to the 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.

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.

FORM EE.—

HEADING OF INDICTMENT.

In the (*name of the Court in which the indictment is found*).

The jurors for our Lord the King present that

(*Where there are more counts than one, add at the beginning of each count*):

"The said jurors further present that ."

*Joinder of counts.*]—Offences of the same character, though differing in degree, may be united in the same indictment, and the prisoner tried on both at the same time, and on the trial he may be convicted on the one and not on the other. Theal v. R. (1882), 7 Can. S.C.R. 397, 405.

The former rule was that if different felonies were stated in several counts of an indictment, while no objecion could be made to the indictment on that account in point of law, the judge, in his discretion, might quash the indictment, or require the counsel for the prosecution to select one of felonies and confine himself to that. That was technically termed putting the prosecutor to his election, and was done when the prisoner, by reason of two charges being inquired into at the same time, would be embarrassed in his defence, or, as it has been said, lest it should "confound" him in his defence, a matter however only of prudence and discretion, to be exercised by the judge. Per Ritchie, C.J., in Theal v. R. (1882), 7 Can. S.C.R. 397, 405. A separate trial may now be directed under this section in respect of any of the counts instead of putting the prosecutor to his election.

Upon the trial at the same time and upon the same indictment of three distinct charges of theft alleged to have been committed within six months of one another by a prisoner, the jury must necessarily be placed in possession of the evidence upon all the charges before being required to find the verdict upon any of them, notwithstanding the danger that a jury might not separate and properly apply the evidence upon the different charges in dealing with them. See Re A. E. Cross (1900), 4 Can. Cr. Cas. 173 (Ont.).

An indictment may now be laid under secs. 626 and 713, charging rape and also assault with intent to commit rape. Taschereau's Cr. Code (1893), p. 273.

*Directing separate trial of persons jointly indicted.*]—Where several persons are indicted jointly, the Crown has the option of having them tried separately instead of together, and none of them can demand a separate trial as a matter of right. R. v. Weir (No. 4) (1899), 3 Can. Cr. Cas. 351 (Que.).

But if the trial of the defendants jointly instead of separately would work an injustice to any of them, the presiding judge may, on due cause being shewn, exercise his discretionary right to direct a separate trial. Ibid.

Whether or not a separate trial shall be granted on the application of a defendant is a matter in the discretion of the court. R. v. Littlechild (1871), L.R. 6 Q.B. 293. The accused persons are not entitled as of right to severance of trial; R. v. McConohy (1874), 5 Revue Legale (Que.) 746, per Monk, J., Q.B., Montreal; but the Crown is so entitled if the case is one in which a severance is practicable; 2 Hawkins, P.C., ch. 41, sec. 8; 1 Bishop's Crim. Prac. 1034. A severance is not allowed in the trial of indictments for conspiracy or for riot. Starkie's Crim. Plead. 36. And

separate trials were refused where the charge was subornation of perjury; R. v. Gravel (1877), per Ramsay, J., Court of Queen's Bench, Montreal; (not reported) referred to in Taschereau's Criminal Code of Canada page 696.

On an indictment of three persons jointly, for publishing blasphemous libels in certain numbers of a newspaper, two of them whose names were on it as editor and publisher respectively, having already been convicted on a charge of publishing similar libels in another number of the paper, it was held that the third, whose case was that he was not connected with the paper at all, ought (on his application) to be tried separately, as his trial with the others might possibly prejudice him in his defence, especially as he desired to call them as witnesses, while it did not appear that his separate trial could at all embarrass the case for the prosecution as the prosecutor would be entitled to give any evidence in his power to fix the defendant with a joint liability for the acts of the others. R. v. Bradlaugh and others (1883), 15 Cox C.C. 217 (Coleridge, L.C.J.).

The trial judge has a discretion at the close of the case for the prosecution to submit the case of one of the defendants separately to the jury, if no evidence is to be given on his behalf; but he is not bound to do so. R. v. Hambly (1859), 16 U.C.Q.B. 617, (Robinson, C.J., McLean and Burns, JJ.). When either the defendant or the prosecution desire to call one of the accused to give evidence for or against a co-defendant, a separate trial should be asked for. Where persons are jointly indicted but are tried separately, one of them is a competent witness against the other although the defendant so called has not been tried and has not been discharged on a nolle prosequi, and although he has not pleaded to the indictment. R. v. Winsor, 10 Cox C.C. 276.

Before the Canada Evidence Act, where prisoners were indicted jointly, and all pleaded not guilty, but having severed in their challenges, the Crown elected to proceed against three of them leaving the fourth to be tried *separately*, it was held that he was a competent witness on behalf of the other prisoners; R. v. Jerrett (1863), 22 U.C.Q.B. 499. (Hagarty, J., and Adam Wilson, J.). But if several prisoners jointly indicted were *jointly* tried and had been given in charge to the jury the former rule was that one of them while in such charge could not be called as a witness for another. R. v. Payne (1872), 12 Cox C.C. 118 (Court for Crown Cases Reserved).

Since the Canada Evidence Act, 1893, every person charged with an offence is a *competent* witness whether the person so charged is charged solely, or jointly with any other person (sec. 4). That section does not make the accused person a *compellable* witness in circumstances under which he was under the prior law neither competent nor compellable, ex. gr. after being given in charge to the jury when being jointly tried with others on the same indictment. It, however, makes it possible for the accused to go into the witness box if he so desires, at the same time providing that the failure of the person charged to testify shall not be made the subject of comment by the judge or by counsel for the prosecution in addressing the jury (sub-sec. 2 of sec. 4).

Where persons are jointly indicted and one pleads guilty and is sentenced before the trial of the other is concluded, the prisoner so sentenced is rendered not only a competent but a compellable witness for or against the other. R. v. Jackson (1855), 6 Cox C.C. 525; R. v. Gallagher (1875), 13 Cox C.C. 61.

Where the accused person becomes a witness either by reason of his own election to give evidence or his obligation to testify as having been rendered a compellable witness, he is not excused from answering any question upon the ground that the 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; (Canada Evidence Act sec. 5, amendment of 1898) provided, however, that if the witness objects to answer upon that ground and if but for sec. 5 of the Canada Evidence Act he would upon such objection have been excused from answering the question then, although the witness shall be compelled to answer, yet the answer so given shall not be used or be 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; Canada Evidence Act sec. 5 (amendment of 1898). See also R. v. McLinehy (1899), 2 Can. Cr. Cas. 416.

**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.

*Accessories after the fact.*]—See secs. 63 (definition); 67 (in treason); 235 (in murder); 531 and 532 (punishment).

*Receivers.*]—See secs. 314-318 (punishment), and 715-717 (procedure and evidence).

If it be proved that one of the persons charged with jointly receiving, separately received any part of the property, the jury may convict him separately under the indictment against two or more. Sec. 715.

**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.

See secs. 478, 676 and 694.

**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.

*What defects are amendable.*]—There is a difference between an indictment which is bad for charging an act which as laid is no crime, and an indictment which is bad for charging a crime defectively; the latter may be aided by verdict, the former cannot. R. v. Waters (1848), 1 Den. C.C. 356. If a substantial ingredient of the offence does not appear on the face of the indictment, the court will arrest the judgment. Cr. Code, sec. 733 (2); R. v. Carr, 26 L.C. Jur. 61; R. v. Lynch, 20 L.C.J. 187. If the indictment is in such a form that it does not charge an offence, the court cannot allow an amendment to remedy the defect. R. v. Flynn, 18 N.B.R. 321. R. v. Norton (1886), 16 Cox C.C. 59; R. v. James (1871), 12 Cox C.C. 127; R. v. Morrison, 18 N.B.R. 682. Nor is an amendment to be made if it change the nature and quality of the offence. R. v. Wright (1860), 2 F. & F. 320.

If the indictment charges no crime, the defect is a matter of substance and not amendable, and the court is obliged to arrest the judgment. R. v. Carr, 26 L.C. Jur. 61; R. v. Wheatley (1761), 2 Burr. 1127; R. v. Turner (1832), 1 Moo. 239; R. v. Webb (1848), 1 Den. C.C. 338. And a plea of guilty is not a waiver, and does not prevent the defendant from moving in arrest of judgment as to defects apparent on the record. R. v. Brown (1890), 24 Q.B.D. 357.

But if the defect is one which the court has the *power to amend*, sec. 629 of the Code then applies, and the objection must be raised before plea. R. v. Mason (1872), 22 U.C.C. P. 246.

With the exception of the added words "except by leave of the court or judge before whom the trial takes place," this section is a re-enactment of R.S.C. (1886), ch. 174, sec. 143, which was derived from 32-33 Vict. (Can.), ch. 29, sec. 32.

The court is not ousted of its power to quash an indictment because a plea has been pleaded. If it is made apparent either on the face of the record or by extrinsic evidence that there is a want of jurisdiction, the court will quash the indictment after plea pleaded, for at the time of pleading a man might not be aware of the defect of jurisdiction. R. v. Heane (1864), 4 B. & S. 947. In ordinary cases the defect in jurisdiction would appear on the face of the indictment; but it is not necessary to allege in the indictment that the preliminaries required by statute before preferring it, have

been complied with; and in such cases the defect *must* be brought to the knowledge of the court by affidavit. Ibid.; R. v. Burke (1893), 24 Ont. R. 64.

Where the defendants had elected to be tried by the County Court judge under the Speedy Trial clauses, they cannot be deprived of such right because indictments were found against them at the assizes for the offences for which they had so elected to be tried, although through the mistake or error of their junior counsel a plea of "not guilty" was by him entered on each of the indictments. R. v. Burke (1893), 24 Ont. R. 64, 68.

An objection to an indictment against a corporation upon the ground that it does not disclose any offence in respect of which the defendant corporation could be liable, must be taken by demurrer and not by motion to quash. R. v. Toronto Ry. Co. (1900), 4 Can. Cr. Cas. 4 (Ont.).

Section 629 applies only to formal defects, and the reason is that the grand jury are the accusers on the indictment, and the accusation cannot be changed into another one without their consent, and, if they have brought an accusation of an offence not known to the law, the court cannot turn it into an offence known to the law by adding to the indictment.

In the Territories the Crown prosecutor is the accuser, and has the right under section 11 of the North-West Territories Act amendment (54-55 Vict. ch. 22) to substitute another charge in respect to the same offence, and having that right it has been held that he may amend the original charge instead of substituting a new one. R. v. Skelton (1898), 4 Can. Cr. Cas. 467 (N.W.T.).

Strictly, a notice to quash an indictment cannot be made after plea, yet in furtherance of substantial justice the court will sustain an objection, though in strict law a prisoner may be too late in making it. R. v. Dowey (1869), 1 P.E.I. Rep. 291. But where the objection is merely technical, where the prisoner cannot be injured by the irregularity of which he complains, and it is evidently made merely in delay of justice, the court will not use its power to assist him. Sir William Withpole's Case, Cro. 134; R. v. Sullivan, 8 A. & El. 831. And a motion in arrest of judgment of guilty in a murder case was refused on this principle, where it was objected that one of the grand jury who found the indictment had also been on the coroner's jury. R. v. Dowey (1869), 1 P.E.I. Rep. 291, per Peters, J.

It is not necessary that an indictment which sufficiently describes that which is by statute an indictable offence should conclude with the words "against the form of the statute in such case made and provided, and against the peace of Our Lord the King, his Crown and dignity." R. v. Doyle (1894), 2 Can. Cr. Cas. 335 (N.S.).

In charging the offence of uttering a forged instrument, the indictment must aver that the defendants made use of or uttered the instrument knowing it to have been forged. A count of an indictment charging the defendant with having, with intent to defraud, unlawfully made use of and uttered a promissory note, alleged to have been made and signed by one of the defendants by procuration, without lawful authority or excuse and with intent to defraud, is defective if it does not also allege that the defendants knew it to have been so made and signed. Such a defect is one of substance and cannot be amended under this section. R. v. Weir (No. 5), 3 Can. Cr. Cas. 499 (Que.).

Where to an indictment for libel a plea of justification was held to be insufficient because it did not set out the particular facts upon which the defendant intended to rely, it was held that the court should in the exercise of its jurisdiction quash the plea upon a summary motion, without requiring a demurrer. R. v. Creighton (1890), 19 O.R. 339.

As to powers of amendment see sec. 723.

**630. Postponing the trial.**—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.

*Application to postpone trial.*]—An application to postpone a trial by jury in consequence of the absence of material witnesses must be supported by special affidavit shewing that the witnesses are material. R. v. Dougall (1874), 18 L.C. Jur. 85.

It is no ground of "surprise" that the prisoner had no knowledge of the evidence to be produced against him, for no one is obliged, by pleading, or otherwise, to disclose the evidence by which his case is to be supported. It is sufficient that the party is fully apprised of the case or charge which it is proposed to prove against him, and he must then, being so informed, prepare himself to repel it. R. v. Slavin (1866), 17 U.C.C.P. 205.

Where it appears by affidavit that a necessary witness for the prisoner is ill (R. v. Hunter, 3 C. & P. 591), or that a witness for the prosecution is ill (R. v. Bowen, 9 C. & P. 509), or unavoidably absent, or is kept out of the way by the contrivance or at the instigation of the prisoner, the court will postpone the trial, unless it appear that the requirements of justice can be satisfied by reading the witness's depositions before a magistrate. Roscoe Cr. Evidence, 11th ed., 185.

If the application is made on the ground of the absence of a material witness, the judge will require an affidavit stating the points which the witness is expected to prove, in order to form a judgment whether the witness is a material one or not. R. v. Savage, 1 C. & K. 75. An affidavit of a surgeon, that the witness is the mother of an unweaned child afflicted with an inflammation of the lungs, who could neither be brought to the assize town nor separated from the mother without danger to life, is a sufficient ground on which to found a motion to postpone the trial. Ib. Where a prisoner's counsel moved to postpone a trial for murder, on an affidavit which stated that one of the witnesses for the prosecution, who had been bound over to appear at the assizes, was absent, and that on cross-examination this witness could give material evidence for the prisoner, Cresswell, J., after consulting Patteson, J., held that this was a sufficient ground for postponing the trial, without shewing that the prisoner had at all endeavoured to procure the witness's attendance, as the prisoner might reasonably expect, from the witness having been bound over, that he would

appear. R. v. Macarthy, Carr. & M. 625. In R. v. Palmer, 6 C. & P. 652, the judges of the Central Criminal Court postponed until the next session the presentment of a bill for a capital offence to the grand jury, upon the affidavit of the attorney for the prosecution, that a witness, whose evidence was sworn to be material, was too ill to attend, and they refused to refer to the deposition of the witness to ascertain whether he deposed to material facts. Where, in a case of murder committed in Newcastle-upon-Tyne, which had created great excitement, a newspaper published in the town had spoken of the prisoner as the murderer, and several journals down to the time of the assizes had published paragraphs, implying or tending to shew his guilt, and it appeared that the jurors at such assizes were chosen from within a circle of fifteen miles round Newcastle, where such papers were chiefly circulated, but that at the summer assizes they would be taken from the more distant parts of the county of Northumberland (into which the indictment had been removed), Alderson and Parke, BB., postponed the trial until the following assizes. Alderson, B., however, said: "I yield to the peculiar circumstances of the case, wishing it to be understood that I am by no means disposed to encourage a precedent of this sort." R. v. Bolam, Newcastle Spring Ass. 1839, M.S.; 2 Moo. & R. 192. See also R. v. Joliffe, 4 T.R. 285. And in R. v. Johnson, 2 C. & K. 354, the same learned judge refused to postpone the trial of a prisoner charged with murder, on the ground that an opportunity might be thereby afforded of investigating the evidence and characters of certain witnesses who had not been examined before the committing magistrate, but who were to be called for the prosecution to prove previous attempts by the prisoner on the life of the deceased. A trial for murder was postponed till the next assizes by Channell, B., upon an affidavit of a medical man as to a witness being unable to travel, although such witness was not examined before the magistrate, and although the trial had been fixed for a particular day. R. v. Lawrence (1866), 4 F. & F. 901.

In general, a trial will not be postponed to the next assizes before a bill is found. R. v. Heesom, 14 Cox C.C. 40. But where it was shewn that the attendance of witnesses, inmates of a workhouse in which smallpox had broken out, was necessary, Baggallay, L.J., did not require any bill to be sent up before the grand jury, but postponed the trial to the next assizes, admitting the prisoner to bail in the meantime. R. v. Taylor (1882), 15 Cox C.C. 8.

In no instance will a trial be put off on account of the absence of witnesses to character. R. v. Jones (1806), 8 East 34.

Where the prisoner applies to postpone the trial, he will be remanded and detained in custody till the next assizes or sessions, or will be admitted to bail, but he is never required to pay the costs of the prosecutor. R. v. Hunter, 3 C. & P. 591. Where the application is by the prosecutor, the court in its discretion will either detain the prisoner in custody, or admit him to bail, or discharge him on his own recognizances. R. v. Beardmore (1836), 7 C. & P. 497; R. v. Parish (1837), id. 782; R. v. Osborne (1837), id. 799; see also R. v. Crowe, 4 C. & P. 251.

**631. Special pleas.**—The following special pleas and no others may be pleaded according to the provisions hereinafter contained, 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 on 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.

*Previous acquittal or conviction for same offence.*]—It is a well-established rule that when a man has once been indicted for an offence, and acquitted, he cannot afterwards be indicted for the same offence. If he be thus indicted a second time he may plead autrefois acquit, and it will be a good bar to the second indictment; and this plea is clearly founded on the principle that no man shall be placed in peril of legal penalties more than once upon the same accusation—nemo debet bis puniri pro uno delicto. Broom's Legal Maxims.

A conviction recorded by justices on a plea of guilty of common assault, to which offence they had illegally reduced the charge on a preliminary enquiry for unlawful wounding, is not a bar to an indictment for unlawfully wounding, based upon the same state of facts, and does not support a plea of autrefois convict. R. v. Lea (1897), 2 Can. Cr. Cas. 233; and see Miller v. Lea, 2 Can. Cr. Cas. 282.

When a competent tribunal, having had a case before it, has given a final judgment, the matter is res judicata. The object of the rule is always put upon two grounds—the one, public policy, that it is the interest of the

State that there should be an end of litigation; and the other, the hardship on the individual that he should be vexed twice for the same cause. Lockyer v. Ferryman (1877), L.R. 2 App. Cas. 519, 528, 530, per Lord Blackburn. A judicial decision is conclusive until reversed, and its verity cannot be contradicted; res judicata pro veritate accipitur. But the prior decision does not prevent the court from considering matters which have arisen subsequently. Heath v. Overseers of Weaverham, [1894] 2 Q.B. 108.

A conviction for obtaining goods under false pretences is a bar to a subsequent indictment for theft on the same facts. R. v. King, [1897] 1 Q.B. 214, 218, 18 Cox C.C. 447.

A previous summary conviction or acquittal by justices after a hearing on the merits is a defence if the justices had jurisdiction over the person and offence. Wemyss v. Hopkins (1875), L.R. 10 Q.B. 378. But a certificate of dismissal by justices of a charge of assault given on the withdrawal of the charge before the hearing of same is not a bar to a subsequent indictment in respect of the same assault. Reed v. Nutt (1890), 24 Q.B.D. 669.

Sec. 864 provides that if the justice, in summary proceedings for common assault, (1) finds the assault complained of to have been accompanied by an attempt to commit some other indictable offence, or (2) is of opinion that the same is from any other circumstances 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.

It would seem, however, that if the justice finds that there are no such circumstances aggravating the offence his decision on that point may, with his certificate of conviction or acquittal for the assault, form the basis of a plea of autrefois convict or autrefois acquit when a charge is subsequently brought for the aggravated offence. R. v. Stanton (1851), 5 Cox C.C. 324; R. v. Elvington (1861), 1 B. & S. 688, 31 L.J.M.C. 14.

A conviction for assault will not, however, bar a subsequent indictment for manslaughter upon the death of the man assaulted consequent upon the same assault. R. v. Friel (1890), 17 Cox C.C. 325; R. v. Morris (1867), L.R. 1 C.C.R. 90.

And where on an indictment containing counts for inflicting grievous bodily harm, unlawful wounding, assault occasioning actual bodily harm, and common assault, the jury convicted of common assault and disagreed on the other counts, it was held that the conviction for common assault would support a plea of autrefois convict as to a re-trial on the other counts. R. v. Greenwood, 60 J.P. 809.

*Variance as to intent or aggravating circumstances.*]—See sec. 633.

*Murder and manslaughter.*]—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 they cannot on that count find the accused guilty of any other offence. Sec. 713 (2).

On an indictment for an assault, defendant pleaded that he had been lawfully acquitted of the offence charged in the indictment, and proved an acquittal on an indictment for murder of the same person, which indictment did not charge an assault; the County Court judge directed a verdict for the Crown and a case was reserved for the opinion of the court whether the prisoner could have been lawfully indicted for assault after having been acquitted on the indictment for murder. It was held that as the prisoner could not have been convicted of the assault on the indictment for murder as framed, his plea failed, and he could be tried and convicted of the assault, and his conviction was upheld. R. v. Smith (1874), 34 U.C.Q.B. 552.

A count charging any offence other than murder cannot now be joined with a count charging murder. Sec. 626 (1).

*Exemplification as evidence.*]—By sec. 10 of the Canada Evidence Act it is provided that evidence of any proceeding or record whatsoever of, in or before any court or before any justice of the peace or any coroner, in any province of Canada may be made in any 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 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.

*Plea of autrefois acquit.*]—This plea may be made ore tenus; 1 Russ. Cr. 6th ed. 49 (*n*); but is ordinarily made in writing and signed by counsel for the accused. The following form of plea is given by Archbold, 22nd ed., p. 157:—

"And the said J.S. in his own proper person cometh into court here, and having heard the said indictment read, saith that our Lord the King ought not further to prosecute the said indictment against the said J.S., because he saith, that heretofore, to wit, at the general quarter sessions of the peace holden at ——, in and for the county of ——, he the said J.S. was lawfully acquitted of the said offence charged in the said indictment. And this he the said J.S., is ready to verify; wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the premises in the present indictment specified."

*Identity of the charges.*]—See sec. 632.

*Plea of pardon.*]—A plea of pardon, other than by statute, should be pleaded at the first opportunity which offers, for if a person has obtained a pardon before he is arraigned and instead of pleading it in bar he pleads not guilty he will thereby waive the benefit of the pardon and cannot use it by way of arrest of judgment. R. v. Norris (1615), 1 Rolle Rep. 297.

Pardons are either free or conditional, and are granted in Canada by warrant under the hand and seal-at-arms of the Governor-General. See also sec. 966.

Unconditional pardons by statute need not be specially pleaded. 2 Hale P.C. 252; R. v. Louis, 2 Keb. 25.

*British Columbia.*]—The following rules of procedure apply in British Columbia:—

Every pleading, other than a plea of guilty or not guilty, to an indictment, information or inquisition shall be intituled "In the Supreme Court of British Columbia," and shall be dated on the day, month, and year when the same was pleaded, and shall bear no other date. A copy shall be delivered to the opposite party, and a copy filed with the Registrar of the Court. B.C. Rule 48.

All proceedings shall be entered on the record made up for trial, and on the judgment roll under the respective dates at which the same took place. B.C. Rule 49.

Every special plea or demurrer shall be in writing, and signed by counsel, or by the solicitor or party, if he defends in person. B.C. Rule 50.

One order only to plead, reply, join in demurrer, or in error, or plead subsequent pleadings in all prosecutions by way of indictment, inquisition, or information shall be given; and every such order shall limit the time from service in which the pleading is to be delivered. B.C. Rule 51.

Time to plead may be extended on application by summons to a Judge at Chambers, on such terms as to the judge appears right. B.C. Rule 52.

**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.

**633. Second accusation.**—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.

*(Amendment of 1893).*

**634. Plea of justification in case of libel.**—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.

*Defamatory libel.*]—See secs. 285-302.

*Justification.*]—The defendant may plead not guilty, as well as a justification that the words are true, and that it was for the public benefit that they should be published. The defence of not guilty permits the defendant to shew that the alleged libel was a fair and bona fide comment on a matter of public interest, or that the occasion of publication was privileged, or any other defence permitted by law, except that the alleged libel is true. Odgers on Libel, 3rd ed. (1896), 330.

*Form of plea.*]—The following form of plea of justification following a plea of not guilty under the corresponding English Act (6 and 7 Vict. ch. 96, sec. 6,) is provided by the English Crown Office Rules of 1886, form No. 81:

"And for a further plea the said A. B., pursuant to the statute in that behalf, says that our said Lord the King ought not further to prosecute the said indictment [*or* information] against him, because he says that it is true that [*here allege the truth of every libellous part of the publication set out in the indictment*].

"And the said A. B. further says that before and at the time of the publication in the said indictment [*or* information] mentioned [*here state facts which rendered the publication of benefit to the public*]; by reason whereof it was for the public benefit that the said matters so charged in the said indictment [*or* information] should be published; and this he, the said A. B., is ready to verify. Wherefore he prays judgment, and that by the Court here he may be dismissed and discharged from the said premises in the said indictment [*or* information] above specified."

A plea of justification to an indictment for defamatory libel must allege that the defamatory matter published is true and that it was for the public benefit that the alleged libel was published. R. v. Grenier (1897), 1 Can. Cr. Cas. 55 (Que.).

Such plea must then set forth concisely the particular facts by reason of which its publication was for the public good, but it must not contain the evidence by which it is proposed to prove such facts, nor any statements purely of comment or argument. Ibid.

A plea of justification, which embodies a number of letters which it is proposed to use as evidence, and contains paragraphs of which the matter consists merely of comments and argument, is irregular and illegal: and the plea itself should be struck from the record, or the illegal averment should be struck out, and the defendant allowed to plead anew. Ibid.

To an indictment for libel, the language of which was couched in general terms, the defendant pleaded that the words and statements complained of in the indictment were true in substance and in fact, and that it was for the public benefit, etc. It was held that the plea was insufficient because it did not set out the particular facts upon which the defendant intended to rely. R. v. Creighton (1890), 19 (Ont.) 339.

*Evidence.*]—The intention of the section is that the right to justify and give the truth on an indictment or information for libel should be limited to defamatory libels on individuals; it was intended not to permit a prosecutor to obtain an advantage over his adversary by complaining of a

defamatory libel in the form of an indictment or information thus instituted in the name of the Crown. While, on the one hand, he was not driven to bring a civil action to vindicate his character, on the other, if he sought to vindicate it by a prosecution, he was not to have the right to prevent the defendant shewing that what had been published was true, and that it was for the public benefit that the matter complained of should be published. R. v. Pattison (1875), 36 U.C.Q.B. 129, per Richards, C.J.

The existence of rumours cannot be proved in justification of the libel. R. v. Dougall (1874), 18 L.C.Jur. 85.

In a prosecution for an alleged defamatory libel contained in a newspaper article, condemning an employer's dismissal of employees belonging to a trade union and charging that the distribution of certain gratuities by the employer to his employees was impelled by motives of selfishness on his part and was for the purpose of winning public approval and favourable public comment through press notices thereof, a plea of justification will not be struck out on the objection that the facts therein alleged do not shew that it was for the public benefit that the publication should be made, if such plea contains a charge that the press notices favourable to the complainant were published at his instance. If the 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 therein, he thereby invites public criticism thereof and cannot object that the answer to his own articles is not a publication in the public interest. R. v. Brazeau (1899), 3 Can. Cr. Cas. 89 (Que.).

"Wherever a man calls public attention to his own grievances or those of his class, whether by letters in a newswaper, by speeches at public meetings, or by the publication of pamphlets, he must expect to have his assertions challenged, the existence of his grievances denied, and himself ridiculed and assailed." Odgers on Libel, 3rd ed., 57; Odger v. Mortimer, 28 Eng. L.T. 472; Kœnig v. Ritchie, 3 F. & F. 413; R. v. Veley (1867), 4 F. & F. 1117; O'Donoghue v. Hussey, Ir. R. 5 C.L. 124; Dwyer v. Esmonde, 2 L.R. Ir. 243.

But where the defendant, in answering a letter which the plaintiff had sent to the paper, does not confine himself to rebutting the plaintiff's assertions, but retorts upon the plaintiff by inquiring into his antecedents, and indulging in other uncalled-for personalities, the defendant will be held liable, for such imputations are neither a proper answer to nor a fair comment on the plaintiff's speech or letter. Murphy v. Halpin, Ir. R. 8 C.L. 127.

Comments, however severe, on the advertisements or handbills of a tradesman will not be libellous, if the jury find that they are fair and temperate comment not wholly undeserved, on a matter to which public attention was expressely invited by the plaintiff. Paris v. Levy, 9 C.B.N.S. 342; Morrison v. Harmer, 3 Bing. N.C. 759, 4 Scott 524.

*What are matters of public interest.*]—Matters of public interest may be classified as follows:—

1. Affairs of State.

Every subject has a right to comment on those acts of public men which concern him as a subject of the realm, if he do not make his commentary a cloak for malice and slander. Parmiter v. Coupland (1840), 6 M. & W. 108; Seymour v. Butterworth, 3 F. & F. 376; Kelly v. Sherlock, L.R. 1 Q.B. 689.

2. The administration of justice.

3. Public institutions and local authorities.

4. Ecclesiastic matters.

5. Books, pictures and architecture.

6. Theatres, concerts and other public entertainments.

7. Other appeals to the public.

A man who has commenced a newspaper warfare cannot complain if he gets the worst of it; but if such answer goes further, and touches on fresh matter in no way connected with the plaintiff's original letter, or unnecessarily assails the plaintiff's private character, then it ceases to be an answer; it becomes a counter-charge, and, if defamatory, will be deemed a libel. And, generally, when a man puts himself prominently forward in any way, and acquires for a time a quasi-public position, he cannot escape the necessary consequence—the free expression of public opinion. Odgers on Libel (1896), 3rd ed., p. 56.

It is a question for the judge, and not for the jury, whether a particular topic was or was not a matter of public interest. Weldon v. Johnson (1884), per Coleridge, C.J., cited in Odgers on Libel, 3rd ed., page 46.

It has been held that the sanitary condition of a large number of cottages let by the proprietors of a colliery to their workmen is a matter of public interest. South Hetton Coal Co. v. N.E. News Association, [1894] 1 Q.B. 133 (C.A.).

Where on the trial of a criminal information for libel the judge in substance told the jury that the defendant, under the pleas of justification, was bound to shew the truth of the whole of the libel to which the plea is pleaded, and that in his opinion, the evidence fell far short of the whole matter charged; such a direction is not so much a direction on the law as a strong observation on the evidence, which may be made in a proper case without being open to the charge of misdirection. R. v. Port Perry, etc., Co., 38 U.C.Q.B. 431; R. v. Wilkinson (1878), 42 U.C.Q.B. 492, 505 (per Harrison, C.J., Wilson, J., diss.).

PART XLVII.

## CORPORATIONS.

SECT.



---

**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.

*Indictment of corporation.*]—An obiter dictum of Sedgewick, J., in Union Colliery v. R. (1900), 4 Can. Cr. Cas. 400, 31 Can. S.C.R. 81, is as follows:—"I am strongly inclined to the view that where the Code specifies an offence and provides for the punishment by imprisonment only, it does not necessarily follow that a corporation may not be indicted and fined for the offence so described."

In a Manitoba case it was held that a corporation is not subject to indictment upon a charge of any crime the essence of which is either personal criminal intent or such a degree of negligence as amounts to a wilful incurring of the risk of causing injury to others, and that secs. 213 and 220, as to want of care in the maintenance of dangerous things, do not extend the criminal responsibility of corporations beyond what it was at common law. There being no power under sec. 639 or otherwise to impose a fine or any other punishment, in lieu of imprisonment, for the offence of manslaughter, it was held that there is consequently no judgment or sentence applicable to a conviction of a corporation for that offence. R. v. Great West Laundry Co. (1900), 3 Can. Cr. Cas. 514 (Man.).

But it has been held in Ontario that a corporation may be indicted under sec. 448 for selling goods to which a false trade description has been applied; and that the proceedings upon such a charge should be instituted by indictment under secs. 635-639, and not by a preliminary inquiry before a magistrate. R. v. T. Eaton Co. (1898), 2 Can. Cr. Cas. 252.

A municipal corporation may be indicted for a nuisance in respect of their non-repair of a highway. Sec. 193; but the consent or order of the judge or the consent of the Attorney-General must first be obtained to the preferring of the indictment. Sec. 641 (3); R. v. City of London (1900); 37 C.L.J. 74.

A justice of the peace cannot compel a corporation to appear before him in respect of an indictable offence, nor can he bind the corporation over to appear and answer to an indictment; and he has no jurisdiction to bind over the prosecutor to present an indictment against the corporation. Re Chapman v. City of London (1890), 19 Ont. R. 33.

As there is no jurisdiction to bind over the prosecutor to prefer a bill of indictment before the grand jury against a corporation, it is necessary that such an indictment should be preferred—(1) by the Attorney-General, or (2) by some one preferring the indictment by the direction of the Attorney-General, (3) or with the written consent of the Attorney-General, (4) or with the written consent of a judge of any court of criminal jurisdiction, or (5) by a person authorized to do so by the court of criminal jurisdiction before which the indictment is sought to be preferred. Sec. 641 (3). It is not necessary that the consent or order should be stated in the indictment. Sec. 641 (4). In default of the corporation appearing by attorney the trial may proceed in the absence of the defendant. Sec. 639. By sec. 641 an objection to an indictment for want of the consent or order required by law in order to prefer an indictment, must be taken by motion to quash the indictment before the accused *person* is *given in charge*. Sub-sec. 4. By sec. 3 of the Code the word "person" includes, unless the context requires otherwise, a body corporate, societies, companies, etc., in relation to such act and things as they are capable of doing and owning respectively. Sec. 3, sub-sec. (*t*). It may be considered as doubtful whether or not a corporation can be properly said to be "given in charge" of the jury, and consequently whether the time limited by sub-sec. 4 of sec. 641 applies to indictments of corporations.

*Whether liable to summary conviction.*]—It has been held by the Supreme Court of New Brunswick that the procedure of the Criminal Code as to summary convictions does not apply to corporations. A magistrate making a summary conviction and directing a distress to levy the fine imposed, is bound to award imprisonment for want of sufficient distress (Code Forms and Code sec. 982), and the summary convictions procedure is, therefore, held not applicable to corporations, as a conviction cannot be made in the terms of the Code Forms (Code schedule 1). The New Brunswick Court held that as regards charges of a criminal nature, a corporation is not within the statutory term "person," which by The Interpretation Act, R.S.C. 1886, ch. 1, is declared to include "any corporation to whom the context can apply," etc. Ex parte Woodstock Electric Light Co. (1898), 4 Can. Cr. Cas. 107 (N.B.).

But a different conclusion was arrived at by a Divisional Court of the High Court of Justice of Ontario in R. v. Toronto Ry. Co. (1898), 2 Can. Cr. Cas. 471, in which it was held that the procedure of the Code as to summary convictions applies as well to corporations as to natural persons, and 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.

See note to sec. 634.

**636. Certiorari, etc., not required.** — 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.

Notice of a summons by justices under the Summary Convictions clauses of the Code may be given in a manner similar to a notice of indictment under this section. R. v. Toronto Ry. Co. (1898), 2 Can. Cr. Cas. 471.

**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 absence of 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. 174, s. 159.

A fine is the punishment which must be substituted under this section in the case of a corporation charged with causing grievous bodily injury through its failure to maintain a bridge in a safe condition (sec. 252), in lieu of the imprisonment mentioned in sec. 252, and the amount is in the discretion of the court (sec. 934). R. v. Union Colliery Co. (1900), 3 Can. Cr. Cas. 523 (B.C.), affirmed 4 Can. Cr. Cas. 400, 31 Can. S.C.R. 81.

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.

*Common law offences.*]—It has never been contended that the Criminal Code of Canada contains the whole of the common law of England in force in Canada. Parliament never intended to repeal the common law, except in so far as the Code either expressly or by implication repeals it. Union Colliery Co. v. The Queen (1900), 4 Can. Cr. Cas. 400, 405; 31 Can. S.C.R. 81, per Sedgewick, J. If the facts stated in an indictment constitute an indictable offence at common law, and that offence is not dealt with in the Code, then an indictment will lie at common law; even if the offence has been dealt with in the Code, but merely by way of statement of what is law, then both are in force.

*Venue.*]—Whenever the accused has been committed by a magistrate or justice of the peace for trial before the court in any district, the court sitting in such district has jurisdiction to try the case. R. v. Hogle (1896), 5 Can. Cr. Cas. 53 (Que.).

The power conferred on a magistrate under sec. 557 of ordering the accused person brought before him, charged with an offence committed out of his territorial jurisdiction (but over which the magistrate still has jurisdiction because of the arrest of the accused within his district), to be taken before some justice having jurisdiction in the place where the offence was committed, is permissive only. Re The Queen v. Burke (1900), 5 Can. Cr. Cas. 29 (Ont.).

See also sec. 609.

*(Amendment of 1900.)*

**641. Who may prefer an indictment.**—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 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.

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.

The only amendment consists in the insertion of sub-sec. 2. The subsequent sub-sections are renumbered to accord with this change. This amendment was suggested by B. M. Britton, Esq., Q.C., M.P. (now Mr. Justice Britton of the King's Bench, Toronto), who pointed out that under the strict interpretation of the former law there was no power for the prosecutor to lay an indictment, except by the written consent of a judge, unless he had taken the precaution at the preliminary investigation of being bound over to prosecute, and that in the majority of cases the prosecutor was not asked by the magistrate to submit himself to be bound over. Commons Debates 1900, p. 5269.

*The grand jury.*]—There is at common law inherent power in a superior court of criminal jurisdiction to order one or more grand juries to be summoned; and the sheriff or coroner may be directed by the one order to summon both a grand and a petit jury. R. v. McGuire (1898), 4 Can. Cr. Cas. 12 (N.B.).

Mr. Justice Wurtele, of the Court of King's Bench, Montreal, in his charge to the grand jury at that city on November 2, 1898, since published in pamphlet form, said:

"Under the common law of England, which was extended to this country in criminal matters in 1774, the panel of a grand jury consisted of twenty-four jurors, but one was struck off at the opening of the court, so that twelve jurors might form the majority of the grand jury; and then it was necessary that twelve at least should concur in finding a charge well founded. It was not necessary that all the twenty-three jurors should be sworn to form the grand jury or that they should all be present at its sittings, but it was necessary that twelve jurors, whatever number was sworn or was present, should join in every finding, and consequently that twelve at least should attend. The constitution of the grand jury and the qualification of the jurors are matters which appertain to the organization of a court of criminal jurisdiction, and which therefore fall under the jurisdiction of the Provincial legislatures, but on the other hand the regulation of the number of jurors who may be required to say if a charge is well founded, is a matter of criminal procedure and it comes within the legislative power of the Parliament of Canada. In order to lessen the expense of the administration of criminal justice, and to reduce the number of persons taken from time to time from their ordinary occupations to serve as grand jurors, it was thought expedient to diminish the number of jurors composing a grand jury and the number of its members who should have to concur in a finding. With this end in view the Parliament of Canada in 1894, by an amendment to the Criminal Code which is contained in the statute 57-58 Vict., ch. 57, enacted that 'seven grand jurors, instead of twelve, might find a true bill in any province where the panel of grand jurors is not more than thirteen:' and the legislature of Quebec in 1895, by the statute 59 Vict., ch. 25, diminished the panel of grand jurors from twenty-four to twelve jurors. . . . The rule, however, as to the attendance of the grand jury, is analogous to the rule which existed when it was composed of twenty-three jurors. It is not necessary, to constitute the grand jury, that all the twelve jurors summoned should be sworn, and it is not necessary either that twelve should be present at the sittings or when the grand jury come into court, but it is necessary that seven at least should always be in attendance.

"The principal duty of the grand jury is to inquire into the accusations that are brought for indictable offences which are alleged to have been committed in the district, or over which it is alleged that the court has juris-

diction. Formerly the grand jury proceeded either upon bills of indictment, which are written statements of the charges against the accused prepared in precise and technical language by the crown prosecutors, or by the presentment of offences which might be within the knowledge of the grand jurors themselves; in the first case, the action of the grand jury was taken on the suggestion of the Crown, and in the other it arose of its own motion from the knowledge of one or more of the jurors. Now, however, the faculty of proceeding by presentment has been taken away, and the grand jury can only proceed on the indictments which are laid before it, and indictments can only be preferred for charges on which a preliminary inquiry has been made before a magistrate, or, when there has been no preliminary inquiry, by the direction of the Attorney-General, or on the written consent of a judge, or by order of the court."

Orangemen, as such, are not disqualified to act as grand jurors on an indictment for a riot during which an Orange lodge had been attacked and damaged. R. v. Collins (1878), 2 P.E.I. 249.

*A bill of indictment.*]—The expressions "indictment" and "count" respectively include information and presentment as well as indictment. Sec. 3 (*l*). Finding the indictment includes also exhibiting an information and making a presentment. Sec. 3 (*j*).

The proceedings are generally commenced by a private prosecutor, who lays his complaint before a magistrate; but in cases which concern the Government of the country or affect public interests, the prosecution may be commenced by the provincial Attorney-General himself or a Crown prosecutor duly authorized by him, directly preferring a bill of indictment before the grand jury. R. v. St. Louis (1897), 1 Can. Cr. Cas. 141, 145 (Que.).

An indictment is an accusation at the suit of the King by the oaths of twelve men of the same county wherein the offence was committed returned to inquire of all offences in general in the county. R. v. Connor (1885), 2 Man. R. 235; 1 Terr. L.R. 4. When such accusation is found by a grand jury without any bill brought before them and afterwards reduced to a formal indictment it is called a presentment. And when it is found by jurors returned to inquire of that particular offence only which is indicted, it is called an inquisition.

Upon the summons of any sessions of the peace, and in case of commissioners of oyer and terminer and gaol delivery, there issues a precept either in the name of the King or two or more justices, directed to the sheriff, upon which he is to return twenty-four or more out of the whole county. 1 Chitty Cr. Law 309.

The summoning of more than twenty-four does not vitiate the panel; but no more than twenty-three can be properly sworn. R. v. McGuire (1898), 4 Can. Cr. Cas. 12 (N.B.). The justice presiding at a court may reform a panel, and the sheriff is bound to return a panel so reformed. Ibid.

It has been the ancient rule, that every indictment should, when found, have indorsed on it the words "a true bill," and be signed by the foreman of the grand jury, as the proper and authentic record of the fact that the grand jury had, before them, sufficient evidence to put the accused on his trial for the offence charged therein. That which was termed a bill of indictment before, becomes, on the finding of the jury, evidenced by these words, the indictment, and the words "a true bill" form part of that indictment on which the prisoner is to be tried.

The indorsement is, if the bill is rejected, "not a true bill," or, which is the better way, "not found," in which case the party is discharged without further answer. The indorsement, "a true bill," made upon the bill becomes part of the indictment, and renders it a complete accusation against the prisoner. When the jury have made their indorsement on the

bills, they bring them publicly into court, and the clerk of the peace at sessions, or the clerk of assize on circuit, calls all the jurymen by name, who severally answer, to signify that they are present, and then the clerk of the peace or assize asks the jury whether they have agreed upon any bills, and have them to present them to the court, and then the foreman of the jury hands the indictments to the clerk of the peace or assize, who asks them if they agree the court shall amend matter of form, altering no matter of substance, to which they signify their assent. This form is necessary to enable the court to alter any clerical mistake, because they have no authority to change the form of the accusation without the assent of the accusers. After this is done, the clerk of the peace reads over the names of the offenders and offences in every indictment, and whether the bill be found or thrown out *as indorsed by the grand jury*, and makes a private mark or cross upon those which are rejected, and usually files the bill, though this is not necessary." Chitty's Criminal Law, 324; 4 Black Com. 302-3; Archbold Crim. Prac. 98-99.

By sub-sec. 2 of sec. 651, where the place of trial is changed, all proceedings in the case are to be had, or if previously commenced, are to be continued in the district, county or place in which the trial is directed to take place, "as if the case had arisen or the offence had been committed therein." This authorizes an indictment being preferred also for another offence disclosed in the depositions. R. v. Coleman (1898), 2 Can. Cr. Cas. 523 (Ont.).

As to objections to indictments against corporations, see note to sec. 635.

*Where consent required.*]—Before the adoption of the Criminal Code, except in cases to which section 140 of the Criminal Procedure Act applied, there was no such limitation of the right to prefer an indictment as is now contained in section 641 of the Code, but in accordance with the recommendations of the report of the Royal Commissioners on the English Draft Code, 1878, pp. 32, 33, the Parliament of Canada, in codifying the criminal laws of the Dominion, extended the substance of the provisions of section 140 to the case of all indictments. R. v. Patterson (1895), 2 Can. Cr. Cas. 339, 344.

As pointed out by the Royal Commissioners, their recommendation was based upon what they deemed the manifest injustice of permitting an indictment to be preferred to a grand jury sitting in secret and without any opportunity to the accused of being heard, and a bill being found, and the accused placed upon trial upon what might turn out to be a wholly unfounded charge, without any preliminary investigation or even notice of the nature of the charge which was intended to be preferred against him.

As there is no jurisdiction to bind over the prosecutor to prefer a bill of indictment before the grand jury against a corporation, it is necessary that such an indictment should be preferred under sub-section 3.

*Attorney-General.*]—The expression "Attorney-General" in the third sub-section means the Attorney-General or Solicitor-General of any province in Canada in which the proceedings are taken; and with respect to the North-West Territories and the District of Keewatin it means the Attorney-General of Canada. Sec. 3 (*b*).

A superior court should not make an order that an indictment be preferred 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. Ex p. Hanning (1896), 4 Can. Cr. Cas. 203, 5 Que. Q.B. 549.

Whether or not the Crown should assume the expense incidental to a prosecution is more particularly a question for the Attorney-General as a part of his executive functions, and is not one to be decided by a court. Ibid.

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 sec. 641, is not a compliance with the section, and, if the person who was bound over by recognizance to prefer an indictment fails to appear, the indictment should be quashed. R. v. Hamilton (1898), 2 Can. Cr. Cas. 178 (N.S.).

Where the preferring of an indictment is authorized solely upon the ground that a direction of the Attorney-General, under sub-sec. 3, has been given therefor, the written consent or direction must be one with regard to the particular case, and the offence must be specified therein; and a general direction in writing by the Attorney-General authorizing counsel to take charge of the criminal prosecutions for the Crown at the sittings of the court will not suffice. R. v. Townsend (1896), 3 Can. Cr. Cas. 29 (N.S.).

*Motion to quash indictment.*]—Where the depositions before the magistrate have not been taken according to law, and a material provision of the law has not been complied with, the indictment may be quashed under sec. 641 upon motion at any time before the accused is given in charge to the jury. R. v. Lepine (1900), 4 Can. Cr. Cas. 145 (Que.).

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." Ibid.

An indictment may be valid as being founded on the evidence disclosed on "the depositions taken before the justice," although the preliminary enquiry was held jointly, in respect of the party indicted and of two others separately charged with the same offence, and the depositions were given in respect of all of them in the one proceeding. R. v. Skelton (1898), 4 Can. Cr. Cas. 467 (N.W.T.).

An indorsement made and signed by the judge upon an indictment by which he "directs" that the indictment be submitted to the grand jury, is a sufficient "consent" of the judge to the preferring of the indictment. R. v. Weir (No. 2), 3 Can. Cr. Cas. 155 (Que.).

An accused against whom an indictment is preferred, under the authority of a judge's consent under sec. 641, is not entitled to have the indictment quashed by reason of the fact that a preliminary enquiry in regard to the same offence was at the same time pending before a justice of the peace upon which the latter had not given his decision for or against committal for trial. Ibid.

After a true bill had been found on an indictment for libel the defendant moved to have same quashed on the ground that one of the grand jurors was of affinity to him in the seventh degree, this was held not to be a sufficient ground for the application. R. v. Lawson (1881), 2 P.E.I. Rep. 398.

*Habeas Corpus Act.*]—The Habeas Corpus Act, 31 Car. II., ch. 2, still applies in Ontario. R. v. Keeler, 7 Ont. Pr. Rep. 124. It was particularly directed to the securing the discharge from imprisonment of persons tried and acquitted, and the avoidance of wilful delays in bringing prisoners to trial. By it the person in custody might apply in open court in the first week of the term, or first day of the session of oyer and terminer and general gaol delivery to be brought to his trial; and if, having made such application, he were not indicted and tried during the second term or sessions of oyer and terminer and general gaol delivery after his commitment, he was entitled to be discharged from his imprisonment. 31 Car. II., ch. 2, sec. 7.

The Crown by this is not obliged to do more than indict at the first assize after commitment and have the prisoner tried at the second assize thereafter. R. v. Bowen (1840), 9 C. & P. 509.

**642 Coroner's inquisition.**—After the commencement of this Act no one shall be tried upon any coroner's inquisition.

**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.**—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.

The provisions of sec. 645, requiring the foreman of the grand jury to initial upon the bill of indictment the names of witnesses sworn is directory only and not imperative. An indictment should not be quashed because of the omission of the foreman in that respect. R. v. Buchanan (1898), 1 Can. Cr. Cas. 442 (Man.); R. v. Townsend (1896), 3 Can.Cr. Cas. 29, 28 N.S.R. 468.

The grand jury may send for and look at any deposition and act upon it as they think proper. R. v. Bullard, 12 Cox 353; R. v. Gerrans, 13 Cox 158. And in a British Columbia case where the grand jury reported that without the evidence of an absent witness they had no materials to find a bill, Crease, J., held that they were entitled to peruse the depositions without proof that the witness was absent from Canada or was too ill to travel. R. v. Howes (1886), 1 B.C.R. pt. 2, p. 307.

**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.

**647. Fees for swearing witnesses.**—Nothing in this Act shall affect any fees by law payable to any officer of any court for 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, 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 a 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, 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 any further inquiry, or examination, either commit him to prison by a warrant, which may be in the form II in schedule one hereto, 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, or to the like effect. R.S.C. c. 174, ss. 33, 34 and 35.

FORM GG.—

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.)*

FORM HH.—

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 His 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.)*

FORM II.—

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 His 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 His 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.)*

FORM JJ.—

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 of 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 as aforesaid, are one and the same person: These are therefore to command you, in His 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.)*

A bench warrant directed to a sheriff and to all constables, etc., requiring them to arrest a man and bring him before the court to find securities for his appearance, was signed by the clerk of the peace, but had no seal. It was tested in open sessions at the court house, and was delivered by the clerk of the peace in court to the sheriff, who handed it to his deputy. It was held that the want of a seal did not make the warrant invalid. Fraser v. Dixon (1848), 5 U.C.Q.B. 231.

PART XLIX.

## REMOVAL OF PRISONERS—CHANGE OF VENUE.

SECT.



---

**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 King'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.

*(Amendment of 1894.)*

5. Whenever, in the Province of Quebec, it has been decided by competent authority that no term of the Court of King'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 then be 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.

*Changing place of trial.*]—To effect a change of venue, or, more correctly, to change the place of trial, the court must be specially moved for the purpose. It does not rest with the Crown to select the place for trial by suggestion or otherwise, as it may desire. And the court will refuse or grant the motion as it may see fit. But it will be granted when there is a reasonable probability that a fair and impartial trial cannot be had in the place where the cause would otherwise be tried. Per Sir Adam Wilson, C.J., in R. v. Carroll (1880), (the Biddulph murder case), cited in 2 Can. Cr. Cas. at p. 200.

The power to change the venue is purely discretionary and should be used with great caution. R. v. Russell (1878), Ramsay's Cases (Que.) 199. But where the application was made on the part of the accused it was held

sufficient to justify the change, that persons might be called on the jury whose opinions might be tainted with prejudice and whom the prisoner could not challenge. Ibid.

Under the fifth sub-section, which applies only to Quebec, and which is taken from 32-33 Vict., ch. 29, sec. 11, the power to change the venue appears not to be limited to a judge sitting in the district where the offence is alleged to have been committed. Ex p. Brydges (1874), 18 L.C. Jur. 141.

A change of venue should not be made in a criminal case whereby the trial would be transferred from the county in which the crime is alleged to have been committed, unless facts are proved, as distinguished from sworn opinions, plainly indicating that a fair and important trial cannot be had in that county. R. v. Ponton (No. 1) (1898), 2 Can. Cr. Cas. 192 (Ont.).

A change of venue should not be granted 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 except by those feelings which arise from the nature of the offence and which are common in all counties. Ibid.

But a change of venue may be ordered under this section 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. R. v. Ponton (No. 2) (1899), 2 Can. Cr. Cas. 417.

The change is rendered "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; and this notwithstanding the sworn statements of every juror at the abortive trial that they were in no way intimidated or influenced by the mob demonstration, part of which took place within hearing of the jury during their deliberations. Ibid.

Affidavits from the jurors denying intimidation are properly admissible in evidence on a motion to change the venue where such intimidation is charged. R. v. Ponton (No. 2) (1899), 2 Can. Cr. Cas. 417.

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 such order was not asked to make an order as to such additional expense, and if it was not shewn to such judge that additional expense would be occasioned. R. v. Coleman (1898), 2 Can. Cr. Cas. 523.

Where, after a committal for trial for an offence under the Criminal Code, 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 justice. Ibid.

In order to obtain a change of venue in a prosecution for defamatory libel such facts must be shewn as will satisfy the court that a fair trial cannot be had at the present venue, and it is not sufficient that the applicant's solicitor swears to a belief that a fair trial is impossible there because of the prosecutor's interest in political affairs.

The fact that two abortive trials of the cause have already taken place at both of which the jury disagreed, is not of itself a ground for ordering a change of venue. R. v. Nicol (1900), 4 Can. Cr. Cas. 1 (B.C.).

PART L.

## ARRAIGNMENT.

SECT.



---

**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 deposition 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.

*Challenge of grand juror.*]—There exists the same right of challenging for favour the grand jury as the petit jury. R. v. Kirwan, 31 State Trials 543; R. v. Gorbet (1866), 1 P.E.I. Rep. 262. If a grand juror who is disqualified be returned, he may be challenged by the prisoner before the bill is presented; or if it be discovered after the finding, the prisoner had formerly to plead in avoidance. Ibid.; but may now under sec. 656 take the objection by motion to the court to quash the indictment. On a trial for riot and conspiracy in obstructing the recovery of rents and service of process relating thereto, the indictment was quashed on its being shewn that the manager for and agent of the person entitled to the rents sat on the grand jury on the finding of the bill. R. v. Gorbet (1866), 1 P.E.I. Rep. 262.

*Arraignment.*]—The arraignment of prisoners against whom true bills for indictable offences have been found by the grand jury consists of three parts: first, calling the prisoner to the bar by name; secondly, reading the indictment to him; and thirdly, asking him whether he is guilty or not of the offence charged. As soon as the indictment has been read over to the prisoner, the clerk of the arraigns or officer of the court demands of him:

"How say you, are you guilty or not guilty?"

If the prisoner pleads guilty, and it appears to the satisfaction of the judge that he rightly comprehends the effect of his plea, his confession is recorded and sentence is forthwith passed, or he is removed from the bar to be again brought up for judgment. Archbold's Crim. Pleadings, 20th ed., 159. If the prisoner pleads "not guilty," his plea is recorded by the officer of the court, and the prisoner is said to have "put himself upon the country." 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. See. 657 (2).

**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.

*Certified record of acquittal.*]—A person tried for felony and acquitted at a Court of Oyer and Terminer in Ontario, can only obtain a copy of the indictment and record of acquittal, to be used in an action of malicious prosecution, on the fiat of the Attorney-General; and the granting or refer-ring of such application cannot be reviewed by the court. R. v. Ivy (1874), 24 U.C.C.P. 78.

In a recent case it was, however, held by Boyd, C., and Ferguson, J., that the judgments of the Courts of General Sessions in Ontario are public records, and the clerk of the peace holds them as their statutory custodian in the interests of the public generally and not as a deputy officer of the Crown; that any person interested in the indictments and records of the Court of General Sessions is entitled of right to inspect them; and that an accused person tried and acquitted in such court is entitled to a copy of the record of such acquittal and of the indictment without the fiat of or inter-vention by the Attorney-General of the province, and a mandamus will lie to the clerk of the peace to compel the delivery to him of certified copies. R. v. Scully (1901), 5 Can. Cr. Cas. 1 (appeal pending).

It was held in Caddy v. Barlow (1827), 1 Manning and Ryland, 275, by the Court of King's Bench that although the copy of indictment offered in evidence in an action for malicious prosecution may have been granted by the court of quarter sessions for a different purpose than that for which it was used at the trial, the copy was receivable in evidence without inquiry into the circumstances under which it was granted. The words of the statute 46 Edw. III. are as follows:—

"Also the Commons pray that whereas records and whatsoever is in the King's Court ought of reason to remain there for perpetual evidence and aid of all parties thereto, and of all those whom in any manner they reach, when they have need, and yet of late they refuse, in the court of our said Lord to make search or exemplification of anything which can fall in evidence against the King or in his disadvantage. May it please you to ordain by statute that search and exemplification be made for all persons of whatever record touches them in any manner, as well as that which falls against the King as other persons. Le roy le voet."

The first restriction of this general right appears to have been imposed in the reign of Charles II. by an order made for the regulation of the Old Bailey sessions by the judges. (Directions for justices at the Old Bailey, Kelyng's Rep. 3). That order directed "that no copies of any indictment for felony be given without special order upon motion made in open court at the general gaol delivery, for the late frequency of actions against prosecutors which cannot be without copies of the indictment, deterreth people from prosecuting for the King upon just occasions."

In Leggatt v. Tollervey, 14 East 302, the practice was thus stated by Lord Ellenborough, C.J.:—"It is very clear that it is the duty of the officer charged with the custody of the records of the court not to produce a record but upon competent authority, what at the Old Bailey is obtained upon application to the court pursuant to the order that has long prevailed there; and, with respect to the general records of the realm, upon application to the Attorney-General." Manning and Ryland in their note to the report of Caddy v. Barlow, supra, say:—"It appears that originally all judicial records of the King's courts were open to the public without restraint and were preserved for that purpose." In Hewitt v. Cane (1894), 26 Ont. R. 133, 142, Rose, J., referring to the Old Bailey rule, said:—"That was a rule passed by the judges to regulate and govern their own action, and merely was that while the record or indictment remained in the court during its session, and before it had been sent out as directed by statute, no copy should be given out unless on motion as therein provided, and did not, as indeed it could not, affect the custody or control of the indictment after it had been sent to the proper officer as directed by statute."

The distinction made in the Old Bailey rule between cases of felony and misdemeanour as regards the certifying of the proceedings, would seem not to apply after the record or indictment has been returned to the proper office. Hewitt v. Cane (1894), 26 Ont. R. at p. 144. In Ontario the practice has been to apply to the Attorney-General for a fiat in cases tried at the assizes. R. v. Ivy, 24 U.C.C.P. 78; O'Hara v. Doherty, 25 Ont. R. 347. This practice is based upon the theory that after the criminal records are returned pursuant to the statute to the officer named therein they must be taken to be in the custody of the Crown, and that the Crown, acting through the Attorney-General, its agent general, is the only person competent to give any directions as to the same. The custody of the records in criminal cases by the clerk of the Crown and pleas at Toronto (see 14-15 Vict. (Can.) ch. 118, and C.S.U.C. ch. 11, sec. 10), after the return of the indictments to him is not as a record of the High Court of Justice, but as an officer of the Crown acting under the supervision of the Attorney-General. Hewitt v. Cane (1894), 26 Ont. R. 133. If the bill of indictment has been ignored by the grand jury its production will be evidence of the termination of the criminal proceedings. R. v. Smith, 8 B. & C. 341; R. v. Ivy, 24 U.C.C.P.; McCann v. Preneveau, 10 Ont. R. 573; but in all other cases a formal record of acquittal must be produced; and, semble, the certified record should shew whether or not an appeal had been taken under Code secs. 743-746. Hewitt v. Cane, 26 Ont. R., at p. 140.

**655. Copy of deposition.**—Every person indicted shall 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.

*Objection to the grand jury.*]—An order of a superior 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 has been summoned by a sheriff who is disqualified from acting because of his relationship to a prosecutor, a new grand jury may be summoned on a venire to a coroner, without formally discharging the jury summoned by the sheriff or disposing of the indictment found by it. The indictment found by the sheriff's grand jury is in such case void, and it is open to the coroner summoning another jury to summon persons already summoned by the sheriff. R. v. McGuire (1898) 4 Can. Cr. Cas. 12 (N.B.).

See also note to sec. 653.

**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 herein 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.

*Plea of not guilty.*]—The defendant has the right to raise the question of jurisdiction under a plea of not guilty. R. v. Hogle (1896), 5 Can. Cr. Cas. 53 (Que.).

As to the time for pleading in Ontario, see secs. 756-759.

*Inability to plead.*]—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. Sec. 737 (1).

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. Sec. 737 (2).

If the verdict on this issue is that the accused is not then unfit to take his trial the arrraignment or the trial shall proceed as if no such issue had been directed. Sec. 737 (3). 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. Sec. 737 (3).

No such proceeding shall prevent the accused being afterwards tried on such indictment. Sec. 737 (4).

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. 1 Chit. Crim. L. 417.

The following form of oath may be administered to the jury: "You shall diligently inquire and true presentment make, for and on behalf of our sovereign lord the King, whether A. B., the defendant who now stands indicted, is or is not on account of insanity unfit to take his trial, and a true verdict give according to the best of your understanding; so help you God."

In R. v. Berry (1876), 1 Q.B.D. 447; 45 L.J. (M.C.) 123, a deaf mute being arraigned for felony, the jury who had been impanelled to try the case were sworn to try whether the prisoner stood mute of malice or by the visitation of God. The jury found that he was mute by the visitation of God. The judge then ordered that a plea of not guilty should be entered, and the trial proceeded. The jury found the prisoner guilty of the felony charged against him, but also found that he was incapable of understanding, and did not understand, the proceedings at the trial. Upon this finding it was held that the prisoner could not be convicted, but must be detained as a non-sane person during the Queen's pleasure. In R. v. Wheeler, Central Criminal Court, May 12, 1852, where the prisoner was indicted for the murder of his mother, and on his arraignment said he was "not guilty," Platt, B., on the motion of the prisoner's counsel, directed the jury to be sworn to inquire 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. Archbold Cr. Ev. (1900), 168.

**658. Special provisions in the case 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 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 His Majesty, or to cases where the overt act alleged is any attempt to injure his person in any manner whatever, or to the offence of being accessory after the fact to any such treason.

PART LI.

## TRIAL.

SECT.

---

**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.

*Full answer and defence.*]—The object of the Crown being not to find the prisoner guilty, but to do justice, it is the duty of the prosecution to bring out the whole of the facts both in the prisoner's favour and against him.

Every witness on the back of the indictment need not be called. R. v. Thompson (1876), 13 Cox 181. That is in the discretion of the prosecuting counsel, but he should have all these witnesses in attendance in case the prisoner should desire to call them. R. v. Woodhead (1847), 2 C. & K. 520; R. v. Cassidy (1858), 1 F. & F. 79.

In R. v. Simmonds (1823), 1 C. & P. 84, it was laid down that the judge would himself sometimes call the omitted witnesses. In 1830, in R. v. Beezley, 4 C. & P. 220, Mr. Justice Littledale held that all witnesses named on the back of the indictment ought to be called by the prosecution, not necessarily to give evidence in chief, but to afford the defence an opportunity of cross-examination. This ruling went further than R. v. Simmonds, which left the matter in the judge's discretion. R. v. Bodle (1833), 6 C. & P. 186, followed the ruling of R. v. Simmonds.

In R. v. Edwards (1848), 3 Cox C. C. 82, Mr. Justice Erle said that, though the judge had power to interfere with counsel's discretion as to calling the witnesses on the back of the indictment, that power would only be exercised in extreme cases.

In 1838, in R. v. Holden, 8 C. & P. 609, on a trial for murder, it was laid down that at a murder trial, every person present at the transaction giving rise to the charge ought to be called by the prosecution, even though they were brought to the assizes by the other side and were not on the back of the indictment, as even if they gave different accounts the jury ought to hear their evidence and draw their own conclusions. Lord Abinger, in a murder case, R. v. Orchard (1838), 8 C. & P. 558, note, commented in his summing up on the prosecution not calling two persons who were in the house at the time of the alleged murder, though they were near relatives of the accused, and would naturally be prejudiced in their favour.

These decisions seem to shew that in murder cases those persons who were present at the occurrence giving rise to the charge, or in such immediate proximity as to make it likely that they could give relevant evidence, ought to be called by the prosecution, even though they were not named on the back of the indictment.

At common law in criminal cases as well as in civil a co-defendant against whom no evidence whatever is given ought to be acquitted at the end of the prosecutor's or plaintiff's case. R. v. Hambly (1858), 16 U.C.Q.B. 617.

But it is in the discretion of the judge, at the close of the prosecution, to submit separately to the jury the case of one of several prisoners against whom no evidence appears; he is not bound to do so, and whether he has rightly exercised his discretion or not cannot be reserved as a point of law. R. v. Hambly (1858), 16 U.C.Q.B. 617.

The admission of evidence in reply which was admissible in chief is as a general rule in the discretion of the judge, subject to being reviewed by the court. R. v. Jones (1869), 28 U.C.Q.B. 416, per Richards, C.J.

One co-defendant cannot be called as a witness by another co-defendant and compelled to give evidence, but a co-defendant may testify if he chooses to do so. R. v. Connors (1893), 5 Can. Cr. Cas. 70 (Que.).

On a joint indictment the evidence adduced by the witnesses for any one of the defendants is effective as regards the others either beneficially or adversely, and, therefore, before the counsel for the prosecution cross-examines, each of the other defendants has the right to cross-examine such witnesses and in doing so to bring out fresh facts which may be advantageous for his defence. R. v. Barsalou (No. 3) (1901), 4 Can. Cr. Cas. 446 (Que.).

The prisoner is entitled to a trial free from comment or observation upon the fact that he did not tender himself as a witness. He has the right to refrain from giving evidence without his failure to testify being made the subject of comment. 56 Viet. (Can.), ch. 31, sec. 4. The infringement of that right is a substantial wrong, which is not removed or remedied by the judge calling back the jury and telling them that he had done wrong. R. v. Coleman (1898), 2 Can. Cr. Cas. 523 (Ont.).

And the fact that the attention of the trial judge was called to the error by the prisoner's counsel does not deprive the prisoner of his right to move the court for a new trial. Ibid. R. v. Gibson (1887), 18 Q.B.D. 537; R. v. Petrie (1890), 20 Ont. R. 317; Martin v. Mackonochie (1878), 3 Q.B.D. 775.

*Proof of 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. Can. Evid. Act, 1893, sec. 12.

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 render 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. Ibid, sec. 13.

No proof is required of the handwriting or official position of any person so certifying 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. Ibid, sec. 14.

Any order in writing, signed by the Secretary of State of Canada, and purporting to be written by command of the Governer-General, shall be received in evidence as the order of the Governor-General. Ibid, sec. 15.

Copies of official and other notices, advertisements and documents printed in The Canada Gazette are prima facie evidence of the originals, and of the contents thereof. Ibid, sec. 16.

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. Idid, sec. 17.

Any document purporting to be 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. Ibid, sec. 18.

But no copy of any such book or other document 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. Ibid, sec. 19.

These provisions are in addition to and not in derogation of any powers of proving documents given by any existing statute or existing at law. Sec. 20.

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. Sec. 21.

**660. Presence of the accused at the 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.

See note to sec. 626.

**661. Prosecutor's right 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 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.

*Prosecuting counsel.*]—The position of prosecuting counsel is not that of an ordinary counsel in a civil case, but he is acting in a quasi judicial capacity and ought to regard himself as part of the court; that, while he is there to conduct his case, he is to do it at his discretion, but with a feeling of responsibility, not as if trying to obtain a verdict, but to assist the judge in fairly putting the case before the jury and nothing more. Blackburn, J., in R. v. Berens, 4 F. & F. 842, 853. He is to regard himself as a minister of justice and not to "struggle for a conviction." R. v. Puddick, 4 F. & F. 497; R. v. Patterson (1875), 36 U.C.Q.B. 129, 146.

*Joint indictments.*]—Where several persons are jointly indicted the order in which each of them shall enter upon his defence is generally subject to the discretion of the trial judge. R. v. Barsalou (No. 3), 4 Can. Cr. Cas. 446 (Que.).

Where there is a difference in degree of criminality with respect to the charge made against several persons jointly indicted, they should be called upon for their defence the greater before the less according to the seriousness of the charge against each as disclosed both by the indictment and the evidence for the prosecution, ex gr., the principal before the accessory, and the thief before the receiver. Ibid.

Where there appears no such difference in degree of criminality in respect of several persons jointly indicted, the order of defence is the order in which their names appear in the indictment. Ibid; R. v. Barber, 1 C. & K. 434; R. v. Meadows, 2 Jurist N.S. 718.

On a joint indictment for one offence, when the evidence for the one would enure to the benefit of the other, the right to a general reply is with the prosecution, though only one defendant called witnesses in defence. R. v. Connolly (1894), 1 Can. Cr. Cas. 468 (Ont.).

This is in accordance with the practice prior to the Code. R. v. Hayes (1838), 2 M. & R. 155; R. v. Jordan (1839), 9 C. & P. 118.

*Right to begin.*]—In criminal cases the prosecution always begins. If the prisoner is defended the counsel for the prosecution opens the case; if, however, he is undefended it is not usual to make any opening statement unless there is some peculiarity in the facts. Phipson Evid., 2nd ed., 42. If there is no prosecuting counsel there can be no opening, the prosecutor not being allowed to address the jury. Roscoe Cr. Evid. 201; R. v. Brice, (1824), 2 B. & Ald. 606; R. v. Gurney (1869); 11 Cox C.C. 414.

*Opening the case.*]—The existence of a previous conviction against the accused should not be referred to in the opening although the charge is for a second offence. Sec. 676. The arraignment must in the first instance be upon so much only of the indictment as charges the subsequent offence, and after that is disposed of the accused is to answer as to the fact of the previous conviction. Ibid.

When the prisoner is given in charge to the jury, the counsel for the prosecution or, if there be more than one, the senior counsel, opens the case to the jury stating the leading facts upon which the prosecution rely. In doing so he ought to state all that it is proposed to prove, as well declarations (other than confessions) of the prisoners as the facts, so that the jury may see if there be a discrepancy between the opening statements of counsel and the evidence afterwards adduced in support of them. R. v. Edward (1833), 1 M. & Rob. 257; R. v. Hartel (1837), 7 C. & P. 773; R. v. Davis (1837), 7 C. & P. 785.

A confession should not be referred to in the opening further than to state its general effect only for the circumstances under which it was made may render it inadmissible in evidence. Archbold Cr. Pl. (1900) 187; R. v. Swatkins (1831), 4 C. & P. 548; R. v. Davis, 7 C. & P. 786; R. v. Orrell (1835), 7 C. & P. 774; and see note to sec. 552 as to evidence of admissions made by the accused.

In opening a case for murder, 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 will be prepared to meet it. R. v. Courvoisier (1840), 9 C. & P. 362.

If any additional evidence not mentioned in the opening speech of counsel is discovered in the course of a trial the prosecuting counsel is not allowed to state it in a second address to the jury. Ibid; R. v. Creau (1861), 8 Cox C.C. 509.

*Witnesses for the prosecution.*]—The witnesses for the prosecution are called and examined viva voce after the opening address, each witness being cross-examined in turn by the prisoner's counsel. Although the prosecution is not in strictness bound to call every witness named on the back of the indictment, it is usual to do so in order to afford the prisoner's counsel an opportunity to cross examine them; and, if the prosecution will not call them, the judge in his discretion may do so. R. v. Simmonds (1823), 1 C. & P. 84; R. v. Bull (1839), 9 C. & P. 22; Phipson Evid., 2nd ed., 476.

In charges of homicide witnesses who were present at the transaction have been called by the judge for the furtherance of justice, although not named on the back of the indictment. R. v. Holden, 8 C. & P. 609; R. v. Stroner, 1 C. & K. 650; R. v. Chapman, 8 C. & P. 558; R. v. Orchard, 8 C. & P. 558 (*n*). But if this is done at the instance of the prisoner and no question is put to them by the prosecution they become so far the prisoner's witnesses that though he may cross-examine he cannot contradict them; R. v. Bodle, 6 C. & P. 186; and the prosecution can only re-examine as a matter arising out of the cross-examination; R. v. Beezley, 4 C. & P. 220; and perhaps if there has been a refusal by the prosecution to call the witness not even then. R. v. Harris (1836), 7 C. & P. 581.

Where a prisoner is not defended by counsel he cross-examines the witnesses for the prosecution if he thinks fit, or the judge does so on his behalf. Archbold Cr. Pl. (1900) 188.

*Defence.*]—If the defendant decides to adduce evidence he may now, if he desires, open his case to the jury, call his witnesses and sum up, which latter process usually extends in practice to a complete commentary on the case. Sub-section (2) supra. Phipson Evid., 2nd ed., 46.

The defendant may be allowed to reserve to himself the right to address the jury and to examine and cross-examine witnesses, and to have his counsel argue any points of law that arise in the course of the trial and to suggest questions to him for the cross-examination of witnesses; R. v. Parkins, Ry. & M. 166; but the defendant will not be allowed to have counsel to examine and cross-examine the witnesses, and to reserve to himself the right of addressing the jury. R. v. White (1811), 3 Camp. 98. Nor can a prisoner have counsel to speak for him and also make a speech for himself other than to make his statement of facts (see that heading, infra). He will be strictly confined in that case to a statement of facts and not allowed to put forward mere matter of argument. R. v. Everett, cited Archbold Cr. Pl. (1900) 188.

See also note to sec. 659.

*Right of reply.*]—The meaning of the last proviso in the above section has been held in Manitoba not to be that the Attorney-General or his representative shall have the last word with the jury where the defendant calls no witnesses, but only that he shall have the right to again address the jury at the close of the evidence, after which the defendant's counsel could make his address. R. v. Le Blanc, 29 C.L.J. 729, per Taylor, C.J. But there is much reason to doubt the correctness of that decision. How can an address made before that of the prisoner's counsel be called a "reply"? The proviso seems rather to be an extension of the statute 32-33 Vict. (Can.) ch. 29, sec. 45, and of the rule referred to in 5 St. Tr. N.S. 3 (*n*), as a "resolution of the judges" and which was intended to remove doubts which formerly existed as to the right of reply in such cases by counsel other than the Attorney-General or Solicitor-General. 2 St. Tr. N.S. 1019. The resolution was as follows:—"In those Crown cases in which the Attorney or Solicitor-General is personally engaged, a reply where no witnesses are called for the defence is to be allowed as of right to the counsel for the Crown, and in no others."

So in R. v. Marsden, M. & M. 439, it was held that the Attorney-General has the right of reply even though the defendant call no witnesses; and in R. v. Toakley, 10 Cox C.C. 406, the same right was accorded to the Solicitor-General appearing on behalf of the Attorney-General in a post-office prosecution. The statute 32-33 Vict., (Can.) ch. 29, sec. 45, gave the right of reply to the Attorney or Solicitor-General or to any Queen's Counsel acting on behalf of the Crown. It had previously been held in Ontario that the Crown counsel not being the Attorney-General or Solicitor-General had no right of reply where no witnesses were called for the defence. R. v. McLellan, 9 U.C.L.J. 75.

In Quebec the rule was to allow the reply in cases of public prosecutions for felony whether the Attorney-General appeared personally or by a representative. R. v. Quatre Pattes, 1 L.C.R. 317.

Phipson in his work on Evidence (1898), 2nd ed., p. 47, says:—"In Ireland all prosecuting counsel in public prosecutions represent the Attorney-General and have the same privilege." See also Eng. L.T., March 4, 1893, and April 24, 1897; 6 Law Magazine (1881), 101; Nineteenth Century (1895), 304.

It is not usual to exercise the right of reply where the only evidence adduced by the defendant is as to character. R. v. Dowse (1865), 4 F. & F. 492.

*Prisoner's statement.*]—The prisoner is entitled to make a statement of facts to the jury whether he is defended by counsel or not, provided he calls no witnesses. R. v. Millhouse (1885), 15 Cox C.C. 622. In that case and in R. v. Shimmin (1882), 15 Cox C.C. 123, it was held that the statement may be

made after his counsel has addressed them, but in R. v. Doherty (1887), 16 Cox C.C. 306, it was allowed to be made before the counsel's address. Counsel for the prosecution has the right of reply if the defendant makes a statement. R. v. Rogers (1884), 1 B.C.R., pt. 2, p. 119, per Crease, J.

In R. v. Maybrick, Liverpool Assizes, Aug., 1889, the prisoner was allowed to make a statement to the jury although witnesses were called by her. Phipson Evid., 2nd ed., 47.

**662. Qualification of a juror.**—Every person qualified and summoned as 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.

*(Amendment of 1894.)*

2. Notwithstanding any law, usage or custom to the contrary, seven grand jurors instead of 12, as heretofore, may find a true bill in any Province where the panel of grand jurors is not more than thirteen: Provided, that this sub-section shall not come into force until a day to be named by the Governor by his proclamation. (Proclaimed from 1 January, 1895.) Vol. 28, Can. Gazette, 1172.

*Where panel not more than thirteen.*]—It is within the power of a Provincial Legislature to fix the number of the grand jurors, who should compose the panel, that being part of the organization or constitution of the court. R. v. Cox (1898), 2 Can. Cr. Cas. 207 (N.S.).

But a Provincial Legislature has no power to fix the number of grand jurors necessary to find a good bill of indictment, that being a matter of criminal procedure and exclusively within the powers of the Dominion Parliament. Ibid.

Where by the provincial law the number of grand jurors summoned has been reduced to less than thirteen, and some of those summoned fail to appear, seven of those who appear may find a bill of indictment. R. v. Girard (1898), 2 Can. Cr. Cas. 216 (Que.).

And see note to sec. 641.

*Juror's knowledge of facts in issue.*]—If a juryman has knowledge of any matter of evidence in the case being tried he ought not to impart the same privily to the rest of the jury, but should state to the court that he had such knowledge, and thereupon be examined and subjected to cross-examination as a witness. R. v. Bushell, 6 Howell 1012 *(n)*; R. v. Reading, 7 Howell 259; R. v. Rosser, 7 C. & P. 648. But there are grave objections to a juror sworn to try being sworn and examined as a witness for if his evidence be contradicted or his credibility be impeached he is placed in the position of joining in the determination of his own credibility. R. v. Petrie (1890), 20 O.R. 317.

**663 Jury de medietate linguæ 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.

**664. Mixed juries in the 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.

*Mixed juries in Quebec.*]—A prisoner arraigned for trial in Quebec has the right to claim a jury composed for one-half at least of persons speaking his language if French or English. After having claimed a mixed jury and the recording of the order therefor by the Court, the prisoner has no absolute right to relinquish such claim and to have the order for a mixed jury superseded, but revocation may be ordered on such an application in the discretion of the Court. R. v. Sheehan (1897), 1 Can. Cr. Cas. 402 (Que.).

The right to a mixed jury in the Province of Quebec, conferred by 27-28 Viet., ch. 41, Statutes of the Province of Canada, still exists in criminal cases, notwithstanding the statute 46 Viet., ch. 16 (Que.), purporting to repeal the former Act. R. v. Yancey (1899), 2 Can. Cr. Cas. 320. A statute of the former Province of Canada in force at the time of Confederation, which conferred the right to a mixed jury in Lower Canada, now the Province of Quebec, remains in force thereafter as a matter of "criminal procedure" as to that province, and can be varied or repealed only by the Parliament of Canada. B.N.A. Act, sec. 91 (27). Ibid; R. v. Sheehan (1897), 1 Can. Cr. Cas. 402 (Que.). The prosecuted party may, upon arraignment, demand a jury composed for the one-half at least of persons skilled in "the language of his defence," whether French or English; but this does not give the accused an option to choose either language as the language of the defence, nor to have at least one-half of the jurors drawn from those skilled in the language in which counsel for the accused proposes to conduct the defence. The "language of the defence" in that connection means the language habitually spoken by the accused. R. v. Yancey (1899), 2 Can. Cr. Cas. 320.

Where six English jurors had been sworn after several jurors had been directed to stand aside at the instance of the Crown and the clerk recommenced to call the panel alternately from the English and the French lists and one of them previously ordered to stand aside was again called, it was held that the previous "stand aside" stood good and did not need to be withdrawn until the panel was exhausted. R. v. Dougall (1874), 18 L.C. Jur. 242.

**665. Mixed juries in Manitoba.**—Whenever any person who is arraigned before the Court of King'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.

The subsequent discovery that one of the jurors sworn did not thoroughly understand the English language is not a ground for a new trial. R. v. Earl (1894), 10 Man. R. 303.

**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 the 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.

FORM KK.—

CHALLENGE TO ARRAY.

Canada,
Province of ,
County of ,
The King } The said A. B., who prosecutes
*v.* } for our Lord the King (*or* the said
C.D. } 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 the said X. Y. (*or* E. F., *as the case may*

*be*) was guilty of partiality (*or* fraud, *or* wilful misconduct) on returning said panel.

See note to sec. 667.

**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 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 should 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.

*Impanelling the petit jury.*]—When a sufficient number of prisoners have pleaded and put themselves upon the country the clerk of arraigns addresses the jurors who have been summoned, thus:

"You good men, who are returned and impanelled to try the issue joined between our sovereign lord the King and the prisoners at the bar, answer to your names and save your fines," (*then calling the jurors by name.*)

The Clerk of the arraigns, before proceeding to call the jurors to the jury box, addresses the prisoners thus:

"Prisoners, these good men that you shall now hear called are the jurors who are to pass between our sovereign lord the King, and you upon your respective trials, [or, in a capital case, 'upon your life and death']; if therefore you or any of you will challenge them or any of them you must challenge them as they come to the book to be sworn, and before they are sworn, and you shall be heard."

Sub-section (4) directs that when the panel has been exhausted, only the jurors who had been directed to stand by, and such other jurymen as have since become available, shall be called and may be sworn on the jury. A challenge once allowed excludes a juror from serving on the jury being formed; for in cases of a peremptory challenge the other party might afterwards exhaust his peremptory challenges and the privilege of withdrawing it might therefore operate as a fraud upon him. Then in the case of a challenge for cause the withdrawal of the challenge would not change the decision of the triers that the juror did not stand indifferent, and that he, therefore, was an improper person to serve on the jury. R. v. Lalonde (1898), 2 Can. Cr. Cas. 188.

When the accused does not challenge, the Crown may either challenge peremptorily, or may challenge for cause, or direct the juror to stand by. The direction to stand by is really a challenge by the Crown for cause without it being necessary to shew and establish the ground on which it is founded until the panel has been exhausted without twelve jurors having been accepted and sworn. It is in fact a deferred challenge for cause; and the term "to stand by" means that the Crown shall have time to shew the

cause of challenge. R. v. Barsalou (No. 1) (1901), 4 Can. Cr. Cas. 343. In the case of R. v. Leach (1839), 9 C. & P. 499, Baron Parke said: "The Crown may challenge without shewing cause till the panel is gone through, and then if there is not a full jury they must shew cause. The order to stand by means that on the prayer of the counsel for the Crown, a juror shall stand by until the time when it becomes incumbent on the Crown to shew cause of challenge."

The Crown may direct any number of jurors to stand by, but when the panel is exhausted they cannot be stood by a second time. R. v. Boyd (1896), 4 Can. Cr. Cas. 219; 5 Que. Q.B. 1; R. v. Morin (1890), 18 Can. S.C.R. 407.

The panel having been gone over without a jury having been procured, the practice is to call over those who were directed to stand by in the order in which they were drawn, and then for the Crown Prosecutor to state the Crown's cause of challenge; if the ground of challenge is not allowed and the juror is not challenged by the accused, he is sworn. If, however, when the panel has been exhausted, jurymen who had made default or who were impanelled on another petit jury, become available, the names of such jurymen should be put in the box and drawn out, and such jurors should be challenged, be ordered to stand by or be sworn, before the jurors originally ordered to stand by are again called. Sec. 667 (4). The direction to stand by is practically a challenge for cause, and such being the case, the order to stand by must be given at a time when a challenge could be made. R. v. Barsalou (No. 1) (1901), 4 Can. Cr. Cas. 343. The right to challenge must be exercised before the juror has taken the book, by direction of the clerk of the court, to be sworn. Ibid.; and sufficient time is always allowed before this order is given to allow the parties to exercise the right of challenge. After the book has been taken, the taking of the oath is deemed to have commenced, and then it is too late to challenge, and also to direct the juror to stand by. In the case of R. v. Frost (1839), 9 C. & P. 129, Chief Justice Tindal said: "The rule is that challenges must be made as the jurors come to the book and before they are sworn. The moment the oath is begun it is too late, and the oath is begun by the juror taking the book, having been directed by the officer of the court to do so."

The fact that the jurors were set aside, rejected or sworn as they were drawn, without first calling the full number required for a jury, does not invalidate the trial, nor constitute a deprivation of the full right of challenge. R. v. Weir (No. 3) (1899), 3 Can. Cr. Cas. 262 (Que.).

Where, after the jury were sworn, it was learned that one of the Crown witnesses had disappeared and the prosecution could not proceed the judge discharged the jury and remanded the prisoner. It was held that the judge had a discretion to discharge the jury, and that the discharge under such circumstances was not equivalent to an acquittal, and that the prisoner might again be put on trial. Jones v. R. (1880), 3 Leg. News, Montreal, 309.

**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.

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 King 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 I.I. 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 in 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 King 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.

FORM LI.—

CHALLENGE TO POLL.

Canada,
Province of . )
County of . )

The King v. C.D. — The said A. B., who prosecutes, &c., (*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 King and the said C. D.," *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."

*Challenge of jurors.*]—Challenges are of two kinds: (1) *To the array*, i.e. when exception is taken to the whole number impanelled (Code sec. 666); and (2) *To the polls*, i.e., when individual jurymen are excepted against.

Challenges to the polls are either *peremptory*, or *for cause*. Peremptory challenges are those which are made without any reason assigned and which the court is bound to allow to the number here limited.

On the demand of the Crown any juror may be directed to "stand by," the consideration of the challenge being postponed until it can be seen whether a full jury can be made without him. Mansell v. R. (1857), 8 E. & B. 54, Dears. & B. 375. The Crown is not bound to shew any cause of challenge until the panel has been gone through and exhausted, so that there are no more jurors in the panel whose attendance can be procured. Mansell v. R., 8 E. & B. 54; Code sec. 668. The Crown's right to have a juror "stand by" is additional to a power to challenge four jurors peremptorily.

A challenge to the polls for cause may be either *principal* or *for favour*. A *principal* challenge for cause is one based upon, (*a*) an objection to the qualification of the person to be a juror, such as alienage, or that the juror's name does not appear in the panel, or (*b*) an objection on the ground of some presumed partiality such as would be a good ground for a principal challenge to the array in the case of the sheriff, i.e., affinity to or employment by either party, or having an interest in the result of the trial; or where an actual partiality is shewn to exist.

A challenge *for favour* is 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 or undue influence; as 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 any other cause exists such as would constitute in the case of the sheriff a ground of "challenge to favour" to the whole panel. Archbold's Crim. Pl. 175.

It has been held that before the prisoner is put to his challenges, he has the right to have the whole panel called over to ascertain which of the persons summoned as jurors appear and which are exempt or are to be excused: R. v. Frost (1839), 9 C. & P. 129, 135; Roscoe's Cr. Evid., 11th ed., 197; but this is now subject to the provisions of sec. 667 of the Criminal Code, by sub-s. 7 of which the names of the jurors on the panel are to be called "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."

The practice is not uniform as to the time of swearing the jurymen: in some courts the first juryman who answers is sworn as soon as he enters the box, and in others it is the practice to get a full jury into the box, and then to commence swearing them. Roscoe's Cr. Evid., 11th ed., 197.

The challenge must be before the juryman is sworn, and he cannot be challenged afterwards except by consent. R. v. Mellor (1858), 4 Jur. N.S. 5, 214, (per Wightman, J.); R. v. Coulter (1863), 13 U.C.C.P. 299, 301. This rule will apply although the ground for challenge was not known at the time. R. v. Earl (1894), 10 Man. R. 307.

"The rule is that challenges must be made as the jurors come to the book, and before they are sworn. The moment the oath is begun it is too late, and the oath is begun by the juror taking the book, having been directed by the officer of the court to do so. If the juror takes the book without authority, neither party wishing to challenge is to be prejudiced thereby." R. v. Frost (1839), 9 C. & P. 129, 137, (per Tindal, C.J.).

The withdrawal of an unqualified or disqualified person who has been sworn as a juror, at the request of the prisoner and by the consent of the Crown, before the whole jury is completed and sworn does not re-open the right of challenge as to those previously sworn nor make it necessary that such jurors should be re-sworn. R. v. Coulter (1863), 13 U.C.C.P. 299 (Draper, C.J., Richards and Morrison, JJ.).

That the juror has visited the prisoner as a friend since he has been in custody, is not a good cause of challenge for cause, on the ground of being "not indifferent" between the Crown and the accused. R. v. Geach (1840), 9 C. & P. 499.

It is not allowable to ask a juryman when called if he has not previously to the trial expressed himself hostile to the prisoner, but statements made by the juryman which are relied on as cause for challenge must be proved by some other evidence. R. v. Edmonds (1821), 4 B. & Ald., 471; R. v. Cooke, 13 How. St. Trials, 333.

The prisoner must shew all his causes of objection before the Crown is called upon to shew cause; Chitty, Cr. Law, Vol. I., 534; Whelan v. The Queen (1868), 28 U.C.Q.B. 2, 49; and as between different prisoners whichever begins to challenge must finish all his challenges before the other begins. Ibid, p. 49; Co. Lit. 158a. A prisoner is entitled to challenge for cause before he has made all or any of his peremptory challenges. Whelan v. The Queen (1868), 28 U.C.Q.B. 2. "He had the right to deal with them when and in what manner he pleased, subject only to those necessary and convenient rules for the conduct of business, which the court might have seen fit to adopt." Per Adam Wilson, J., Ibid, p. 50.

If the prisoner whose challenge of a juror for favour has been disallowed, chooses then to challenge the juror peremptorily, he waives the benefit of any exception to the disallowance of his challenge for favour. Stewart v. The State (1853), 13 Arkansas Rep. 720; approved in Whelan v. The Queen, 28 U.C.Q.B., at p. 55; Freeman v. People (1847), 4 Denio, N.Y., 61.

A peremptory challenge of a juror 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. R. v. Lalonde (1898), 2 Can. Cr. Cas. 188.

Where several persons are jointly indicted and tried, the Crown is restricted to the number of peremptory challenges allowed on the trial of one person. Ibid.

If a defendant omit to challenge a juror on the ground that such juror entertains a hostile feeling against him, he cannot, after a verdict of guilty, ask on that ground to have the verdict quashed and for a new trial. R. v. Harris (1898), 2 Can. Cr. Cas. 75.

When a defendant and one of the impanelled jurors have had an unpremeditated and innocent conversation, which could not bias the juror's opinion nor affect his mind and judgment, although such conversation is improper, it cannot have the effect of avoiding the verdict and constituting ground for a new trial. Ibid.

The ordinary course of proceeding when the prisoner challenges for cause is that the juror is tried for cause at once; but he may be required to stand aside for a time, and the cause be tried at a later stage, if it be more convenient as a matter of practice and procedure that it should be so, or the challenge for cause may be postponed until the peremptory challenges have been exhausted. After challenging for cause and failing to support his challenge, the prisoner may desire to exclude that juror in case he might be influenced against the prisoner by reason of the challenge for cause, and if he had been compelled to exhaust the whole of his peremptory challenges before that, he would then be unable to exclude the juror he had challenged for cause, whom he might have excluded if his peremptory challenges had not been completed. Per Adam Wilson, J., in R. v. Smith (1876), 38 U.C.Q.B. 218.

The fact that one of the jury sworn in a trial in Manitoba did not thoroughly understand the English language is no ground after trial and conviction for holding that there has been a mistrial or for granting a new trial. R. v. Earl (1894), 10 Man. R. 303. Had the trial judge's attention been called to the fact he might have in his discretion directed the juror to be set aside, and this he may do under any circumstances which contribute a reasonable ground for believing that the juror is unfit to fulfil the functions of a juryman. Ibid; Mansell's Case (1857), 8 E. & B. 54.

It is a good ground of challenge of a petit juror that he was on the grand jury by which the indictment was found, the reason being that he may have been one of the twelve who found the indictment and then if he sat on the trial a criminal would be convicted by only twenty-three instead of twenty-four of his peers. R. v. Dowey (1869), 1 P.E.I. 291, per Peters, J.

The improper disallowance of any challenge for the defence is an absolute ground for a new trial. Sec. 746 (1).

The right of a prisoner to challenge for cause, though he has not exhausted his peremptory challenges, is fully recognized; but the right of postponing the hearing and trial of that cause is discretionary with the judge. Whelan v. The Queen, 28 U.C.Q.B. 132; R. v. Smith (1876), 38 U.C.Q.B. 218.

The Crown has the right to require the judge to set aside any juror till the panel is perused; and consistently with this the judge may in his discretion for sufficient cause further postpone the time of assigning cause, either for the Crown or the prisoner, but not as a matter of right on a mere request without sufficient cause. Mansell v. R. (1857), 8 E. & B. 54, 111.

*Jurors stood aside.*]—The Crown at common law had the right to challenge any number of jurors peremptorily without alleging any other reason than "quod non sunt boni pro rege," 2 Hawkins, P.C., ch. 43, sec. 23. This power was first controlled by the Stat. 33 Edw. I. Stat. 4, and later on by 32 & 33 Viet. (Can.) 29, sec. 38.

Jurors ordered to stand aside by the Crown are not called again till the panel has been gone through, and the jury is yet incomplete. In that case the panel is called over, omitting those challenged by the prisoner peremptorily, and the Crown may still have the jurors standing aside so remain so long as the panel can be made up by the requisite number of those who are not so ordered to stand aside, or who are not so challenged for cause and found not indifferent. If the panel cannot be completed otherwise than by calling those standing aside at the instance of the Crown, the Crown must then shew cause to each juror as he is called. Mansell v. The Queen, 8 E. & B. 54, 72; R. v. Smith (1876), 38 U.C.Q.B. 218.

The phrase "to stand aside" merely means that the juror being challenged by the Crown, the consideration of the challenge shall be postponed till it be seen whether a full jury can be made without him. Ibid.

When a panel had been gone through and a full jury had not been obtained the Crown on the second calling over the panel was permitted to direct eleven of the jurymen on the panel to stand aside a second time. It was held that the Crown could not without shewing cause for challenge direct a juror to stand aside a second time. (R. v. Lacombe, 13 L.C. Jur. 259 over-ruled.) R. v. Morin (1890), 18 Can. S.C.R. 407; R. v. Boyd (1896), 5 Que. Q.B. 1, 4 Can. Cr. Cas. 219.

**669. Right to cause jurors to stand aside in cases of libel.**—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.

*Standing jurors aside in libel cases.*]—The words of this section include all cases of defamatory libels upon individuals as distinguished from seditious or blasphemous libels; and in all cases of indictment for defamatory libels within the statute, the right of the Crown which previously existed to cause jurors to stand aside is taken away. R. v. Patteson (1875), 36 U.C.Q.B. 129.

Compare Code sec. 833 as to costs in libel cases. The latter section also contains the phrase "indictment or information by a private prosecutor for the publication of a defamatory libel." The words referring to the indictment and prosecutor being identical in the two sections they ought to have the same application. R. v. Patteson (1875), 36 U.C.Q.B. 129, 155.

The "private prosecutor," as the term is here used, means the person who puts the criminal law in motion; and if there is a criminal proceeding to which the term private prosecutor is more applicable than another, it is in the case of a defamatory libel—a prosecution, as said by Lord Campbell, uniformly instituted by the party injured. Per Morrison, J., in R. v. Patteson (1875), 36 U.C.Q.B. 129, at p. 141.

The fact that the Attorney-General or his representative conducts the prosecution in respect of a private defamatory libel does not make it a public proceeding or withdraw it from the operation of this section. R. v. Patteson (1875), 36 U.C.Q.B. 129, 143; R. v. Marsden (1829), 1 M. & M. 439; R. v. Bell, 1 M. & M. 440.

**670. Peremptory challenges in case of 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 one-half of

persons skilled in the language of the defence under sections 664 or 665, 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 a 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 note to sec. 664.

**671. Accused persons joining and severing in their 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.

Under these provisions each defendant has a right to the full number of his peremptory challenges; but a corresponding privilege is not given to the Crown, and therefore the Crown is restricted, in the case of the trial of several defendants jointly, to the number of peremptory challenges allowed to it in the case of the indictment of a single person. But if the joint defendants refuse to join in their challenges, the Crown has the right to try them separately, and then the Crown has its four peremptory challenges at the trial of each defendant. R. v. Lalonde (1898), 2 Can. Cr. Cas. 188 (Que.)

**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.

*(Amendment of 1895.)*

**673. Adjournment; jury separating.**—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.

*Jury separating.*]—An objection to a verdict on the ground that the jury in a capital case had separated, should be taken before the verdict is given. R. v. Peter (1869), 1 B.C.R., pt. 1, p. 2; but it would seem that if any communication or other misconduct is negatived by affidavit, and it appears that the separation was by the removal of a juryman to his residence when taken with a fit and that he remained in charge of a physician and of the sheriff until rejoined by the other jurymen, the verdict would stand. Ibid.

**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. 57, s. 21.

This section abrogates the common law rule that a jury should have no refreshments during the period of their deliberation, as to which see Winsor v. R. (1865), L.R. 1 Q.B. 308.

**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.

*Impanelling new jury.*]—The illness of a juror or the illness of the prisoner will constitute a sufficient ground for discharging the jury. Winsor v. R., L.R. 1 Q.B. 390. But if a juryman has merely fainted because the court room is hot and close, it would be proper to wait a short time for his recovery so as to proceed with the same jurors; but if a juror be taken so ill that there is no likelihood of his continuing to discharge his duties without danger to his life, the jury should be discharged. Ibid.

Where during the course of a trial it was discovered that one of the jurors had come from a house infected with smallpox, the jury were discharged and a new jury impanelled. R. v. Considine, 8 Montreal Legal News, 307.

A jury sworn and charged may be discharged at the desire of the accused and with the assent of the prosecution. R. v. Charlesworth, 2 F. & F. 326;

or because they are unable to agree on a verdict and the accused may be tried anew, the discharge of the first jury without a verdict not being equivalent to an acquittal. Ibid; Winsor v. R. (1865), L.R. 1 Q.B. 390.

Where the jury cannot agree the judge should not delay discharging them until they are exposed to the dangers which arise from exhaustion or prostrated strength of body and mind or until there is a chance of conscience and conviction being sacrificed for personal convenience and to be relieved from suffering. R. v. Charlesworth (1860), 2 F. & F. 326.

And it is now expressly enacted by Code sec. 728 that 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 impanelled during the sittings of the court, or may postpone the trial on such terms as justice may require. The exercise of that discretion is not subject to review. Sec. 728 (2).

*General verdict.*]—The right of the jury to find a general verdict in a criminal case, and to decline to find the facts specially, cannot be questioned, especially where their verdict is one of acquittal. R. v. Spence (1855), 12 U.C.Q.B. 519, per Robinson, C.J.

And counsel are not entitled to question the jury directly as to grounds of their verdict; but the judge may ask them if he sees fit. R. v. Ford, 3 U.C.C.P. 217.

**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 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.

Except as by this section provided, a certificate to prove a prior conviction is not properly admissible as to character.

*Evidence of character.*]—Evidence of character can only be as to general reputation. R. v. Rowton (1865), 10 Cox C.C. 25; R. v. Triganzie (1888), 15 Ont. R. 294.

Where evidence is adduced on behalf of the accused as to his general good character, the witnesses may be cross-examined by the prosecution as to the grounds of their belief and as to the particular facts on the question of character of which they have knowledge. R. v. Barsalou (No. 2) (1901), 4 Can. Cr. Cas. 347.

**677. Attendance of witnesses.**—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.

*Competency of witness.*]—The Canada Evidence Act, 1893, applies to all criminal proceedings, and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in this behalf. 56 Vict., ch. 31. sec. 2. By it a person shall not be incompetent to give evidence by reason of interest or crime. Ibid., sec. 3.

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, thut 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. Can. Evid. Act, 1893, sec. 4.

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. Ibid., sec. 4, sub-sec. 2.

A witness who is unable to speak, may give his evidence in any other manner in which he can make it intelligible. Can Evid. Act, 1893, sec. 6.

By section 5 of the Canada Evidence Act as amended in 1898, ch. 53, sec. 1, the following provision is made:—"No witness 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."

Evidence obtained by the unauthorized execution of an illegal process, ex gr., a search warrant illegally issued, is not necessarily inadmissible, so long as the fact so wrongly discovered is as a fact—apart from the manner in which it was discovered—admissible against the party. R. v. Doyle (1886), 12 O.R. 347.

As to the evidence of young children in cases of indecent assault, etc., see sec. 685.

*Confidential communications.*]—A client cannot be compelled and a legal adviser will not be allowed, without the express consent of his client, to disclose oral or documentary communications made or obtained in professional confidence. Phipson Evid., 2nd ed., 181. The same privilege does not extend to physicians. R. v. Duchess of Kingston (1776), 20 How. St. Tr. 540; R. v. Gibbons (1823), 1 C. & P. 97. Communications made to clergymen are not protected. R. v. Gilham (1828), 1 Moo. 186; Wheeler v. Le Marchant, 17 Ch. D. 681; Normanshaw v. Normanshaw, 59 Eng. L.T. 468; but some eminent judges have expressed opinions against compelling such disclosure.. R. v. Griffin (1853), 6 Cox 219, per Alderson, B.; Broad v. Pitt (1828), 3 C. & P. 518, per Best, J.

Those who cause criminal proceedings to be instituted are not bound to disclose the sources of their information. The offence charged has to be proved, and the person who makes an unfounded criminal charge may have to suffer in damages to compensate the person injured in an action for malicious prosecution. In the civil action if he should decline to disclose the source of his information, his refusal might be accepted by the jury as evidence of malice. But in the criminal case, giving the source of information would not tend to prove or disprove the charge. R. v. Sproule (1887), 14 Ont. R. 375, 380.

*Credibility of witnesses.*]—It is a well established rule that the jury must judge of the credibility of the witness. The nature of the story he tells, the manner of telling it, the probability of its being true, his demeanour, his readiness to answer some questions, his unwillingness to answer others, and his whole conduct indicating favour to one side or the other, must and ought to raise doubts as to his telling the truth. On the other hand, a frank, straightforward manner of answering questions without regard to consequences to either party, a desire to state all the facts, no unwillingness or hesitation to answer—these are calculated to impress jurors favourably; and in fact the superiority of oral over written examination of witnesses in extracting the truth is the opportunity it affords of judging how far you may rely on the mere statements of a witness, when unaccompanied by such other concurrent circumstances as give weight to such statements or facts. R. v. Jones (1869), 28 U.C.Q.B. 416, per Richards, C.J.

The answer of a prisoner examined as a witness on his own behalf to a question in cross-examination foreign to the issue, must be accepted as final; and the prosecution is not entitled to call rebuttal evidence to contradict it for the mere purpose of impeaching the credit of the witness. R. v. Lapierre (1897), 1 Can. Cr. Cas. 413 (Que.).

*Evidence of accomplice.*]—The rule that the evidence of an accomplice requires corroboration is not a rule of law, but a rule of general and usual practice, the application of which is for the discretion of the judge by whom the case is tried; and in the application of the rule much depends upon the nature of the offence, and the extent of the complicity of the (accomplice) witness in it. R. v. Boyes (1861), 1 B. & S. 320; R. v. Seddons (1866), 16 U.C.C.P. 389.

Principals in the first degree are those who have actually and with their own hands committed the fact. Principals in the second degree are those who were present, aiding and abetting, at the commission of the fact. They are generally termed aiders and abettors, and sometimes accomplices; but the latter term will not serve as a term of definition, as it includes all the participes criminis, whether they are considered, in strict legal propriety, as principals in the first or second degree, or merely as accessories before or after the fact. R. v. Smith (1876), 38 U.C.Q.B. 218, 228.

The direction commonly given to the jury is, that they are not bound to convict on the unsupported testimony of an accomplice, or even an accessory after the fact; that it is not safe to do it; that they should not give credit to such unsupported testimony; but that he cannot withdraw such

evidence from their consideration; it is legal evidence, and, being so, they may act upon it or not as they please, bearing in mind the caution and advice which they have received. Per Adam Wilson, J. R. v. Smith (1876), 38 U.C.Q.B. 218; Re Mennier, [1894] 2 Q.B. 415.

When the jury have been cautioned as to acting upon the unconfirmed testimony of accomplices, no fault can be found with the admission of this evidence. R. v. Seddons (1866), 16 U.C.C.P. 389.

The omission of a judge to tell the jury that the evidence of an accomplice required to be corroborated, does not entitle a prisoner to a reversal of the conviction. R. v. Beckwith, 8 U.C.C.P. 277, followed in R. v. Andrews (1886), 12 O.R. 184.

*Identification of criminals.*]—By the Criminals' Identification Act, 1898, the Bertillon system is authorized. That Act provides 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. Ibid. Sec. 1.

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 sec. 1 of this Act. Ibid. Sec. 2.

*Hypothetical questions.*]—On a trial for murder the Crown having made out a prima facie case by circumstantial evidence the prisoner's daughter, a girl of 14, was called on his behalf, and swore that she herself killed the deceased, without the prisoner's knowledge, with two blows from a stick of certain dimensions. It was held that a medical witness previously examined for the Crown was properly allowed to be recalled to state that in his opinion, the injuries found on the body could not have been so occasioned. R. v. Jones (1869), 28 U.C.Q.B. 416.

A skilled witness cannot in strictness be asked his opinion respecting the very point which the jury are to determine; but he may be asked a hypothetical question which in effect will determine the same question. In R. v. Jones the skilled medical witness was not asked respecting the very point which the jury were to determine, namely, whether the prisoner caused the death of the deceased, nor even the question whether in his opinion the girl had killed the deceased (as sworn to by her), but simply whether the blows as she described them could produce the fractures, etc., found on the head of deceased. R. v. Jones (1869), 28 U.C.Q.B. 416.

*Doctrine of res gestæ.*]—In a pamphlet published by Cockburn, C.J., commenting upon the case of R. v. Bedingfield (1879), 14 Cox 341, tried before him, the following passage occurs: "Whatever act or series of acts constitute or in point of time immediately accompany and terminate in the principal act charged as an offence against the accused from its inception to its consummation or final completion, or its prevention or abandonment, whether on the part of the agent or wrongdoer in order to its performance, or on that of the patient or party wronged in order to its prevention, and whatever may be said by either of the parties during the continuance of the transaction with reference to it, including herein what may be said by the suffering party, though in the absence of the accused, during the continuance of the action by the latter, actual or constructive, as e.g. in the case of flight or applications for assistance, form part of the

principal transaction, and may be given in evidence as part of the res gestæ or particulars of it; while, on the other hand, statements made by the complaining party after all action on the part of the wrong doer, actual or constructive, has ceased through the completion of the principal act or other determination of it by its prevention or its abandonment by the wrong-doer, such as e.g. statements made with a view to the apprehension of the offender, do not form part of the res gestæ, and should be excluded." Cited by Armour, C.J., in R. v. McMahon (1889), 18 O.R. 502, 516.

The expression "res gestæ" includes everything which may be fairly considered an "incident of the event under consideration. Taylor on Evidence, 1897, sec. 583.

The circumstances or declarations need not be contemporaneous with the main fact under consideration if so connected therewith as to illustrate its character, to further its object, or to form in conjunction with it one continuous transaction. Rouch v. Great Western Ry. (1841), 1 Q.B. 51, 61; Bateman v. Bailey, 5 T.R. 512; Ridley v. Gyde, 9 Bing. 349; Rawson v. Haigh (1824), 2 Bing. 104. Taylor on Evidence, 1897, sec. 588. "Although concurrence of time cannot but be always material evidence to shew the connection, yet it is by no means essential." Per Lord Denman, C.J., in Rouch v. Great Western Ry., supra.

It is in the discretion of the judge to admit or reject evidence of other offences of the same class which form the subject of other indictments, if all of the offences constituted parts of the same transaction, and such discretion will be guided by the evidence appearing necessary or unnecessary in support of the indictment on which the prisoner is being tried. Russell on Crimes, 5th ed., Vol. 3, 375; R. v. McDonald (1886), 10 O.R. 553.

*Expert evidence.*]—No evidence of matters of opinion is admissible except where the subject is one involving questions of a particular science in which persons of ordinary experience are unable to draw conclusions from the facts. The jury, as a general rule, draw all inferences themselves, and witnesses must speak only as to facts. R. v. Preeper (1888), 15 Can. S.C.R. 409. Per Strong, J.

On some particular subjects, positive and direct testimony may often be unattainable; and, in such cases, a witness is allowed to testify as to his belief or opinion, or even to draw inferences respecting the fact in question from other facts, providing these facts be within his personal knowledge. Nor is this course fraught with much danger; because a witness who testifies falsely as to his belief, is equally liable to be convicted of perjury with the man who swears positively to a fact which he knows to be untrue. Taylor on Evidence, 8th ed., sec. 1416; Code sec. 145.

Where a witness states that a wound was inflicted with a certain kind of instrument it is permissible to test that witness's credibility by calling a medical man to testify whether a wound of the kind described can be inflicted by such an instrument. R. v. Jones (1869), 28 U.C.Q.B. 416.

*Evidence of insane persons.*]—The general rule is that a lunatic or a person affected with insanity is admissible as a witness, if he have sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of matters which he has seen or heard, in reference to the questions at issue, and whether he have that understanding is a question to be determined by the court, upon examination of the party himself, and any competent witnesses who can speak to the nature and extent of his insanity. Columbia v. Armes, 107 U.S. 419; R. v. Hill (1851), 5 Cox 259.

*Dying declaration.*]—In trials for murder or manslaughter the dying declarations of the deceased, made under a sense of impending death, are admissible to prove the circumstances of the crime; but the deceased must be proved, to the satisfaction of the judge, to have been at the time of making the declaration in actual danger of death and to have abandoned all hope of recovery. Phipson Evid. 299.

In deciding the preliminary question as to whether the deceased was under a sense of impending death the trial judge must have regard to the whole of the surrounding circumstances, including the nature and extent of the gun charge and the immediate result of the wound. R. v. Davidson (1898), 1 Can. Cr. Cas. 351 (N.S.).

A statement made by a person who had been shot was held to be inadmissible in evidence as a dying declaration on an indictment for murder, in the absence of proof that the deceased at the time he made the statement was under "a settled hopeless expectation of death." R. v. McMahon (1889), 18 O.R. 502.

The result of the decisions is that there must be an unqualified belief in the nearness of death; a belief, without hope, that the declarant is about to die. As said by Chief Baron Kelly:—"If we look at reported cases and at the language of learned judges we find that one has used the expression, "every hope of this world gone"; another, "settled, hopeless expectation of death"; another, "any hope of recovery, however slight, renders the evidence of such declarations inadmissible." We, as judges, must be perfectly satisfied beyond all reasonable doubt that there was no hope of avoiding death; and it is not unimportant to observe that the burden of proving the facts that render the declaration admissible is upon the prosecution." Per Kelly, C.B., in R. v. Jenkins (1869), L.R. 1 C.C. 187 (cited by Hagarty, C.J., in R. v. Smith (1873), 23 U.C.C.P. 312). It is to be noted that in the case of R. v. Jenkins the declaration was rejected, the words being that she had no hope of recovery *at present*.

A dying declaration of the deceased that he was shot in the body and was "going fast" was held in Nova Scotia to be sufficient proof of a settled and hopeless consciousness that he was in a dying state, so as to make the declaration admissible. R. v. Davidson (1898), 1 Can. Cr. Cas. 351 (N.S.).

*Character evidence.*]—Evidence is not admissible in proof that the defendant committed the crime charged, either that he bore a bad reputation or that he had a disposition to commit crimes of that particular class. R. v. Cole (1810), 1 Phil. Evid. 508; Phipson Evid. 154.

In criminal cases, involving punishment as distinguished from penalty, A.-G. v. Bowman, 2 B. & P. 532; A.-G. v. Radloff, 10 Ex. 84; the prisoner is, on grounds of humanity, allowed the privilege of proving his good character, for the purpose of raising a presumption of his innocence of the crime charged.

The character proved must be of the specific kind impeached—e.g., honesty where dishonesty is charged, good character in other respects being irrelevant. Tay., sec. 351. And it must be general, and not relate to particular instances of such honesty, etc. Ibid. In strictness, also, it seems that the witness should depose to the prisoner's reputation (i.e., the estimate formed of him by the community), and not to his own individual opinionof the prisoner's character or disposition. R. v. Rowton, 34 L.J.M.C. 57. But "this distinction is seldom, if ever, acted on in practice, the question always put to a witness to character being, What is the prisoner's character for honesty, morality, or humanity? as the case may be. Nor is the witness ever warned that he is to confine his evidence to the prisoner's reputation. It would be no easy matter to make the common run of witnesses understand the distinction." Steph., note xxvi. As the best character is often the least talked of, the witness may even give negative as well as affirmative evidence on the subject—e.g., that he has never heard anything against the prisoner. R. v. Rowton, supra. Finally, the character proved must relate to a period proximate to the date of the charge. R. v. Swendsen, 14 How. St. Tr. 559, 596.

Evidence to character must be evidence to general character in the sense of reputation; evidence of particular facts, although they might go far more strongly than the evidence of general reputation to establish that the

disposition and tendency of the man's mind was such as to render him incapable of the act with which he stands charged, must be put out of consideration altogether. Rebutting evidence to meet evidence of character brought forward by the prisoner must be of the same character and kept within the same limits. While you can give evidence of general good character, the evidence called to rebut it must be evidence of the same general description, shewing that the evidence which has been given to establish a good reputation on the one hand is not true because the man's general reputation was bad. Per Cockburn, C.J., in R. v. Rowton (1865), L. & C. 520; 10 Cox C.C. 25; R. v. Triganzie (1888), 15 O.R. 294.

Except in rebuttal to evidence of good character, it is not competent to give evidence of a prisoner's bad character, or the bad character of his associates, as that does not in any manner tend to establish the particular offence for which the prisoner is being tried. But if the conduct or character of his associates has a bearing upon the particular charge forming a link, near or remote, in the chain that connects the accused with the offence, it may be admissible in evidence. Per Cameron, C.J., in R. v. Bent (1886), 10 O.R. 557.

*Documentary evidence.*] —The contents of a document material to the issue should be proved by primary evidence; but if the production of such evidence is out of the power of the party desiring to place it in evidence, secondary evidence may be admissible. Phipson Evid. 484, 502. See also the Canada Evidence Act, 1893, as to secondary evidence of the contents of official documents by certified copies or exemplifications thereof.

Where the defence to a summary prosecution for selling liquor without a license is that the accused was entitled to do so under a statutory exception respecting registered druggists, and by statute the onus is expressly cast on the accused to prove himself within the exception, and provision made for proving the register by the production of a printed copy thereof, the viva voce testimony of the accused that he is a duly registered druggist is not competent evidence of the fact, and the magistrate may disregard the same, although no objection was taken to the admission of such testimony. R. v. Herrell (No. 2) (1899), 3 Can. Cr. Cas. 15 (Man.).

The Canada Temperance Act does not per se make the sale of intoxicating liquor an offence; it is only after the second part of the Act has been brought into force by the proceedings indicated for that purpose in the first part of the Act that such sale becomes prohibited, and the subject of a penalty; these proceedings cannot be judicially noticed, they must be proved, and in the absence of such proof the magistrate acts without jurisdiction. R. v. Walsh (1883), 2 Ont. R. 206. Proof may be made by the production of the official Gazette. R. v. Bennett, 1 Ont. R. 445.

Parol evidence of a son of the alleged administratrix that his mother is administratrix is insufficient proof. R. v. Jackson (1869), 19 U.C.C.P. 280.

The answer of a witness stating for whom he voted is not secondary evidence because the vote was by mark upon a paper not produced upon which the candidates' names were printed, and on which there was or should be nothing to identify the ballot as that marked by the voter; and such evidence is admissible without production of the ballots. R. v. Saunders (1897), 3 Can. Cr. Cas. 278 (Man.).

An error in receiving in evidence a document insufficiently proved may be cured by the subsequent evidence in the case; and it is not necessary to again tender the document after the evidence necessary to complete its proof has been disclosed. R. v. Dixon (No. 2) (1897), 3 Can. Cr. Cas. 220 (N.S.).

*Inadmissible evidence.*]—It is the duty of the judge in criminal trials to take care that the verdict of the jury is not founded upon any evidence except that which the law allows. If a mistake has been made by counsel

that does not relieve the judge from the duty to see that the proper evidence only was before the jury. R. v. Gibson (1886), 18 Q.B.D. 537; R. v. Hagerman, 15 Ont. R. 598; R. v. Becker, 20 Ont. R. 676. In the latter case an objection to the admissibility of certain evidence taken for the first time on an appeal from an order refusing a certiorari was held not too late.

Upon a charge of causing grievous bodily harm to a child under defendants' care with intent to bring about the child's death, evidence of acts of cruelty by defendants to another child also in defendants' care are irrelevant to the case and inadmissible. R. v. Lapierre (1897), 1 Can. Cr. Cas. 413 (Que.).

Where an alleged confession is received in evidence after objection 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 impanelled. R. v. Sonyer (1898), 2 Can. Cr. Cas. 501 (B.C.).

**678. Compelling attendance of witnesses.**—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 recognizance, 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.

*Witness fees.*]—At common law witnesses in criminal cases were not entitled to reimbursement for their expenses; Roscoe Cr. Evid., 11th ed., 104; R. v. Cousens, 3 Russ., Cr. 5th ed., 599; but the court might refuse to grant an attachment in the case of a poor witness if his expenses were not paid. Ibid. 105. The court has no authority to order the defendant to pay a witness his expenses though he has been subpœnaed by such defendant. R. v. Cooke (1824), 1 C. & P. 321.

Where a witness is financially unable to pay his expenses of attending, it is usual for the Department of the provincial government charged with the administration of justice to pay the same; and in the more serious offences, the Crown will subpœna the witnesses for the accused, if the latter is financially unable to pay the expenses of service of process.

Witnesses in summary conviction matters before justices are entitled to witness fees under sec. 871.

The erroneous decision of a magistrate as to whether or not a defaulting witness was bound to attend his court in respect of a trial for an offence against a provincial statute without pre-payment of witness fees, and as to the liability of such witness to arrest has been held not to be reviewable upon habeas corpus, although the accused was deprived of such witness's testimony through the refusal of the magistrate to issue a warrant for his arrest. R. v. Clements (1901), 4 Can. Cr. Cas. 553 (N.S.). Such refusal will not deprive the magistrate of jurisdiction to convict, and the defendant's remedy is by way of appeal only. Ibid. Per Meagher, J.

*Protection of witness from arrest.*]—Whether subpœnaed or attending by consent without a subpœna, the witness is protected from arrest eundo, morando et redeundo. Meekins v. Smith, 1 H. Bl. 636; Smith v. Stewart, 3 East 89. The courts are disposed to be liberal in regard to the allowance of a reasonable time for going and returning. 1 Stark. Evid., 2nd ed., 90. If the witness is improperly arrested the court out of which the subpœna issued will order him to be discharged. Archbold Cr. Ev., 9th ed., 161.

But where the witness was summoned before a court sitting in another judicial district from that in which he lived, the privilege was held not to apply to a charge of a criminal offence committed by him during the time he was in the former district for the purpose of giving evidence. Ex p. Robert Ewan (1897), 2 Can. Cr. Cas. 279 (Que.).

*(Amendment of 1900.)*

**678A. Warrant for material witness.**—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 warant 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 gaol, 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.

This is intended to meet the case of absconding witnesses. Sec. 583 provides a similar means of securing the attendance of a witness upon a preliminary investigation, but there was no corresponding provision as to witnesses required at the sessions or assizes. An unwilling witness served with a subpœna might abscond, and there was formerly no way of enforcing his attendance until the trial upon proof of default. Sec. 678. See also sec. 679.

**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 witnesses 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.

*(Amendment of 1900.)*

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 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.

It was found to be extremely difficult, if not impossible, for a court in one province to enforce in another province the proceedings for contempt under the first sub-section, and it is sought by this amendment to get over the difficulty. A portion of sub-sec. (2) is modelled from sec. 84 of the Winding Up Act, R.S.C. 1886, ch. 129.

*(Amendment of 1900.)*

**680. Bringing up a prisoner as 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 gaoler 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, gaoler, sheriff or other person shall convey the prisoner to such place and produce him there according to the exigency of the order.

The only change made by the amendment is in the insertion of the words "or any chairman of General Sessions," and the addition of paragraph (*b*). See Imp. Act, 16 & 17 Vict., ch. 30; Taylor on Evidence, 9th ed., secs. 1275, 1276.

Paragraph (*b*) was suggested by the late Chief Justice Davie, of British Columbia, and is intended to effect a considerable saving of expense, especially in that province.

**681. Evidence of person dangerously ill may be taken under commission.**—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 when such evidence is taken.**—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 may be taken out of Canada under 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.

*(Amendment of 1895.)*

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 commissioners, 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. 53 V., c. 37, s. 23.

3. The depositions taken by such commissioners may be used as evidence as well before the grand jury as at the trial.

*(Amendment of 1900.)*

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.

This provision first appeared in the Criminal Law Amendment Act of 1890 (53 Vict. (Can.), ch. 37, sec. 23).

The latter sub-section should properly be numbered as 4, as the other sub-sec. 3 had been added in 1895. The words "by direction of the presiding judge" were inserted in order to impose upon the judge the duty of seeing that the commission had been regularly taken, before directing that the deposition should be used. Commons Debates 1900, p. 6321. But the application of the procedure in civil cases by the second sub-section does not confer a like right of appeal as in civil cases from the order appointing the commissioners. R. v. Johnson (1892), 2 B.C.R. 87.

Any evidence taken under commission may be objected to at the trial on the ground of the irregularity of the commissioners' appointment. Ibid.

Acting under ch. 37, Stat. Can. 1890, sec. 23, a judge made an order for the examination in Boston of witnesses on behalf of the Crown residing out of Canada, and that the evidence so taken should be read before the grand jury. On appeal to the court the order was held valid so far as it related to the taking of the evidence, but the majority of the court held that the judge went beyond his powers in directing that the depositions taken under the order should be read before the grand jury. R. v. Chetwynd (1891), 23 N.S.R. (11 R. & G.) 332. The grand jury have a right to decide for themselve upon what evidence they will find a bill, and the court cannot enquire into the proceedings before them or as to the nature of the evidence which they took into consideration. Ibid, per Ritchie, J., p. 338. The above sub-sec. (3) now provides that such depositions *may* be used as evidence as well before the grand jury as at the trial.

*Foreign commission.*]—An order for a commission to take the evidence of any person residing out of Canada who is able to give material information relating to an indictable offence, or relating to any person accused thereof, may ordinarily be made any time after an information is laid charging such offence, and such evidence may be used at any stage of the inquiry at which evidence may be given. Such order ought to provide that the commission be returned to the court out of which it issues, and ought not to limit the use of the evidence. R. v. Chetwynd (1891), 23 N.S.R. 332, and R. v. Gibson, 16 Ont. R. 704, referred to. R. v. Verral, 17 Ont. P. R. 61, affirming 16 Ont. P. R. 444.

A commission to take the evidence of witnesses abroad in a libel prosecution is properly ordered at the trial where the evidence relates wholly to a plea of justification just entered of record. R. v. Nicol (1898), 5 Can. Cr. Cas. 31 (B.C.).

An order for a commission to take such evidence should not be made in such case before plea. Ibid.

*(Amendment of 1893.)*

**684. When 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 65.

(*b*) Perjury, Part X., section 146;

(*c*) Offences under Part XIII., sections 181 to 190, inclusive;

(*d*) Procuring feigned marriage, Part XXII., section 277;

(*e*) Forgery, Part XXXI., section 423.

*Where corroboration is required.*]—This section originated with 32 & 33 Vict., ch. 19, sec. 54 (D.), which abolished the incapacity of interested witnesses, but with a proviso that the evidence should be insufficient unless corroborated by "other legal evidence in support of the prosecution." The corroboration required by that statute was held not to be the corroboration of the evidence of the person interested in every material particular, but the corroboration of it in some material particular tending to support the prosecution. R. v. Bannerman (1878), 43 U.C.Q.B. 547.

On an indictment for forgery of prosecutor's name as endorser of a promissory note, prosecutor swore that he had not endorsed the note; that it was not his writing; that he had never authorized the prisoner to sign his name to the note, and that he himself was unable to write his name, being in fact a marksman. A son of his also swore that his father was unable to write his name and was a marksman. Another witness also proved that he had known the prosecutor three or four years, and knew that he could not write. It was held that the evidence of the son and of the other witness to the effect that the prosecutor was unable to write his name was "other legal evidence in support of the prosecution within the meaning of the section, and that it sufficiently corroborated the evidence of the prosecutor to sustain the conviction, and that the burden was then on the prisoner to shew as a defence that he was authorized to use or write the prosecutor's name. R. v. Bannerman (1878), 43 U.C.Q.B. 547.

In a charge of forgery, it was held that the corroboration must be that of another witness, and not merely the evidence of the same witness on another point. R. v. McBride (1895), 2 Can. Cr. Cas. 544, 26 Ont. R. 639.

In R. v. Giles (1856), 6 U.C.C.P. 84, the prisoner, Elizabeth Giles, was charged with forging an order for the delivery of goods. The only persons who gave evidence at the trial were the person whose name was alleged to have been forged, and the person to whom the order was addressed. The person whose name was alleged to have been forged denied the signature and also swore that he could not write; but the person to whom the order was presented by the prisoner, and who had supplied her with goods on the faith of same, was not aware of that, and accepted the order in good faith. The order purported to be a request to let "the bearer" have goods, and the prisoner, on presenting it, gave a fictitious name. In delivering the judgment of the Court of Common Pleas (Draper, C.J., Richards and Hagarty, JJ.) the Chief Justice said:—"The false representation made by prisoner as to her own name would be a very material fact to establish a guilty knowledge on her part, if the fact that the note was forged were established; but, until that is done, this false statement wants significance, and I think it would be going too far to treat [it] as a corroboration of the statement of Aikenhead [the party whose name was alleged to have been forged] that the order was a forgery. . . . There is no corroboration of his testimony, i.e., there is no material fact proved by him which is proved either by other direct testimony, or by the proof of other facts which go to establish the truth of any material part of his statements."

The corroborative evidence "implicating" the accused which is made necessary to sustain a charge of seduction of a girl under sixteen may con-

sist of the prisoner's admission made after she attained sixteen that he had had connection wits her. R. v. Wyse (1895), 1 Can. Cr. Cas. 6 (N.W.T.).

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 a jury or by a judge exercising the functions of a jury. R. v. Wyse (1895), 1 Can. Cr. Cas. 6 (N.W.T.).

It has been held that evidence of defendant's subsequent conduct in seeking to continue his illicit relation with the seduced person may be received as connected with and tending to corroborate the principal charge in a civil action for damages, as well as being matter of aggravation. Russell v. Chambers (1883), 31 Minn. 54, 16 N.W. Rep. 458.

The reception of such evidence, in a criminal prosecution before a jury, is to be largely controlled by the judge who tries the cause, and the evidence is to be submitted to the jury, with proper explanation of its purpose and effect. State v. Witham (1881), 72 Me. 531.

Both prior and subsequent acts to that charged in the indictment are admissible, if indicating a continuousness of illicit intercourse. State v. Witham (1881), 72 Me. 531, 535.

If, however, the acts are too remote in point of time to afford any reasonable inference of guilt as to the offence charged, proof thereof should be rejected. Stewart v. State (1887), 64 Miss. 626, 2 So. Rep. 73.

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" required by this section in order to sustain a conviction. R. v. Vahey (1899), 2 Can. Cr. Cas. 258 (Ont.).

Apart from statutory enactment, it was a general rule that the testimony of one witness was insufficient to convict on a charge of perjury. Roscoe's Cr. Evid., 11th ed., 807. It is not, however, imperative that there should be two witnesses to disprove the fact sworn to by the accused, for if any other material circumstance be proved by other witnesses in confirmation of the witness who gives the direct testimony of perjury, it may turn the scale and warrant a conviction. R. v. Lee (1766), 3 Russell on Crimes, 5th ed., 72. Two witnesses are not essentially necessary to contradict the oath on which the perjury is assigned, but there must be something more than the oath of one, to shew that one party is more to be believed than the other. R. v. Boulter (1852), 5 Cox C.C. 543; 3 Car. & Kir. 236. And it has been held that a letter written by the accused contradicting his statement upon oath would be sufficient to make it unnecessary to have a second witness. R. v. Mayhew (1834), 6 C. & P. 315.

It was seen that this section does not apply to the offence of making a false statutory declaration under sec. 147.

It is not a rule of law that an accomplice must be corroborated, but one of practice merely. It is usual for judges to tell the jury that they may act as they please upon the uncorroborated evidence of an accomplice, but that it is safer to require corroboration. Per Jarvis, C.J. R. v. Stubbs (1855), Dears. 555; 7 Cox 48; 1 Jur. N.S. 1115. "Judges, in their discretion, will advise a jury not to believe an accomplice unless he is confirmed, or only in so far as he is confirmed; but if he is believed, his testimony is unquestionably sufficient to establish the facts to which he deposes. It is allowed that he is a competent witness, and the consequence is inevitable that if credit is given to his evidence it requires no confirmation from another witness." Per Lord Ellenborough. R. v. Jones (1809), 2 Camp 132, 11 R.R. 680. An accomplice stands in a situation differing from one

whose character is bad. He is immediately connected with the crime, the subject of enquiry, and has an obvious interest in obtaining the conviction of those whom he represents to have acted with him in committing it; but it cannot be treated as a point of law that the evidence of an accomplice must be corroborated. Per Draper, C.J. R. v. Beckwith (1859), 8 U.C.C.P. 274. A conviction of a prisoner for horse stealing upon the uncorroborated evidence of an accomplice was held to be legal, although the judge did not caution the jury as to the weight to be attached to the evidence. Ibid.

The testimony of an accomplice ought not to be relied upon unless corroborated both as to the circumstances of the crime and the identity of the accused. R. v. Farlar (1837), 8 C. & P. 106; R. v. Stubbs (1855), Dears. 555, 25 L.J.M.C. 16; Phipson on Evidence, 2nd ed. (1898), 482. There should be some fact deposed to, independently altogether of the evidence of the accomplice, which, taken by itself, leads to the inference, not only that a crime has been committed, but that the prisoner is implicated in it. Roscoe's Crim. Evid., 11th ed., 124.

The corroboration should be as to some material fact or facts which go to prove that the accused was connected with the crime charged. Russell on Crimes, 6th ed. (1896), vol. 3, p. 646; R. v. Webb (1834), 6 C. & P. 595; R. v. Addis (1834), 6 C. & P. 388; R. v. Wilkes (1836), 7 C. & P. 272.

**685. Evidence not under oath of child in certain cases.**—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 259 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 under 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.

*Child's evidence.*]—Section 25 of the Canada Evidence Act, 1893, provides that 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; but that

no case shall be decided upon such evidence alone, and such evidence must be corroborated by some other material evidence.

In a case prior to the Canada Evidence Act it was held that where the conviction on a charge of indecent assault was for common assault only, but the evidence was corroborated as here required, the conviction would be valid although the child's evidence would not at that time have been admissible on a charge of common assault. R. v. Grantyers (1893), 2 Que. (Q.B.) 376.

It will be observed that while, under the Canada Evidence Act, the corroboration is required to be only "by some other material evidence," the corroboration under sec. 685 of the Code must in the cases to which it applies be "by some other material evidence in support thereof implicating the accused." See also note to sec. 684.

**686. Deposition of sick witness may be read in evidence.**—If the evidence of a sick person has been taken under commission, as provided in section 681, 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 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 it 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.

*(Amendment of 1900.)*

**687. Depositions as evidence.**—If upon the trial of an accused person such facts are proved upon 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.

*Using depositions as evidence.*]—The section as it formerly stood provided that the deposition might be used if it were proved that it was taken in the presence of the person accused "and that *he*, his counsel or solicitor, had a full opportunity of cross-examining," etc. The word "he" is now left out. In the debate upon this amendment the Hon. David Mills, then Minister of Justice, said:—"It sometimes happens that an ill-informed man is without counsel before a magistrate, and evidence is taken and he is incapable of cross-examining the party. He is unrepresented by counsel. The witness who appeared before him may have left the country before the trial and may not be present at the trial. The evidence is frequently not well taken, and it may be very different from what it would have been if the witness had been cross-examined. It is, nevertheless, used against him without any opportunity of bringing out those facts which might have completely altered the complexion of the evidence had he been subjected to cross-examination; so where there is no cross-examination I think it is better that the evidence should not be produced." Senate Debates, 1899, p. 554.

Sub-section 2 is new. Under the former sec. 687 it was doubtful whether depositions taken at a former trial could be used at a second trial necessitated by a disagreement of the jury at the first trial or directed on a case reserved, although the witness had died or left the country meanwhile. 35 C.L.J. (1899), pp. 91 and 212.

The original statute 32-33 Vict., ch. 30, sec. 30, was passed to prevent the obstruction of justice by the absence of witnesses. The question as to whether or not the witness is unable to travel must in the main be left to the judgment and discretion of the trial judge. R. v. Wellings (1878), L.R. 3 Q.B.D. 42; R. v. Stephenson (1862), L. & C. 167. And the same rule will be applied where the absence from Canada is not positively proved but is a matter of inference from circumstances. R. v. Nelson (1882), 1 Ont. R. 500.

Evidence of a custom's clerk that the captain of a schooner had cleared from a Canadian port a week before the trial is not sufficient evidence of his being out of Canada to satisfy this section. R. v. Morgan (1893), 2 B.C.R. 329. Semble, there should have been evidence that the schooner actually left the harbour.

The following proof of absence of a witness from Canada was held sufficient to allow of the reading of his deposition taken on the preliminary enquiry; a witness was called who said that he saw the absent witness ten days previously, that he was then employed on a certain boat and on leaving him had said he was going on board the boat and that the boat's route had now been changed to foreign waters. R. v. Pescaro (1884), 1 B.C.R., pt. 2, p. 144, per Begbie, C.J., Gray and Walkem, JJ.

Depositions may also be proved by the magistrate, or his clerk, and in important cases it is better to have the magistrate present at the trial. R. v. Hamilton (1866), 16 U.C.C.P., p. 353.

As to the meaning of the phrase "full opportunity to cross-examine," see note to sec. 590.

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 this section because taken in the absence of the accused. R. v. Woods (1897), 2 Can. Cr. Cas. 159 (B.C.).

In order that this section should apply to make admissible as evidence at the trial the deposition of a witness, since deceased, taken on a preliminary inquiry or other investigation of a charge against the accused before a justice of the peace, the document containing the deposition is alone to be looked at to ascertain if the deposition "purports to be signed by the justice," as is required by that section. R. v. Hamilton (1898), 2 Can. Cr. Cas. 390 (Man.).

Where the deposition sought to be used had been signed by both the witness and the magistrate, and was attached at the end of depositions taken by the magistrate on a previous date named, but did not itself contain a new "caption," or the date when taken, or any record by the magistrate certifying that such added deposition had been *taken* by him, and the first depositions formed in themselves a complete document concluding with the magistrate's note of the remand of the case, it is not to be presumed that the informal deposition following the formal document is a continuation of the first deposition (in which appeared no reference to the added deposition), or that it relates to the same charge, and it was held that such added deposition did not "purport to be signed by the justice by or before whom the same purports to have been taken." Ibid.

A deposition, the caption of which sets out the name of the justice and describes him as one of the justices of the peace for a named county, "purports to be signed by the justice by or before whom the same purports to have been taken," if the same is signed by the justice with his name only, without adding to it, as in form 8 of the Code, the initials "J.P." and the name of the county for which he is a justice; and such a deposition is prima facie admissible in evidence. Ibid.

The deposition must be a verbatim record of the witness's evidence. R. v. Graham (1898), 2 Can. Cr. Cas. 388 (Que.).

Notes of evidence taken by the coroner at an inquest which do not contain the precise expressions of the witness, but a summary only of the evidence, are not admissible in contradiction of the witness's testimony in a subsequent proceeding unless signed by the witness, or unless read over to and acquiesced in by him. R. v. Ciarlo (1897), 1 Can. Cr. Cas. (Que.).

But the witness may in such case be cross-examined as to any material statements made by him at the inquest, and witnesses may be called to shew that he then made a different and contradictory statement. Ibid.

The deposition of an ill or absent witness taken before a magistrate having jurisdiction to hold the preliminary enquiry, other than the one before whom the charge was laid and the committal made, may be used at the trial if the deposition was taken in the presence of the prisoner and with full opportunity of cross-examining, and if the formalities of the Code are complied with as to the manner of taking and signing depositions. R. v. De Vidal (1861), 9 Cox C.C. 4 (Blackburn, J.), approved in Re Guerin (1888), 16 Cox 596 (Wills and Grantham, JJ.); although a commitment can only be made by the magistrate who has himself heard all the evidence upon which it is based. Re Nunn (1899), 2 Can. Cr. Cas. 429 (B.C.).

Depositions of a witness speaking in French taken down by the translator in English at a preliminary inquiry but not read over and explained to the witness or signed by him are not admissible to contradict his testimony on a subsequent proceeding, but the witness may be cross-examined as to material statements then made, and witnesses called to shew a contradiction with his former testimony. R. v. Ciarlo (1897), 1 Can. Cr. Cas. 157 (Que.).

**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 statement by accused.**—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.

Although the magistrate's record of proceedings does not shew on its face that a statement made by the accused to him in answer to the charge was made after due caution in accordance with the Act, the fact that it was so made may be proved at the trial and the statement may then be put in evidence by the prosecution. R. v. Kalabeen (1867), 1 B.C.R., pt. 1, p. 1, per Begbie, C.J.

See also note to sec. 687.

**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 His Majesty's mint, or other person employed in producing lawful coin in His 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 480, 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 *prima 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.

*Proving previous conviction.*]—A previous conviction must be proved by evidence in legal form, which may be done (*a*) by the production from the proper custody of the conviction itself, and (*b*) by a copy of the conviction certified by the clerk of the peace or other officer having charge of the records of same. R. v. Yeoveley (1838), 8 A. & E. 806; R. v. Ward (1834), 6 C. & P. 366.

If the certificate or exemplification be that of a court having a seal it must be certified under such seal; if the proceeding to be certified be before a justice of the peace or coroner, the proceeding may be under the hand *or* seal of such justice or coroner; and, if any such court, justice or coroner has no seal, *or* so certifies, then a copy purporting to be certified under the signature of a judge or presiding magistrate of such court or of such justice or coroner is admissible without any proof of the authenticity of such signature or other proof whatsoever. Canada Evidence Act, 1893, sec. 10.

Certificates of previous convictions of a defendant of the same name and description as the accused are admissible as evidence without further proof that the accused was the person formerly convicted. Ex parte Dugan (1893), 13 C.L.T. 249 (Sup. Ct. New Brunswick).

The accused is entitled to adduce evidence to prove that he is not the party previously convicted, and the onus is upon him if the name and description correspond with his own, such being prima facie evidence of identity. Ex parte Dugan, 13 C.L.T. 249.

The question whether the defendant had been previously convicted or not is within the jurisdiction of the magistrate, and his finding thereon on competent evidence is conclusive. R. v. Brown, 16 Ont. R. 41 (Q.B.D.).

It is said that where no particular circumstance tends to raise a question as to the party being the same, even identity of name is in civil cases something from which an inference of identity may be drawn in proof of a signature to a document, but that, in a criminal case, the mere fact that a person of the same name as the prisoner signed a document, or the like, would not be considered sufficient. Russell on Crimes, 6th ed. (1896), vol. 3, 470 (*n*).

In the Irish case of R. v. Ellen Murtagh (1854), 6 Cox C.C. 447, the prisoner was indicted for a misdemeanour in making a false declaration before a magistrate. The magistrate, who had taken the declaration, and a clerk from the police office, were examined, and proved that the declaration produced was made by a woman describing herself as Ellen Murtagh, and who signed by making her mark to it, but were unable to identify the prisoner. It was attempted to prove identity by means of alleged admissions in prisoner's examination upon a subsequent statutory inquiry under oath, but such being held inadmissible it was held there was no evidence to support the indictment.

**695. Proof of previous conviction of 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.

A witness may be cross-examined as to whether he has been convicted of any offence, i.e., a criminal offence. If he denies it or refuses to answer the cross-examining party may prove such conviction as affecting his credit although the fact of the conviction may be wholly irrelevant to the issue. Ward v. Sinfield, 49 L.J.C.P. 696.

A defendant in a criminal case tendering himself as a witness on his own behalf is subject to such cross-examination. Phipson Evid., 2nd ed., 164.

**696. Proof of attested instrument.**—It shall not be necessary to prove by the attesting witness any instruments 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.

**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.

*Comparison of handwriting.*]—This section is in the same terms as the Imperial Statute 28-29 Vict., ch. 18, sec. 8, under which it has been held that both the genuine and the disputed writings must be produced in court. Arbon v. Fussell, 3 F. & F. 152.

Experts may without a comparison of handwriting give opinion evidence from their general knowledge of the subject, as to whether the writing produced is in a feigned or natural hand; R. v. Coleman, 6 Cox C.C. 163; or as to whether interlineations were written contemporaneously with the rest of the document. Re Hindmarsh, L.R. 1 P. & D. 307.

A jury may properly make a comparison of disputed handwriting although no witness has been called to prove the handwriting to be the same in both, and may draw their own conclusions as to its authenticity, if an admittedly genuine handwriting and the disputed handwriting are both in evidence for some purpose in the case. R. v. Dixon (1897), 3 Can. Cr. Cas. 220 (N.S.).

*If the witness proves adverse.*]—A witness is "adverse" when in the opinion of the judge he bears a hostile animus to the party calling him and not merely when his testimony contradicts the proof of such party. Greenough v. Eccles (1859), 5 C.B.N.S. 786; Reed v. King, 30 Eng. L.T. 290; Taylor Evid., sec. 1426.

Whether or not the witness is adverse is a matter wholly for the court, and a party though called by his opponent cannot as of right be treated as hostile. Price v. Manning, 42 Ch.D. 372 (C.A.).

The discretion of the judge in that respect is not subject to appeal. Rice v. Howard, 16 Q.B.D. 681.

**699. Party discrediting his 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.

Apart from this enactment a party may, as of right, without obtaining the opinion or leave of the court, *contradict* his own witness, whether the latter is adverse or not, by other evidence relevant to the issue and thus indirectly discredit him. Roscoe Cr. Evid., 97, 98; Phipson Evid., 2nd ed., 475.

**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 shewn 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 prima facie to have been signed by the witness. R.S.C. c. 174, s. 235.

*Former written statements.*]—If a witness has been examined before a magistrate or coroner, under such circumstances that these officers respectively have in pursuance of their duty, taken down his statement in writing, parol evidence of his examination cannot be given in the event of his death so long as the deposition itself can be produced; for the law having constituted the deposition as the authentic medium of proof, will not permit the admission of any inferior species of evidence. If, indeed, it can be shewn that the deposition is lost or destroyed, or is in the possession of the opposite party, who, after notice, refuses to produce it, the statement of a witness who was present at the examination will then be admissible, as well as a copy of the deposition. Taylor on Evidence, sec. 552, approved in R. v. Troop (1898), 2 Can. Cr. Cas. 28 (N.S.).

This section of the Code is a re-enactment of sec. 235, Rev. Stat. Canada, ch. 174, originally taken from sec. 5, Imperial Statute, 28 and 29 Vict., ch. 18.

As to a statement made orally by a witness and reduced to writing, his statement, if the writing can be produced, must be proved by the writing; but failing the writing, the provision of the law can be carried out by proving the statement in the way which would be the obvious and the legal method if the reduction to writing had never taken place, namely, by the evidence of a witness or witnesses, who heard the statement as it was originally made. R. v. Troop (1898), 2 Can. Cr. Cas. 29 (N.S.).

This view is, of course, not applicable to the case of a statement made in writing by the witness himself, which, obviously could be proved only

by the production of the writing itself, or failing that, by proof of its contents. Ibid.

The statement of the accused made upon the preliminary enquiry and certified by the justice, may be given in evidence against him upon the trial without further proof thereof, unless it is proved that the justice purporting to have signed the same did not in fact do so. Sec. 689.

And 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. Sec. 668.

**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.

*Previous inconsistent statement.*]—Questions respecting the relevancy of testimony to the matter in issue often arise when a counsel in cross-examination of a witness uses a license, which the practice allows him, of asking a variety of questions having no apparent connection with the matter to be tried, in the hope of involving the witness in some contradiction. He is not in such cases obliged to explain the object of his questions, because that might defeat his object, but he must be content to take the answer which the witness gives to any question that is irrelevant, and is not allowed to call witnesses to disprove the statements he makes in reply, because that would lead to the trial of innumerable issues irrelevant to the case, and would distract the attention of the jury; and besides, which is a better reason, it would be unsafe, and would be unjust towards the witness, to infer from any contradiction that might be given by another witness that the one who has been cross-examined has sworn falsely, and is unworthy of belief, since he could not have contemplated that he would be questioned upon points unconnected with the facts to be tried, and could not therefore be expected to be able, on the sudden, to support his testimony by the evidence of other persons, though it might be perfectly true in itself notwithstanding the contradiction. R. v. Brown (1861), 21 U.C.Q.B. 330.

But whether the witness admit or deny the alleged contrary statement he may if he state certain facts connected with such former statement relevant to the cause, be contradicted with regard to such facts. R. v. Jerrett (1863), 22 U.C.Q.B. 499, 511 (A. Wilson, J.).

A witness for the Crown gave evidence quite different from a previous written statement made by him to the prosecutor's counsel; he admitted such statement when shewn to him, but said it was all untrue and made to save himself. Hagarty, J., inclined to the opinion that the witness having fully admitted his previous inconsistent statement, no further evidence relating to it should have been received. Adam Wilson, J., held that the prosecutor's counsel was properly admitted to disprove the witness's assertion as to how this statement came to be made, for the fact of its being

obtained as he stated would tend very much to prejudice the prosecution, and was therefore not a collateral matter, but relevant. R. v. Jerrett and others (1863), 22 U.C.Q.B. 499.

The present section applies only where the witness is being cross-examined.

Evidence given by the official stenographer to the effect that the prisoner resembled the party of same name as prisoner, whose depositions he had taken, and that he believed him to be the same man, but could not sufficiently remember to swear positively to his identity, is properly submitted to a jury. R. v. Douglas (1896), 1 Can. Cr. Cas. 221 (Man.).

See also note to sec. 700.

*(Amendment of 1900).*

**701A. Proving age of juvenile.**—In order to prove the age of a boy, girl, child or young person for the purposes of ss. 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.

This section is intended to facilitate proof of age, particularly in the cases of children coming from abroad in charge of charitable institutions, for registers or other proof of date of birth are not usually available in such cases.

There is no clause 934A. in the Code and the reference thereto is an error. A clause bearing that number was introduced and passed in the Senate, providing for the whipping of boys between the ages of ten and sixteen years in certain cases; but it did not pass the Commons.

*Proof of age.*]—A register is evidence of the particular transaction which it was the officer's duty to record, even though he had no personal knowledge of its occurrence. Doe v. Andrews, 15 Q.B.D. 756. But it is doubtful how far a register can be received to prove incidental particulars regarding the main transaction, even where these are required by law to be included in the entry. Phipson Evid., 2nd ed., 317; Huntley v. Donovan, 15 Q.B. 96.

Proof of the date of birth may be made from the recollection of a person then present. R. v. Nicholls (1867), 10 Cox C.C. 476; but not by the testimony of the person himself. R. v. Rishworth, 2 Q.B. 476. And the oral testimony of a father who was absent for a few days at the time of the birth and was only told of it on his return was held insufficient to fix the date where a very few days difference would be material to the case. R. v. Wedge (1832), 5 C. & P. 298.

Where the charge was one of cruelty to children under sixteen the testimony of a school teacher that the children attended her school and that she believed they were under sixteen was held admissible, as well as similar evidence by policemen and others who had seen the children. R. v. Cox, [1898] 1 Q.B. 179, 14 Times L.R. 122, 18 Cox 672.

By sub-sec. (*b*) supra, the court or jury may infer the age from the appearance of the child, but this, of course, only applies where the child is produced in court.

**702. Evidence of 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 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."

The only material change made by the amendment was the insertion after the words "section 198" of the words "or section 199." This was to make a certain class of evidence sufficient on the trial of a prosecution under sec. 199 as it already was on the trial of a prosecution under sec. 198.

See secs. 198 and 575.

*(Amendment of 1900.)*

**703. 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.

The object of this amendment was the same as that of the amendment of 702, supra, the only change being that the provision is made applicable to sec. 199 as well as to sec. 198.

See secs. 198, 199 and 575.

**704. Evidence in case 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 201, 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 bona fide intention to acquire or to sell such goods, wares or merchandise, or to deliver or to receive delivery thereof, as the case may be, shall rest upon the person so charged.

See sec. 201.

*(Amendment of 1893.)*

**705. Evidence in certain cases of libel.**—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, as amended.

See sec. 289.

**706. Evidence in case of polygamy, etc.**—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. 53 V., c. 37, s. 11.

See sec. 278.

**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, of 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 prima facie evidence that the same has been stolen by him. R.S.C. c. 164, s. 30.

See sec. 343.

*(Amendment of 1901.)*

**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 prima 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 approval.

Section 707A, introduced in 1900, was repealed and the above substituted in 1901, 1 Edw. VII., c. 42.

See sec. 331A.

**708. Evidence of stealing timber.** — In any prosecution, proceeding or trial for any offence under section 338, 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 prima 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.

See sec. 338.

**709. Evidence in cases relating to public stores.**—In any prosecution, proceeding or trial under sections 385 to 389 inclusive for offences relating to public stores, proof that any soldier, seaman or marine was actually doing duty in His Majesty's service shall be prima 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 387 was, at the time at which the offence is charged to have been committed, in His 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 384 shall be presumed until the contrary is shown. 50-51 V., c. 45, s. 13.

See secs. 385-389.

**710. Evidence in case of fraudulent marks on merchandise.**—In any prosecution, proceeding or trial for any offence under Part XXXIII. relating to fraudulent marks on merchandise, if the offence relates to imported goods evidence of the port of shipment shall be prima facie 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.

The sub-section applies only to cases coming under the definition laid down by sec. 445 as follows:—

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;

(*b*). falsifies any genuine trade mark, whether by alteration, addition, effacement or otherwise.

If the offence charged be under sub-sec. (*b*) of sec. 447 of the Code, for falsely *applying* to any goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive, it is necessary for the prosecution to negative the assent of the proprietor. R. v. Howarth (1898), 1 Can. Cr. Cas. 243 (Ont.).

By the corresponding English Act, the Merchandise Marks Act, 1887, 50 & 51 Vict., ch. 28, in separate provisoes, the one in respect of forging, and the other as to falsely applying, the onus is placed in both cases upon the defendant (secs. 4 and 5).

And see secs. 445 and 447.

**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 may be convicted of such attempt and punished accordingly. R.S.C. c. 174, s. 183.

See sec. 64 as to attempts.

**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 an attempt to steal, and the proof establishes that the offence of larceny was actually committed, the jury may convict of the attempt, unless the court discharges the jury and directs that the prisoner be indicted for the complete offence. R. v. Taylor (1895), 5 Can. Cr. Cas. 89 (Que.). This is a departure from the rule which prevailed before the Code, as to which see Leblanc v. R., 16 Montreal Legal News 187.

See also note to sec. 64.

**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.

*Conviction for lesser offence.*]—It is not necessary that the lesser offence should be expressly charged on the face of the indictment. It will be sufficient if the offence charged must of necessity include it. Per Richards, C.J., R. v. Smith (1874), 34 U.C.Q.B. 552, following R. v. Bird (1850), 5 Cox C.C. 1, 2 Den. C.C. 94.

An indictment for rape includes the lesser charge of assault, and a verdict thereon of guilty of common assult is properly followed by a conviction although the information was laid more than six months after the offence was committed. R. v. Edwards (1898), 2 Can. Cr. Cas. 96 (Ont.).

The essential elements of the offence of receiving stolen goods are not included in the offence of "housebreaking and theft," and a conviction for receiving stolen goods cannot be rendered on the summary trial of a person charged only with housebreaking and theft. R. v. Lamoureux (1900), 4 Can. Cr. Cas. 101 (Que.).

As to what constitutes an attempt to commit an offence see sec. 64.

An assault with intent to commit an offence is an attempt to commit such an offence. R. v. John (1888), 15 Can. S.C.R. 384.

**714. On indictment for 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 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.

The offence of "concealment of birth" is dealt with by sec. 240, which provides that "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."

*(Amendment of 1901.)*

**714A. Cattle frauds.**—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.

See secs. 331 and 331A.

**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.

See notes to secs. 314 and 317.

**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.

*Finding other stolen goods in receiver's possession.*]—This section does not apply to admit proof in respect of other property stolen within the twelve months and disposed of by the prisoner; it must be found in his possession at the time when he was found in possession of the property in respect of which the charge is laid. R. v. Carter (1884), 12 Q.B.D. 522; R. v. Drage (1878), 14 Cox 85; although other stolen property could be shewn to have been disposed of by him within that period at half its value. R. v. Drage (1878), 14 Cox C.C. 85.

This section is similar to the Imperial Act, 34-35 Vict., ch. 112, sec. 19. It would appear not to extend to admit such evidence in respect of a charge of theft although joined in the same indictment with a charge of receiving. In such a case arising under the English statute the prosecution was not allowed, on an indictment charging both stealing and receiving, to give evidence of other stolen property found in the prisoner's possession at the same time as that which was the subject of the indictment. Anon. June 22nd, 1898, 33 L.J. (Eng.) 365.

Apart from the provisions of this section other instances of receiving similar goods which had been stolen from the *same* party may be proved. R. v. Dunn (1826), 1 Mood. C.C. 146; R. v. Davis (1833), 6 C. & P. 177; R. v. Nicholls (1858), 1 F. & F. 51.

And see notes to secs. 314 and 317.

**717. The same 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.

Service of the notice and proof of a previous conviction does not, however, dispense with the necessity of proving that the prisoner knew that the goods had been stolen, but is merely a circumstance to be taken into consideration in conjunction with other evidence tending to prove guilty knowledge. R. v. Davis (1870), L.R. 1 C.C.R. 272.

**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.

See secs. 460 et seq.

**719. Verdict in libel case.** — 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 infomation; but the 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.

This section originated in the English Act of 1792, 32 Geo. III. ch. 60 which became part of the law of the Province of Canada. Under it, it is for the jury to say whether, under the facts proved, there is libel and whether the defendant published it. R. v. Dougall (1874), 18 L.C. Jur. 85.

And see secs. 301 and 302 as to the punishment for defamatory libel.

**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.

Documents filed as exhibits in a civil case may be impounded on the application of the Crown if a charge of forgery is laid in respect thereof. Couture v. Fortier, 7 Que. S.C. 197.

**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 by jury.**—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 shewn 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.

*View by jury.*]—Taking a view of the locality of the offence is receiving evidence, in a sense, and the prisoner's counsel should have the opportunity of attending. R. v. Petrie (1890), 20 O.R. 317, 324. In that case the prisoner was indicted for feloniously displacing a railway switch and was tried by a judge without a jury under the "Speedy Trials Act." After hearing the evidence and the speeches of counsel the judge reserved his decision, and before giving it he examined the switch in question, neither the prisoner, nor any one on his behalf being present; it was held that there was no authority for the judge acting under that statute to take a view of the place, and that the manner of his doing so (in the absence of the prisoner) was unwarranted and the conviction was quashed.

The judge may adjourn the court to enable the jury to have the view, even after the summing up; but the jury must not communicate with the witnesses during such view. R. v. Martin (1881), 12 Cox C.C. 204.

On an indictment for theft the court usually insists upon the stolen property, if found, being produced before the jury unless it is of a perishable nature, or its exhibition would be inconvenient or offensive. Best Evid., s. 197; Phipson Evid., 2nd ed., 4.

**723. Variance and amendment.**—If on the trial of 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 ss. 615 and 617, 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 misleading or prejudice might be removed by adjourning or postponing the trial, the Court may in its dis-

cretion 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.

*Amendment of indictment.*]—The court may, at the trial, amend an indictment if the amendment does not change the character or nature of the charge, and if the accused cannot be prejudiced by the change either as regards the evidence applicable or the defence raised. If the amendment asked would substitute a different transaction from that first alleged, or would render a different plea necessary, it ought not to be made. R. v. Weir (No. 3), 3 Can. Cr. Cas. 262 (Que.).

But, on an indictment for perjury alleged to have been committed on a trial for burning a barn, an amendment was allowed to charge that such trial was for firing a stack. R. v. Neville (1852), 6 Cox C.C. 69.

Where the ownership of stolen property is wrongly stated an amendment may be allowed. R. v. Vincent (1852), 2 Den. 464; R. v. Marks (1866), 10 Cox C.C. 367. And on a charge of theft of money the amount thereof may be amended to conform with the evidence. R. v. Gumble (1872), L.R. 2 C.C.R. 1.

When the false pretence in a charge of obtaining money under false pretences was erroneously laid in the indictment as being that there was in store "a large quantity of beans, to wit, 2,680 bushels of beans," instead of that there were in store "2,680 bushels of beans," as appeared from the depositions taken on the preliminary inquiry, the trial judge may allow an amendment of the indictment to conform with the proof. Although upon the indictment in its original form the charge would be merely upon a false pretence that there was in store "a large quantity of beans," and the number of bushels would not be required to be proved, the variance by reason of the amendment is not such as would mislead or prejudice the accused in his defence. R. v. Patterson (1895), 2 Can. Cr. Cas. 339 (Ont.).

A person may be described either by his real name or by that by which he is usually known. R. v. Norton (1823), R. & R. 510; R. v. Williams (1836), 7 C. & P. 298.

If there be several different species of goods enumerated on a charge of theft and the prosecutor prove theft of any one or more it will be sufficient, although he fails in his proof of the rest, except in a case where value is essential to constitute the offence and the value is ascribed to all the articles collectively but not separately, in which case an amendment would seem to be essential. R. v. Forsyth (1814), R. & R. 274.

The day and year on which the acts charged are alleged to have occurred are not, in general, material to an indictment. Archbold Cr. Pl. (1900) 272. But when the precise date of any fact is necessary to ascertain and deter-

mine with precision the offence charged, or the matter alleged in excuse or justification, any variance between it and the evidence will be fatal unless amended. Ibid.

In a charge of burglary, the offence must be proved to have been committed in the night time, although it may be proved to have been committed on any other day previous to the preferring of the indictment. R. v. Brown (1828), M. & M. 315.

Where the place at which the offence is alleged to have been committed is stated as matter of local description and not as venue merely, an amendment should be made if there is a variance between the description in the indictment and the evidence. 3 Russ. Cr. 6th ed., 436. So on a charge of burglary, a variance between the indictment and evidence in the name of the place where the house is situate or in any other description given of it may be fatal unless amended. R. v. St. John (1839), 9 C. & P. 40; 1 Taylor Evid., 9th ed., 209.

The amendment must be made before verdict: R. v. Frost (1855), Dears, 474; R. v. Larkin (1854), Dears. 365; but it is doubtful whether it can be made after the prisoner's counsel has addressed the jury; R. v. Rymes (1853), 3 C. & K. 326; but see R. v. Fullarton (1853), 6 Cox C.C. 194.

See also sec. 629.

**724. Amendment to be endorsed on the 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 such case.**—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 on 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 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.

As to pleas of autrefois acquit and autrefois convict, see sec. 631; and as to certifying the indictment and proceedings thereon, see note to sec. 654.

**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, if 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.

"A jury after retiring may desire to ask a question of the court for their satisfaction, and it shall be granted so it be in open court," Hale P.C., p. 296. But it is not unlawful, though it is inadvisable, for a judge to proceed to the jury-room, on the request of the jury for further instruction, and to there give further directions in presence of the prisoner and sheriff, the Crown counsel being absent. Greer v. R. (1892), 2 B.C.R. 112.

Before the Code the effect of allowing the jury to go at large in a charge of felony was to nullify the trial. R. v. Deniek (1879), 2 Leg. News, (Montreal), 214. (Dorion, C.J., Monk, Ramsay, Tessier and Cross, JJ.)

It was held in 1886 by the Supreme Court of British Columbia that in that province a prisoner is not entitled as of right to have the jury polled; and that the trial court properly refused a poll where it saw nothing to create a doubt as to the concurrence of the whole jury. Sproule v. R. (1886), 1 B.C.R. pt. 2, p. 219 (same case sub. nom. Re Sproule in S.C. of Canada, 12 Can. S.C.R. 140); and see R. v. McClung, 1 N.W.T. Rep. pt. 4. p. 1.

Where during a trial an adjournment is ordered 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. Sec. 673 (3). Such direction is obligatory in capital cases. Ibid.

**728. Jury unable to agree.**—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.

See note to sec. 675.

*(Amendment of 1900).*

**729. Verdict, etc., on holiday.** —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.

The amendment is in the addition of the words "or any other holiday" at the end of the section. It was intended to remove doubt as to the validity of proceedings in jury cases, the trial of which continues until after midnight of a day preceding a statutory holiday.

In Manitoba it has been held that sec. 729 applies only to matters before a jury and not to a preliminary enquiry before a magistrate. R. v. Cavelier (1896), 1 Can. Cr. Cas. 134. In Ontario it has been held that a preliminary inquiry held by a magistrate and a commitment made thereon on a statutory holiday are invalid. R. v. Murray (1897), 1 Can. Cr. Cas. 452.

*Sundays and holidays.*]—This section is to be applied only to matters before a jury. The conduct of a preliminary inquiry before a magistrate is a judicial proceeding which cannot be legally taken on Sunday. R. v. Cavelier (1896), 1 Can. Cr. Cas. 134 (Man.); Re Cooper, 5 Ont. P.R. 256.

A preliminary inquiry held by a magistrate and a commitment for trial made on a statutory holiday are bad in law; but if after such commitment the accused elects to be tried at the County Judge's 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. R. v. Murray (1897), 1 Can. Cr. Cas. 452 (Ont.).

At common law Sunday was a dies non juridicus, and all judicial proceedings on that day were therefore void. 2 Coke's Inst. 264-5, 1 Bishop on Crim. Proc., sec. 207.

Only ministerial acts, and not acts which are judicial could be legally performed in court on a Sunday, and the taking of a verdict is a judicial act, for it might be a verdict which could not be received being bad in law, or it might be a special verdict which required the guidance of the judge in framing it. R. v. Winsor (1866), 10 Cox C.C. 276, 305, 322.

The court will take judicial notice that a certain day was Sunday. Wharton on Evidence, 3rd ed., sec. 335; Tutton v. Darke, 5 H. & N. 645; Hanson and Shackelton, 4 Dowl, 48; Pearson v. Shaw, 7 Ir. L.R. 1.

**730. Woman sentenced to death while pregnant.** —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 should be so delivered.

**731. Jury de ventre inspicendo abolished.**—After the commencement of this Act no jury de ventre inspiciendo shall be empanelled or sworn.

**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.

*Nolle prosequi.*]—This section provides a procedure which is substantially the same as that formerly known as nolle prosequi. It may be taken in lieu of an application by the Crown to discharge the recognizances of the prosecutor and witnesses. R. v. Treakley (1852), 6 Cox C.C. 75.

The Attorney-General may stay the proceedings ex parte and without calling on the prosecutor to shew cause why he should not do so. R. v. Allen (1862), 1 B. & S. 850.

A stay is proper where any improper and vexatious attempts are made to oppress the defendant, as by repeatedly preferring defective indictments for the same supposed offence; 1 W. Bl. 545; or if it be clear that an indictment is not sustainable against the defendant. 1 Chitty Cr. Law 479. It was also commonly granted in cases of misdemeanor where a civil action was depending for the same cause. R. v. Fielding (1759), 2 Burr. 719; Jones v. Clay (1798), 1 B. & P. 191.

The party accused will remain liable to be again indicted upon the charge. Archbold Cr. Pl. (1900), 127.

**733. Motion in arrest of judgment on verdict of guilty.**—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.

*Arrest of judgment.*]—A motion in arrest of judgment is not the proper manner to raise the question of jurisdiction, for such a motion can only avail when the indictment does not state any indictable offence. R. v. Hogle (1896), 5 Can Cr. Cas. 53 (Que.).

If a defendant omit to challenge a juror on the ground that such juror entertains a hostile feeling against him, he cannot, after a verdict of guilty, ask on that ground to have the verdict quashed and for a new trial. R. v. Harris (1898), 2 Can. Cr. Cas. 75 (Que.).

When a defendant and one of the impanelled jurors have had an unpremeditated and innocent conversation, which could not bias the juror's opinion nor affect his mind and judgment, although such conversation is improper, it cannot have the effect of avoiding the verdict and constituting ground for a new trial. Ibid.

An indictment for stealing under a power of attorney which charges that the money appropriated was the proceeds of a sale made by the defendant while acting under a power of attorney will not be quashed for failure to allege that the power of attorney was one for the sale or disposition of property (sec. 309), but particulars will be ordered as to the date, nature or purport of the alleged power of attorney. The defect, being only a partial one, was cured by verdict, and cannot be given effect to upon a motion in arrest of judgment. R. v. Fulton (1900), 5 Can. Cr. Cas. 36 (Que.).

That a jury may correct their verdict, or that any of them may withhold assent and express dissent therefrom at any time before it is finally entered and confirmed is clear from numerous authorities; and the judge presiding over a criminal court cannot be too cautious in being assured that, when a result so serious to the party accused as a verdict of guilty is arrived at, all the jury understand the effect and concur in the decision; and if at any moment, before it is too late, anything occurs to excite suspicion on this subject, he should carefully assure himself that there is no misapprehension in the matter. R. v. Ford (1853), 3 U.C.C.P. 209, 217, per Macaulay, C.J.

There is no legislative authority for amending the verdict of a jury in a criminal case, though an erroneous judgment may be in certain cases made right, when the case is being reviewed in a court of appeal. R. v. Ewing (1862), 21 U.C.Q.B. 523.

Where the misconduct of a jury can be so far impeached as to warrant the court in interposing to relieve against the verdict, application should be made to stay the judgment, for, after sentence pronounced, judgment cannot be arrested. R. v. Smith (1853), 10 U.C.Q.B. 99; R. v. Justices of Leicestershire, 1 M. & S. 442.

**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.

See note to preceding section.

*(Amendment of 1893).*

**735. Verdict not to be impeached for certain omissions as to jurors.**—No omission to observe the directions contained in any Act as respects the qualification, selection, balloting or distribution of jurors, the preparation 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, amended.

This section does not cure defects in the procedure by which the jury is chosen from the panel returned. R. v. Boyd (1896), R.J.Q. 2 Q.B. 284.

A panel returned contained the names of Robert Grant and Robert Crane, and Robert Grant was called but Robert Crane by mistake answered to the name and was sworn without challenge. Before the jury left the box the mistake was discovered. It was held that a conviction was invalid because the prisoner had not had an opportunity to challenge Robert Crane. R. v. Feore (1877), 3 Que. Law Rep. 219.

It has long been an established rule of law that no affidavit of a juror or of what a juror has said can be received for the purpose of upsetting the verdict of a jury. R. v. Lawson (1881), 2 P.E.I. Rep. 403 (following Lord Mansfield in Owen v. Warburton, 1 N.R. 326, and Lord Abinger and Parke and Alderson, BB., in Straker v. Graham, 3 M. & W. 721.

**736. Insanity of accused at time of evidence.**—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.

As to insanity as a ground of defence to a criminal charge, see sec. 11 and note to same.

**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 dicharged.

4. No such proceeding shall prevent the accused being afterwards tried on such indictment. R.S.C. c. 174, ss. 252 and 255.

See sec. 11.

**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 empanelled 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.

PART LII.

## APPEAL.

SECT.



---

**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 s. 785, 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.

*Criminal appeals.*]—The general rule is laid down by Anson (Law of the Constitution II. 445) as follows: "The Queen has authority by virtue of the prerogative to review the decisions of all colonial courts, whether the proceedings be of a civil or criminal nature, unless Her Majesty has parted with such authority." But no appeal lies to the Privy Council in criminal cases, for sec. 751 of the Code enacts that "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."

The Canadian legislation respecting Crown Cases Reserved is borrowed from the Imperial Statute, 11 & 12 Vict. ch. 78, which enacts, like ours, that when any person has been convicted, any question of law which may have arisen on the trial may be reserved. Harris, in commenting on this statute (p. 451), says that a point may be reserved, provided, of course, that a conviction has taken place, for otherwise there is no need for further consideration; and Shirley, in his sketch of Criminal Law, p. 118, says: "If

the judge thinks that the objection is one entitled to considerable weight and that his own opinion may possibly not be the correct one on the subject, he will, at the request of the prisoner's counsel, reserve the point and let the case go to the jury. If the jury then convict, sentence will be postponed till after the point of law has been decided. Of course, if the jury acquit on the merits, nothing more is heard of the point of law."

Any question of law which has arisen on the trial or any of the proceedings preliminary, subsequent or incidental to the trial, may be reserved either during or after the trial, and when a question is reserved during the trial, the case proceeds, and when a verdict of guilty is rendered or a conviction is pronounced, the judge prepares a case and transmits it to the Court of Appeal. There must have been a trial, an adverse ruling or judgment on a question of law, and a verdict of guilty or a conviction to give jurisdiction to the Court of Appeal. R. v. Lalanne (1879), 13 Montreal Legal News 16; and a verdict of guilty or a conviction is, under the provisions of this section, a condition precedent to the right of appeal, by an accused person from a ruling or judgment on a question of law.

The dictum of Lord Campbell in the case of R. v. Faderman (1850), 1 Den. 573, gives the reason why there must be a ruling or judgment on the question of law raised: "If judgment," he said, "has not been given, we have nothing to consider, for we only sit here to consider something which has been decided, not to give advice prior to a decision by some other tribunal."

A reserved case cannot be had where there has been neither trial nor verdict of guilty, nor conviction; and when a question of law has been reserved during a trial and there is an acquittal, the reservation is no longer of any utility and lapses. R. v. Trepanier (1901), 4 Can. Cr. Cas. 259; (Que.); R. v. Paxton, 2 L.C.L.J. 160.

After a conviction on indictment by a court having general jurisdiction over the offence charged, a writ of habeas corpus is an inappropriate remedy. Re R. E. Sproule (1886), 12 Can. S.C.R. 140. And by sec. 743 no proceeding "in error" shall be taken in any criminal case begun after the Criminal Code.

Even before the Code a writ of error did not lie in cases of summary conviction, R. v. Powell (1861), 21 U.C.Q.B. 215.

The appeal from a summary conviction under the Seamen's Act of Canada for harboring and secreting a deserting seaman is under section 879 and not under this section (742), and in the Province of Quebec the appeal should be taken to the Crown Side and not to the Appeal Side of the Court of King's Bench of that province. R. v. O'Dea (1899), 3 Can. Cr. Cas. 402 (Que).

Except where specially authorized by statute, an appeal does not lie in Ontario to the Court of Appeal from an order of the High Court of Justice quashing a summary conviction made under a provincial statute. R. v. Cushing (1899), 3 Can. Cr. Cas. 306 (Ont. C.A.).

A magistrate trying a charge of theft of goods of the value of less than $10 under the summary trials procedure (Code sec. 783 and 786) with the consent of the accused, is not a "court or judge having jurisdiction in criminal cases" within sec. 742 allowing an appeal by way of a case reserved. R. v. Hawes (1900), 4 Can. Cr. Cas. 529 (N.S.).

*Appeals to Supreme Court of Canada.*]—The right of appeal in criminal cases to the Supreme Court of Canada from the decision of a Court of Criminal Appeal is restricted to cases where the conviction has been affirmed by the Court of Appeal, and then only in case one or more of the judges of the latter court has dissented from the decision of the majority of the court. If by the decision of the Court of Appeal, the conviction is set aside and a new trial ordered, there is no appeal therefrom to the Supreme Court of Canada. Viau v. R., 2 Can. Cr. Cas. 540 (S.C.C.).

The dissent from the "opinion" of the majority (Code 742) by any of the judges of the Court of Appeal which is necessary in order to confer the right of a further appeal to the Supreme Court of Canada has reference to the "decision" or "judgment" of such majority in affirmance of a conviction (Code 750); and where a majority of the Court of Appeal in directing a new trial also expressed their concurrence (two of them dissenting) with that part of the decision appealed from by which it was held that certain evidence was properly admitted, the latter decision was held to be not reviewable by the Supreme Court of Canada. Ibid.

Where on a criminal trial a motion for a reserved case made on two grounds is refused and on appeal the Appellate Court unanimously affirms the decision of the trial judge as to one of such grounds but not as to the other, an appeal to the Supreme Court of Canada can only be based on the one as to which there was a dissent. McIntosh v. R. (1894), 23 Can. S.C.R. 180.

**743. 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.

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.

*Reserved case.*]—The provisions relating to Crown cases reserved are founded upon the Canadian Statute, 14-15 Vict., ch. 13, which was substantially a transcript of the Imperial Act, 11-12 Vict., ch. 78. R. v. Gibson (1889), 16 Ont. R. 704.

A case may be reserved for the opinion of the court after verdict. R. v. Patterson, 36 U.C.Q.B. 129; R. v. Corcoran (1876), 26 U.C.C.P. 134.

The general rule in civil cases where there is a jury is not to entertain a motion for a new trial upon a ground of misdirection or nondirection, unless the particular point in controversy was raised at the trial and pressed upon the consideration of the judge. The rule rests upon considerations of convenience and good sense, which are as much applicable to a criminal as a civil trial.

especially when the parties to the litigation are represented by counsel. R. v. Fick, 16 U.C.C.P. 379; R. v. Wilkinson (1878), 42 U.C.Q.B. 492, 500; R. v. Seddons, 16 U.C.C.P. 389. But see contra R. v. Theriault (1894), 2 Can. Cr. Cas. 444, 460 (N.B.), a manslaughter case, in which Hanington, J., said: "In such cases as the present the aim of the court as well as of the Crown should be to see that the prisoner has a full and complete trial and that a conviction is based on such points as reasonably arise upon the evidence; and it appears to me that if a most important and substantial ground of defence clearly disclosed by the evidence is not submitted to the jury, justice demands that such a conviction shall not stand." See also R. v. Bain (1877), 23 L.C. Jur. 327, infra.

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 at the trial, should be served upon the accused personally. The authority of the solicitor acting for the accused in the trial proceedings is prima facie to be presumed to have terminated upon the latter's acquittal; and proof of service upon the solicitor is insufficient in the absence of evidence rebutting such presumption. R. v. Williams (1897), 3 Can. Cr. Cas. 9 (Ont.).

A case reserved at the instance of the accused may at his request be amended during the argument thereon by adding the evidence taken at the trial. R. v. Bain (1877), 23 L.C. Jur. 327; R. v. Ross (1884), Montreal L.R. 1 Q.B. 227.

On the hearing of a reserved case it is not necessary that the prisoner should be present, and he may be kept locked up in gaol to prevent his being present while his case is being argued. R. v. Glass (1877), 21 L.C. Jur. 245, 1 Montreal Leg. News 212.

A reserved case may be granted at any time, however remote from the date of the trial or judgment, if it is still possible that some beneficial result may accrue to the prisoner by a decision in his favour. R. v. Paquin (1898), 2 Can. Cr. Cas. 134.

Whether or not the judge presiding at the trial had jurisdiction to summarily try the defendants is a "question of law" and may be the subject of a reserved case. Ibid.

A reserved case should not be granted by the trial judge unless he has some doubt in the matter upon which it is suggested that a question be reserved for the opinion of a Court of Appeal. R. v. Létang (1899), 2 Can. Cr. Cas. 505 (Que.).

*Any question of law.*]—A question depending upon the weight of evidence cannot properly be made the subject of a reserved case. R. v. McIntyre (1898), 3 Can. Cr. Cas. 413 (N.S.).

But if the evidence merely points to a suspicion of guilt and lacks the material ingredients necessary to constitute proof of the offence, this is not a question of weight of evidence but of want of evidence, and a conviction will be quashed if there is no legal evidence to support it. R. v. Winslow (1899), 3 Can. Cr. Cas. 215 (Man.).

Where on a case reserved or a case stated by direction of a Court of Appeal the sole question is whether there was evidence of guilt, and no leave has been obtained to apply for a new trial on the ground that the verdict is against the weight of evidence, the finding of a jury, or of the trial judge trying the case without a jury, cannot be disturbed as to conclusions or inferences justly capable of being drawn from the evidence, or as to the credibility of the witnesses. R. v. Clark (1901), 5 Can. Cr. Cas. 235 (Ont.).

Nor is the question as to the order of addresses to the jury by counsel at the close of the evidence a question of law proper to be reserved for the opinion of a Court of Appeal under sec. 743. R. v. Connolly (1894), 1 Can. Cr. Cas. 468 (Ont.).

Whether the judge cautions the jury that the evidence of an accomplice requires to be corroborated or not, is not a matter for the court to review, as it is not a question of law, but one of mere practice. R. v. Stubbs (1855), Dears. 555, 7 Cox C.C. 48, cited by Cameron, C.J., in R. v. Andrews (1886), 12 Ont. R. 184.

*On proceedings preliminary, subsequent or incidental.*]—The sufficiency of an indictment upon a motion to quash it is a question of law which arises in a proceeding preliminary to the trial and not on the trial and therefore could not be reserved under R.S.C., ch. 174, sec. 259, which applied only to questions of law arising "on the trial." R. v. Gibson (1889), 16 Ont. R. 704.

The "trial" is not terminated until sentence is rendered, and a question which "has arisen" on the trial does not necessarily mean a question that was *raised* at the trial, but one that took its rise at the trial. R. v. Bain (1877), 23 L.C. Jur. 327. And it was held under the former law that a point might be reserved by the court although not mentioned by the defence. Ibid.

*Bail pending a reserved case.*]—Where under sub-section 5 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 the accused fails to appear after judgment is given on the reserved case quashing the conviction and ordering a new trial. The conviction having been set aside, the accused was entitled to presume that he would not be called for sentence, and the sureties were not bound for his appearance for any other purpose than to receive sentence. R. v. Hamilton (1899), 3 Can. Cr. Cas. 1 (Man.)

*British Columbia.*]—All appeals from the verdict, judgment, or ruling of any court or judge having jurisdiction in criminal cases, or from the conviction, order, or determination of a justice under part LVIII. of the Criminal Code shall be by case stated, except where otherwise provided by statute. B.C. Rule 56.

Order XXXIV. of the Supreme Court Rules, as far as the same are applicable, shall apply to a special case under these rules. B.C. Rule 57.

*(Amendment of 1900).*

**744. Appeals.**—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.

Under the former law an application had first to be made to the Provincial Attorney-General for his consent to apply to the Court of Appeal. The second step, if the Attorney-General granted leave to apply, was an application to the court for the leave to appeal; and lastly the appeal itself was argued before the court in cases in which the court granted the leave. The amendment of sub-secs. (1) and (2) does away with the first application. It was suggested as a reason for this being done that, in some cases at least, the Attorney-General of a province was averse to giving his consent to appeal on account of a desire to avoid having the view of the law which he had upheld for the prosecution declared to be erroneous, and reversed on appeal. Another difficulty was the fact that in many instances the Attorney-General depends on the local County Crown Attorney for any information in the case not apparent on the record, and the fate of the application might be practically dependent upon the report of the local Crown prosecutor.

*Leave to appeal.*]—Leave to appeal to the Court of Appeal under sec. 744, as amended in 1900 should not be granted to a private prosecutor except under exceptional circumstances. R. v. Burns (No. 1), (1901), 4 Can. Cr. Cas. 324 (C.A. Ont.).

Leave to appeal will not be granted to a private prosecutor from the decision of a police magistrate holding a summary trial by consent, merely upon the ground that the magistrate erred in rejecting certain evidence which was properly admissible but corrobative only. Ibid.

By the third sub-section if the Court of Appeal grants the leave, a case shall be stated for the opinion of the Court of Appeal "as if the question had been reserved." The Code is not explicit as to whether the form of the stated case is to be settled by the Court of Appeal or by the trial court. In R. v. Coleman (1898), 2 Can. Cr. Cas. 523, 539 (Ont.) the Court of Appeal made an order for leave which included in detail the form of the case to be stated and a direction to the trial judge, in this case a chairman of a Court of General Sessions, to state the case so set forth.

**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 restated. R.S.C. c. 174, s. 264.

*Reference to notes of evidence.*]—The forwarding of the whole of the evidence taken at the trial does not dispense with the necessity for the trial judge to certify his findings of fact and to specify the points of law as to which he entertains the doubt. R. v. Giles (1894), 31 Can. Law Jour. 33; R. v. Létang (1899), 2 Can. Cr. Cas. 505 (Que.).

**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.

*Substantial wrong or miscarriage.*]—The intention is that the improper admission of evidence shall not in itself constitute a sufficient reason for granting a new trial, and that it is not necessarily a "substantial wrong or miscarriage." (Makin v. New South Wales (1894) A.C. 57, distinguished.) R. v. Woods (1897), 2 Can. Cr. Cas. 159 (B.C.).

But in the absence of a direct and unmistakable enactment, the Court should not, upon a case reserved, affirm a conviction, where material evidence has been improperly received, because, in the opinion of the Court, there is sufficient good evidence to support a verdict. R. v. Dixon, 29 N. S.R. 462.

On a trial for murder, if the trial judge directs the jury that imminent peril of the prisoner's own life or of the lives of his family is a ground of justification for killing, in defence of his household, one of a party committing an unprovoked assault upon him, but does not direct them that a reasonable apprehension of immediate danger of grievous bodily harm to the prisoner or to his wife and family is an equal justification, such omission constitutes a substantial wrong or miscarriage occasioned on the trial (Cr. Code 746 (*f*), and a new trial should be ordered, where the circumstances shewn in evidence are such as to point much more to the latter ground of justification than to the former. R. v. Theriault (1894), 2 Can. Cr. Cas. 444 (N.B.).

If a most important and substantial ground of defence clearly disclosed by the evidence is not submitted to the jury by the judge's charge, the conviction cannot stand, although the prisoner's counsel did not ask at the trial for any other or fuller direction. Ibid.

The strictness of the rule applied in civil cases in some of the provinces by which an objection not raised at a time when it could have been remedied, cannot afterwards be allowed, should not be applied to cases of misdirection in criminal cases. R. v Fiek (1866), 16 U.C.C.P. 379, disapproved. Ibid.

Where a deposition of a deceased witness taken on an enquiry before a magistrate 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. R. v. Hamilton (1898), 2 Can. Cr. Cas. 390 (Man.).

Where an alleged confession is received in evidence after objection 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 impaneled. R. v. Sonyer (1898), 2 Can. Cr. Cas. 501.

If the trial judge refuses to impanel a new jury in such a case, a new trial will be ordered by a court of appeal; but the court of appeal will not determine the question of the admissibility of the alleged confession. Ibid.

An accused person has the right to have his case submitted to the jury without any comment on his failure to testify being made by the trial judge, and although such comment is afterwards withdrawn, the making of same is a substantial wrong to the accused, and if he is convicted he is entitled to a new trial by reason thereof. R. v. Coleman (1898), 2 Can. Cr. Cas. 523 (Ont.).

*Co-defendants.*]—In R. v. Saunders, [1899] 1 Q.B. 490, 63 J.P. 150, two prisoners were indicted together for conspiracy, one of them defended by counsel and the other defended in person. In the course of the trial certain questions were asked of the prosecutor, which the counsel for the prisoner who defended by counsel objected to, and as to the admissibility of which a case was reserved at his request. The prisoners were both convicted. On the case reserved the court was of opinion that the evidence objected to was held inadmissible; and the court (Lord Russell, C.J., and Wills, Lawrance, Bruce and Kennedy, JJ.,), further held that it could properly deal with both convictions, notwithstanding that the objection was raised by only one of the prisoners, and the conviction was quashed as to both.

*Time of hearing appeal.*]—A reserved case upon an objection taken before pleading, that the charge, upon which the accused was arraigned for a

"speedy trial," was not founded upon the evidence adduced at the preliminary enquiry should not be heard by the appellate court to which it is referred until after the trial has been concluded, and then only in case of conviction. R. v. Trepanier (1901), 4 Can. Cr. Cas. 259 (Que.).

*Re-sentence on appeal.*]—The Court of Appeal hearing a case reserved as to the validity of the sentence has power under sec. 746 (c) to correct a sentence in excess of that authorized by law and should in such case reduce the same to the maximum limit. R. v. Dupont (1900), 4 Can. Cr. Cas. 566 (Que.).

**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.

*New trial on the facts.*]—In deciding whether there should be a new trial on the ground that the verdict against the accused was against the weight of evidence, the question is whether or not the verdict is one which the jury, as reasonable men, ought not to have found. A new trial will not be granted merely because the trial judge is dissatisfied with the verdict and favours an acquittal. R. v. Brewster (1896), 4 Can. Cr. Cas. 34 (N.W.T.).

The application to the court under this section is authorized only upon the ground that the verdict was against the weight of evidence, and, as was said in Mellin v. Taylor, 3 Bing. N.C. 109, the court ought to exercise not merely a cautious, but a strict and sure judgment before it sends the case to a second jury. R. v. Chubbs (1864), 14 U.C.C.P. 32, 43, per Richards, C.J. If the application be upon other grounds as for example the discovery of fresh evidence the application should be made to the Minister of Justice under sec. 748.

When there is divergence between the evidence adduced by the Crown and that adduced by the defence, and the jurors have exercised the discretion which is allowed to them by rejecting the evidence given on one side or on the other, and their verdict is supported by and founded on the evidence which they believed and accepted, the verdict is not against the weight of evidence. R. v. Harris (1898), 2 Can. Cr. Cas. 75 (Que.). In forming their opinion as to the credibility of the witnesses, the jurors are not bound to accept the evidence given on any side because there are more witnesses on that side than on the other. To oblige them to do so would infringe on their function to consider, weigh and pass upon any evidence adduced, and then to accept or to reject it in their discretion. Ibid.

The failure of the trial judge, ex mero motu to direct the jury to give to the prisoner the benefit of any reasonable doubt, is not a good ground for interfering with the verdict in a case where the evidence does not point to any reduced or lesser offence. R. v. Riendeau (1900), 3 Can. Cr. Cas. 293 (Que.).

Before verdict all presumptions will be in favour of the innocence of the prisoner, after verdict all presumptions will be against it. The court is not justified in setting aside the verdict unless it can say the jury were wrong in the conclusion they arrived at. It is not sufficient that the

appellate court would not have pronounced the same verdict. R. v. Hamilton (1866), 16 U.C.C.P. 353.

Where the verdict is not perverse, nor contrary to law and evidence, though it may be somewhat against the judge's charge, that is no reason for interfering if there be evidence to sustain the finding, because the jury are to judge of the sufficiency and weight of the evidence. R. v. Seddons (1866), 16 U.C.C.P. 389.

The former rule was that the court would not in criminal cases grant a new trial unless the verdict was clearly wrong, even though the evidence on which a prisoner was convicted would equally justify his acquittal, for the jury are to judge of the preponderance of the evidence, and their finding will not be disturbed. R. v. Mellroy (1864), 15 U.C.C.P. 116, following R. v. Chubbs, 14 U.C.C.P. 32.

A new trial should be ordered, if the judge's charge was 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. R. v. Collins (1895), 1 Can. Cr. Cas. 48 (N.B.).

A new trial in a criminal case should not be granted unless after an examination of the evidence given at the trial, and of the grounds of the application, the court sees some apparent reason for doubting the propriety of the conviction, especially where the judge before whom the prisoner was convicted did not feel it necessary to reserve any question of law which arose at the trial for the consideration of one of the superior courts. R. v. Craig (1858), 7 U.C.C.P. 241.

Where affidavits were made by some of the jurors who tried the case that the jury were not in fact unanimous, but the belief among them was that unanimity was not necessary, and that a verdict could be given according to the opinion of the major part of them, they cannot be received and acted upon by the court as ground for a new trial. R. v. Fellowes and others (1859), 19 U.C.Q.B. 48.

In R. v. Chubbs, 14 U.C.C.P. 32, in which the prisoner had been convicted of a capital offence, Wilson, J., said, "In passing the Act, giving the right to the accused to move for, and the court to grant, a new trial, I do not see that it was intended to give courts the power to say that a verdict is wrong, because the jury arrived at conclusions which there was evidence to warrant, although from the same state of facts other and different conclusions might fairly have been drawn and a contrary verdict honestly given." Richards, C.J., before whom the case had been tried, said, "If I had been on the jury, I do not think I should have arrived at the same conclusions, but as the law casts upon them the responsibility of deciding how far they will give credit to the witnesses brought before them, I do not think we are justified in reversing their decision, unless we can be *certain* that it is wrong."

In R. v. Greenwood, 23 U.C.Q.B. 255, a case in which the prisoner had been convicted of murder, Hagarty, J., said, "I consider that I discharge my duty as a judge before whom it is sought to obtain a new trial on the ground of the alleged weakness of the evidence, or of its weight in either scale, in declaring my opinion that there was evidence proper to be submitted to the jury; that a number of material facts and circumstances were alleged properly before them—links, as it were, in a chain of circumstantial evidence—which it was their especial duty and province to examine carefully, to test their weight and adaptability each to the other . . . To adopt any other view of the law would be simply to transfer the conclusion of every prisoner's guilt or innocence from the jury to the judges."

R. v. Hamilton, 16 U.C.C.P. 340, was also a case in which the prisoner had been convicted of murder. Richards, C.J., who delivered the judgment of the court, said, "We are not justified in setting aside the verdict, unless we can say the jury were wrong in the conclusion they arrived at. It is not

sufficient that we would not have pronounced the same verdict; before we interfere we must be *satisfied* they have arrived at an erroneous conclusion." So, in R. v. Seddons, 16 U.C.C.P. 389, it was said, "The verdict is not perverse, nor against law and evidence; and although it may be somewhat against the judge's charge, that is no reason for interfering, if there be evidence to sustain the finding, because the jury are to judge of the sufficiency and weight of the evidence."

In R. v. Slavin, 17 U.C.C.P. 205, the law on the subject was thus stated: "We do not profess to have scanned the evidence with the view of saying whether the jury might or might not, fairly considering it, have rendered a verdict of acquittal. We have already declared on several occasions that this is not our province under the statute. It is sufficient for us to say that there was evidence which warranted their finding."

All that the court is required to do is to see if there is any evidence to support the finding of the jury. R. v. Riel (No. 2) (1885), 1 Terr. L.R. 23, per Taylor, J.; sed quære per Killam, J., ibid., page 63.

It has been said that the discovery of new evidence, which amounts to nothing more than corroborative testimony, is no ground for granting a new trial. Scott v. Scott, 9 L.T.N.S. 456; R. v. Mellroy (1864), 15 U.C.C.P. 116.

A new trial was refused in a murder case, where the application was based solely on an affidavit of a witness that he had misapprehended a question put to him, which had led to his answer producing a wrong impression. R. v. Crozier (1858), 17 U.C.Q.B. 275.

Comment by the prosecuting counsel before the jury in respect of the failure of prisoner's wife to testify is error entitling the prisoner to a new trial. R. v. Corby (1898), 1 Can. Cr. Cas. 457 (N.S.).

The rule is to be applied, notwithstanding a subsequent withdrawal of the comment and notwithstanding the judge's direction to the jury to disregard it. The objection is not waived, because not taken at the time, and it is sufficient if drawn to the attention of the trial judge after the jury have retired to deliberate. Ibid.

*Circumstantial evidence.*]—In cases where there is direct and positive evidence of the fact charged, and that evidence is contradicted, it may be said that no question but the credibility of the witness is presented, and that as credibility and weight of evidence are entirely questions for the jury, their decision may well be deemed final, unless the judge who tried the case should express himself to be dissatisfied with the verdict; but that where the evidence is merely circumstantial there is, first the question whether the facts relied upon were established by the evidence; and second, whether the fact of guilt was properly inferable from them; and that in the latter case the court should review the correctness of the deduction of the jury. It was held, however, in the murder case of R. v. Greenwood (1864), 23 U.C.Q.B. 255, that there is no reason for applying a different rule where the evidence is circumstantial. Admitting that "they must decide, not whether these facts are consistent with the prisoner's guilt, but whether they are inconsistent with any other rational conclusion" (Tay. Ev. sec. 60), where they have so decided it certainly cannot prevent a less obstacle to the interference of the court than where they have simply decided that they give credit to the witnesses for the prosecution, and not to those for the defence Per Draper, C.J. R. v. Greenwood (1864), 23 U.C.Q.B. 255.

*New Evidence.*]—An application on the ground of the discovery of new evidence would seem not to be warranted under this section. In R. v. Oxentine (1858), 17 U.C.Q.B. 295 it was held that such an application was not upon a "question of fact" and the latter phrase was construed as meaning only a question of fact arising from or suggested by the evidence which was given. But an order for a new trial on that ground may be made by the Minister of Justice under sec. 748. R. v. Sternaman (1898), 1 Can. Cr. Cas. 1.

*Co-defendants.*]—It is the established practice in criminal cases where all the defendants have been convicted, and it is found that one or more of them have a just claim to a new trial, that a new trial shall be granted to all, in order that the whole case may be tried as at first. R. v. Fellowes and others (1859), 19 U.C.Q.B. 48; see also R. v. Saunders, [1899] 1 Q.B. 490.

*Second trial.*]—Upon a new trial, everything must be begun de novo, and the prisoner asked to plead again. "There is no court continuing all the time before which he has pleaded; there must be a new court established for the trial of each charge, and the proceedings upon the first trial cannot be incorporated with those upon the second." Per Killam J. in R. v. Riel (No. 2), (1885), 1 Terr. L.R. at page 60.

In Attorney-General v. Bertrand (1867), L.R. 1 P.C. 520, the facts were that a prisoner had been tried in New South Wales for felony, after a previous trial and disagreement of the jury thereat. On the second trial some of the witnesses were re-sworn, and their evidence given at the first trial was read over to them from the judge's notes at the instance of the presiding judge, who informed each witness that he intended to read over the notes which he, the judge, had taken of the evidence given by the witness at the former trial, and that if the witness wished to add anything to the evidence he had then given, or to alter or correct it in any way, he could do so. The judge also then informed the counsel for the prisoner and the counsel for the crown that if either of them wished to ask the witness any questions he could do so. No specific or definite consent was given by the prisoner or his counsel as to the proposed course being adopted, or as to any specific witness being thus examined, but no objection was then made by the prisoner or his counsel, and they were considered by the court to have assented to the course proposed. The Judicial Committee expressed the opinion that such a mode of laying the evidence before the jury was to be discouraged, although not amounting in law to a mis-trial.

**748. New trial by order of 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 His 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.

A new trial was granted by the Minister of Justice under this section on the discovery of new evidence in R. v. Sternaman (1898), 1 Can. Cr. Cas. 1.

**749. Intermediate effects of appeal.**—The sentence of a Court shall not be suspended by reason of any appeal, unless the Court 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.

See sec. 744 as amended.

**750. Appeal to Supreme Court of Canada.**—Any person convicted of any indictable offence, whose conviction has been affirmed on an appeal taken under s. 742, 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.

*Supreme Court of Canada.*]—The dissent from the "opinion" of the majority (Cr. Code 742) by any of the judges of the Court of Appeal, which is necessary in order to confer the right of a further appeal to the Supreme Court of Canada, has reference to the "decision" or "judgment" of such majority in affirmance of a conviction (Cr. Code 750); and where a majority of the Court of Appeal in directing a new trial also expressed their concurrence (two of them dissenting) with that part of the decision appealed from by which it was held that certain evidence was properly admitted, the latter decision is not reviewable by the Supreme Court of Canada. Viau v. R. (1898), 2 Can. Cr. Cas. 540 (S.C. Can.).

In Michaelmas Term, 1877, certain questions of law reserved, which arose on the trial of the appellants, were argued before the Court of Queen's Bench for Ontario, composed of Harrison, C.J., and Wilson, J., and in February, 1878, the said court composed of the same judges delivered judgment affirming the conviction of the appellants for manslaughter. The Court of Queen's Bench for Ontario when full is composed of a Chief Justice and two puisne judges. On appeal to the Supreme Court of Canada it was held that the conviction of the Court of Queen's Bench, although affirmed by only two judges, was unanimous, and therefore not appealable. R. v. Amer (1878), 2 Can. S.C.R. 592.

Where the decision is in favour of the prisoner the Supreme Court of Canada, exercising the ordinary appellate powers of the court, may give the judgment which the court whose judgment is appealed from ought to have given, and may order prisoner's discharge. R. v. Laliberté (1877), 1 Can. S.C.R. 117.

By Rule 48, of the Supreme Court of Canada, in criminal appeals and in appeals in cases of habeas corpus, and unless the court or judge shall otherwise order, the "case" must be filed as follows:—

(1.) In appeals from any of the provinces other than British Columbia, at least one month before the first day of the session at which it is set down to be heard.

(2.) In appeals from British Columbia, at least two months before the said day.

Rule 49 is as follows:—

In matters of criminal appeals, and appeals in matters of habeas corpus, notice of hearing shall be served the respective times hereinafter fixed before the first day of the general or special session at which the same is appointed to be heard, that is to say:

(1.) In appeals from Ontario and Quebec, two weeks.

(2.) In appeals from Nova Scotia, New Brunswick and Prince Edward Island, three weeks.

(3.) In appeals from Manitoba, one month.

(4.) In appeals from British Columbia, six weeks.

Contempt of court is a criminal proceeding and, unless the court appealed from was not unanimous in affirming the conviction, an appeal does not lie to the Supreme Court of Canada from a judgment in proceedings therefor. Ellis v. R. (1893), 22 Can. S.C.R. 7; O'Shea v. O'Shea, 15 P.D. 59. And it is questionable whether a contempt in respect of the publication of improper newspaper comment on a pending cause is an indictable offence under this section so as to permit an appeal in any case. Strong, J., in Ellis v. R. (1893), 22 Can. S.C.R. at p. 12.

**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 His Majesty in Council may be heard. 51 V., c. 43, s. 1.

See note to sec. 742.

PART LIII.

## SPECIAL PROVISIONS.

SECT.



---

**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.

*Further detention on habeas corpus, etc.*]—It was held in Re Timson (1870), L.R. 5 Exch. 257, that where a prisoner is brought up on a writ of habeas corpus, and the return shews a commitment bad on the face of it, the court will not, on the suggestion that the conviction is good, adjourn the case for the purpose of having the conviction brought up, and amending the commitment by it in a case where the magistrates had not brought the conviction before the court, although served with notice and appearing by counsel.

In R. v. Fife (1889), 17 Ont. R. 710, a warrant of commitment for trial, issued in a preliminary enquiry upon a charge of having "wilfully and maliciously" burned down a fence, was quashed by MacMahon, J., as insufficient because it did not charge also that the act was done "unlawfully." The prosecution was there taken under the Malicious Injuries to Property Act, R.S.C. 1886, ch. 168, sec. 58, under which section the injury must have been done "unlawfully and maliciously" in order to constitute an offence thereunder.

In R. v. Chaney (1838), 5 Dowl. 281, the commitment was likewise defective in not alleging matter essential to the offence, and the right to certiorari on the part of the accused had been taken away by statute, but not the right to habeas corpus. The court held that unless the Crown brought up the conviction, the commitment, although defective, would be considered as a true recital of it.

Where, however, the application is one upon affidavits for a writ of habeas corpus, the usual practice is to require that the conviction be brought up, before the court will take any notice of a defect in the warrant; and for this purpose a certiorari is taken to bring up the record, and a writ of habeas corpus to bring up the defendant. R. v. Taylor, 7 D. & R. 622.

The inclusion of the process of certiorari in Code sec. 752, supra, leads to the inference that the powers thereby conferred are to apply as well after as before the conviction, and that a person convicted still remains a person "charged" with an indictable offence.

If the evidence as to the commission of the alleged offence is conflicting, and the term of imprisonment imposed by the conviction, is in excess of that authorized by law, the judge before whom the case is brought on habeas corpus should not exercise the powers conferred by sec. 752 of ordering further detention, but should discharge the prisoner. R. v. Randolph (1900), 4 Can. Cr. Cas. 165 (Ont.). The warrant of commitment can be amended only where there is a "valid conviction to sustain the same." Code sec. 800.

If the conviction is by a court of record having general jurisdiction of the offence charged, habeas corpus will not lie. Re Sproule, 12 Can. S.C.R. 140; Re D. C. Ferguson, 24 N.S.R. 106. In such case the right to hold the prisoner is founded on the *fact* of a sentence having been passed by such a court. Ibid. A decision of a County Court Judge's criminal court under the Speedy Trials procedure can only be reviewed by reserved case or appeal as provided by the Code, and not by habeas corpus. R. v. Burke (1898), 1 Can. Cr. Cas. 539 (N.S.).

Where the conviction itself was lodged with the gaoler as his authority for the detention in lieu of a warrant of commitment, the judge before whom the prisoner is brought upon habeas corpus may properly order the further detention of the prisoner for a limited time until a warrant in due form can be obtained from the magistrate. R. v. Morgan (1901), 5 Can. Cr. Cas. 63 (Ont.).

Where the evidence as to the commission of the alleged offence is conflicting, and the term of imprisonment imposed by the conviction is in excess of that authorized by law, the judge before whom the case is brought on habeas corpus should not exercise the powers conferred by sec. 752, of making an order for the further detention of the accused. R. v. Randolph (1900), 4 Can. Cr. Cas. 165 (Ont.).

A court of one province has no jurisdiction to direct an inquiry before a justice or a judge in another province, or the hearing of further evidence in another province, to controvert the allegation of jurisdiction. This section is to be applied only to cases where the habeas corpus issues in the same province in which the commitment is made. R. v. Defries (1894), 1 Can. Cr. Cas. 207 (Ont.).

**753. Question raised at trial may be reserved for decision.**—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.

**754. Practice in High Court of Justice of 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, 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.**—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 His 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.

The Governor-General of the Dominion of Canada, exercising the prerogative right of the Crown, can issue a commission to hold a Court of Oyer and Terminer, and General Gaol Delivery, already established in a province. R. v. Amer (1878), 42 U.C.Q.B. 391. And the Lieutenant-Governor of a province, as well as the Governor-General, has the power to issue commissions to hold Courts of Assize. Ib., p. 403.

**756 Court of General Sessions.**—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.

The Court of General Sessions is not properly an inferior court; it is a Court of Oyer and Terminer. R. v. McDonald (1871), 31 U.C.Q.B. 337; Campbell v. R., 11 Q.B. 799, 814. It is, however, a court which does not possess any greater powers than are conferred upon it by statute. It has a general jurisdiction over offences attended with a breach of the peace, and has also such other powers as are conferred upon it by statute. R. v. Dunlop, 15 U.C.Q.B. 118; R. v. McDonald (1871), 31 U.C.Q.B. 337.

**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.**—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.

**760. Procedure 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.

This section applies only to Nova Scotia. The amendment consists in striking out the last two lines of the section which read thus: "And the indictment shall not be made out, except in Halifax, until the grand jury so directs." The distinction thus made between Halifax and the country was found to be very inconvenient in practice. The decision of the Supreme Court of Nova Scotia in R. v. Townsend, 3 Can. Cr. Cas. 29, as to the validity of an indictment in Nova Scotia without the words "true bill" being endorsed by the foreman of the grand jury, must now be viewed in the light of this amendment.

**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.

PART LIV.

## SPEEDY TRIALS OF INDICTABLE OFFENCES.

SECT.



---

**762. Application of Part LIV.**—The provisions of this part do not apply to the North-West Territories or the District of Keewatin. 52 V., c. 47, s. 3.

*(Amendments of 1895 and 1900.)*

**763. Definitions.**—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;

(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 King'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 King'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.

The Speedy Trials Act, 52 Viet., ch. 47 (D.), from which Part 54 is derived, is not a statute conferring jurisdiction, but is an exercise of the power of Parliament to regulate criminal procedure. In re County Courts of British Columbia (1892), 21 Can. S.C.R. 446.

Whether the judge presiding at the trial had jurisdiction to summarily try the defendants under this part of the Code is a "question of law" under sec. 743 and may be the subject of a reserved case. R. v. Paquin (1898), 2 Can. Cr. Cas. 134 (Que.).

**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.

One of the consequences of a district magistrate in Quebec acting under the Speedy Trials sections being a court of record is that his judgment cannot be enquired into on habeas corpus. Ex p. O'Kane, Ramsay's Cases (Que.) 188.

The Habeas Corpus Act, 29-30 Vict., 1866 (Prov. of Can.), ch. 45, now R.S.O. 1897, c. 83, precludes the right to a writ of habeas corpus where the judgment conviction or decree is that of a "court of record."

The County Judges Criminal Court in Ontario was constituted by 37 Vict., 1873 (Ont.), ch. 8, sub-sec. 57 and 58. By sec. 57, now R.S.O. 1897, ch. 57, sec. 1, the judge of every county court, or the junior or deputy judge thereof, authorized to act as chairman of the general sessions of the peace for any county, is constituted "a court of record for the trial out of sessions and without a jury, of any persons committed to gaol on a charge of being guilty of any offence for which such person may be tried at a court of general sessions of the peace, and for which the person so committed consents to be tried out of sessions and without a jury"; and by sec. 58, now R.S.O. 1897, ch. 57, sec. 2, the court so constituted was styled "The County Judge's Criminal Court" of the county in which the same is held.

The court so constituted has all the powers and duties which secs. 763-781 of the Code purport to give, so far as the Legislature of Ontario can confer the same. R.S.O. 1897, ch. 57, sec. 1.

Being a court of record its judgment cannot be reviewed on a writ of habeas corpus. R. v. St. Denis (1875), 8 Ont. Pr. 16; R. v. Murray (1897), 1 Can. Cr. Cas. 452 (Ont.).

*(Amendment of 1900.)*

**765. County judge's criminal court.**—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 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 surrendered 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.

The amendment is in the addition of the second sub-section. The Supreme Court of Nova Scotia had held that the former section only applied where the person was actually and formally "committed for trial," and not to the other cases to which it is now extended. R. v. James Gibson, 3 Can. Cr. Cas. 451, and R. v. Smith, 3 Can. Cr. Cas. 467.

*Election of speedy trial.*]—In a British Columbia case before the amendment of this section it was held by McColl, J., that the words "committed to gaol for trial" should be construed as including any case where the accused is found in custody charged with an offence in respect of which he has the right to elect in favour of a speedy trial, and although he is so in custody by reason of his surrender for the purpose of appearing before the judge to elect a speedy trial after being admitted to bail by the magistrate under sec. 601, the magistrate declining to commit him for trial. R. v. Lawrence (1896), 1 Can. Cr. Cas. 295. But in Nova Scotia a more limited construction was placed upon it, and it was held that a person not committed by the magistrate, but admitted to bail by him under sec. 601, was not a person "committed to gaol to trial," although he had given himself into custody. R. v. James Gibson (1896), 3 Can. Cr. Cas. 451; R. v. Smith (1898), 3 Can. Cr. Cas. 467. In consequence of these conflicting decisions subsec. (2) was introduced in 1900.

The prisoner's reply upon arraignment that "for the present" he elected to be tried without a jury is a sufficient election. R. v. Ballard (1897), 1 Can. Cr. Cas. 96, 28 Ont. R. 489.

Consent does not confer jurisdiction, and the accused may, upon an appeal by way of case reserved, object to the jurisdiction of the tribunal he has himself selected if the case does not properly come within the provisions of this Part. R. v. Smith (1898) 3 Can. Cr. Cas. 467 (N.S.).

Semble, an accused person may, upon a preliminary enquiry, waive the preliminary examination into the charge and consent to be committed for trial without any depositions being taken; but as the "charge" in the County Judges' Criminal Court must be prepared from the depositions (sec. 767), the accused, committed without depositions having been taken, has no right to elect to be tried at the County Judges' Criminal Court. R. v. James Gibson (1896), 3 Can. Cr. Cas. 451 (N.S.); but see note to sec. 767.

The surrender by a defendant himself out on his own bail, has the effect of remitting him to custody, and enables him to avail himself of the Speedy Trials clauses, and to elect to be tried summarily; and where a defendant had so elected an indictment subsequently laid against him at the assizes was held bad and quashed even after plea pleaded where the plea was made through inadvertence. R. v. Burke (1893), 24 Ont.R. 64.

In that case MacMahon, J., said:—"The defendants were by the police magistrate 'committed to gaol for trial;' they gave bail to appear for trial, so that when they were rendered by their bail, they stood in the same position as if they had never been bailed, and were therefore 'committed to gaol for trial;' and, if so committed, they were confined, as far as it was necessary for the sheriff so to do, when they were almost immediately brought before the judge to elect as to the mode of their trial. The date for proceeding under the Speedy Trials Act was fixed by the judge, and the defendants having appeared, they had a right to be tried by the forum, which the statute said should be theirs if they so elected. They cannot be deprived of that right because the Crown Counsel had determined on presenting bills and having them found by the grand jury; for the statute says they may elect to be tried, although the grand jury is sitting."

If the accused, after electing in favour of a speedy trial, his right to which is disputed by the Crown, takes no further steps to obtain that right and is then indicted at the next court of Oyer and Terminer, his plea to such indictment will conclude him as to the mode of trial, and he cannot afterwards elect for a speedy trial without a jury. R. v. Lawrence (1896), 1 Can. Cr. Cas. 295 (B.C.). In the latter case the Crown consented to the withdrawal of the plea to the indictment, upon a statement by the counsel for the accused that the plea was made inadvertently. See also R. v. Burke, supra.

If imprisonment in a common gaol is ordered on a conviction under this part (LIV.) it shall be with or without hard labour in the discretion of the court or person passing sentence, and if it is to be with hard labour the sentence shall so direct. Sec. 955 (6).

**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.

*(Amendment of 1900.)*

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.

Sub-section (2), added in 1900, was intended to remedy an inconvenience which exists particularly in the maritime provinces, where a judge's jurisdiction extends sometimes over three or four counties. Under the section as it formerly was, it was necessary for the judge to receive notice for the purpose of going to where the prisoner was, to call the prisoner before him to make his election, and he was obliged to go back on another day for the purpose of holding the trial.

By the amendment it is provided that in such cases notice shall be given to the prosecuting officer. He will then notify the judge, and the judge will come on the day fixed for the trial, so that he will not be obliged to make two trips for the purpose of holding the trial.

See notes to sections 765 and 767.

*(Amendment of 1900.)*

**767. Arraignment before county judge.**—The judge or such 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, 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.

4. If the prisoner demands a trial by jury, he shall be remanded to gaol.

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 sub-section 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 proceeded against as if his said first election had not been made.

FORM MM.—

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 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.*

FORM NN.—

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.*

It had been held that the technical effect of a prisoner's having once elected to be tried by jury was that his power to elect was thereby exhausted. That rule delayed a trial uselessly, involved increased expense to the Crown and to the prisoner, and prolonged the time of imprisonment of a man who on the trial might be found not guilty. Sub-section 5 is a new

sub-section intended to obviate the difficulty by providing that the prisoner may re-elect. The other changes were necessitated by the change of procedure under section 766.

*Preferring the charge.*]—Inasmuch as the "charge" in the County Judge's Criminal Court must, under that section, be prepared from "the depositions," it is doubtful whether an accused person, committed by consent upon a preliminary inquiry at which no evidence was taken, such evidence being waived by the prisoner, has a right to elect in favour of a speedy trial without a jury. In R. v. Gibson (1896), 3 Can. Cr. Cas. 451, it was held that he had not, but quære whether the sworn information is not a part of the depositions sufficient in such case for the drawing of the "charge."

The record is properly framed if it states the offence charged in such form as the depositions or evidence shewed it should have been; and the judge's jurisdiction was not confined to the trial only of the charge as stated in the commitment. Cornwall v. R. (1872), 33 U.C.Q.B. 106.

Where no amendment is made (sec. 778) and no new charge is substituted (sec. 773) the prisoner cannot be tried for any offence with which he is not charged or which is not included in the charge against him. The judge is in the same position as a jury would occupy if the prisoner were on trial before them. R. v. Morgan (1893), 2 B.C.R. 329. So where the charge was forgery and there was no evidence to convict of that offence, the judge cannot record a conviction for obtaining money by false pretences, although the evidence adduced would support such a charge. Ibid.

A reserved case upon an objection taken before pleading, that the record or charge, upon which the accused was arraigned for a "speedy trial," was not founded upon the evidence adduced at the preliminary enquiry, should not be heard by the appellate court to which it is referred until after the trial has been concluded, and then only in case of conviction. R. v. Trepanier (1901), 4 Can. Cr. Cas. 259 (Que.).

*Election against jury trial.*]—See note to sec. 765.

*Changing his election.*]—Where a prisoner on arraignment before the County Court Judge elects *in favour of* a speedy trial under Part LIV. of the Code, he cannot withdraw the election so made and obtain a trial by jury. Sub-sec. 5 of sec. 767, as amended 1900, gives the accused the right of re-election only in case his first election was for trial by jury. R. v. Keefer (1901), 5 Can. Cr. Cas. 122 (Ont.).

Before the amendment of 1900 it had been held in Ontario that a prisoner arraigned before a county judge under secs. 766 and 767, and who had thereupon demanded a trial by jury and elected not to be tried forthwith by such judge without a jury, had no absolute right after remand to goal to change the election so made; and this notwithstanding that the election made by him was made under mistake. R. v. Ballard (1897), 1 Can. Cr. Cas. 96 (Ont.).

But in R. v. Prevost (1895), 4 B.C.R. 326, it was held by Crease, J., that a prisoner who had elected to be tried by a jury, might afterwards re-elect in favour of a speedy trial on application for leave to abandon his former election, and that the court would have inherent jurisdiction over the sheriff, as its officer, to direct him to produce the prisoner. Parliament then passed the amending statute, which, however, is limited to cases where the prisoner has elected to be tried "by jury," and under the maxim "expressio unius, etc.," it must be taken that the power of re-election so given shall not apply in cases of election of trial without a jury.

See also secs. 769-771.

*Persons jointly accused.*]—See sec. 768.

*Amendment of charge.*]—The judge has all the powers of amendment which any court mentioned in sec. 763 would have if the trial were before such court. Sec. 778.

*Substituting new charge.*]—See sec. 773.

*Adjournment.*]—Notwithstanding sec. 777 authorizing the adjournment of a trial, it is not competent for a judge trying a charge under this section to postpone his decision on the first charge until he has heard the evidence on several other charges against the same accused party, 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 on both charges. If time be required in the first case for deliberation on the question of guilt after hearing the evidence, an adjournment may be made, but the trial of the subsequent charges must likewise be postponed. R. v. McBerny (1897), 3 Can. Cr. Cas. 339 (N.S.).

**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. or Part LVI., 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 be 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 766, 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.

**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 other such 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.

*View.*]—Provision is made by sec. 722 for a "view" by a jury of the locality of the crime, under the direction of the court, but it would seem that a judge exercising jurisdiction under the "speedy trials" clauses is not warranted in taking a view except by consent of the parties. R. v. Petrie (1890), 20 Ont. R. 317. At common law there could be no view in a criminal prosecution without consent. R. v. Redman, 1 Kenyon 384.

Where the preliminary enquiry was held and the committment made on a statutory holiday, and both were therefore invalid, and the accused was arraigned at the County Court Judge's Criminal Court under this Part of the Code and there pleaded to the charge and was convicted, it was held that the conviction was not bad because of the invalidity of the preliminary enquiry and committment. R. v. Murray (1897), 1 Can. Cr. Cas. 452 (Ont.).

As to adjournment, see sec. 777 and note to same.

**773. Trial for 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.

*Substituted charge.*]—This provision was introduced in 1879 by 42 Viet. ch. 44, sec. 3. In case of a substitution of another charge for which the law permits a heavier punishment the prisoner's consent should be distinctly obtained, not to the substitution, but to the waiving of the right of trial by jury. Goodman v. R. (1883), 3 Ont. R. 18.

Where a man consents to waive his right to a jury, and to be tried summarily by the judge on a charge which on its face would only warrant an imprisonment for less than a year, he ought not by any implication to be held as assenting to waive such right as to any charge that the law may allow to be substituted therefor which might render him liable to a larger punishment, and his assent to be summarily tried on the substituted charge should be obtained and recorded. Ibid.

**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.

Where prisoners were charged at the County Judges' Criminal Court with obtaining money ($50) by false pretences with intent to defraud, and by a second count with fraud, unlawful device and ill practice in betting, unlawfully obtaining money with intent to cheat, and by a third count with obtaining by false pretences appropriating to their own use money the property of the prosecutor; and the county judge was of opinion that there was not sufficient evidence to support any of the charges as laid, and that a charge of larceny could not be sustained, but found that the prisoners with intent to defraud, by pretending that they were betting, got possession of the money of the prosecutor, and with like intent applied the same to their own use, and convicted them under 32 & 33 Viet., ch. 21, sec. 110 D., the court held that the county judge had the like authority to find the defendants guilty of an offence under that section upon the accusation in the case in like manner as a jury could have done. R. v. Haines (1877), 42 U.C.Q.B. 208.

But where after an acquittal for larceny, but before the accused had been formally discharged out of custody, the prosecuting counsel asked leave to prefer another charge upon which there had not been a committal, and the accused elected a speedy trial on the same, it was held that a conviction thereon could not be sustained and that the proceedings with respect to the second charge were wholly without jurisdiction. R. v. Lonar, 25 N.S.R. 124.

**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.

*Adjournment of speedy trial.*]—An adjournment of a speedy trial may be made in order to obtain the attendance of a material witness, although the party applying for same had elected to proceed without such witness, and although the trial had commenced. R. v. Gordon (1898), 2 Can. Cr. Cas. 141 (B.C.).

But a speedy trial should not be adjourned at the request of the Crown, simply to enable the prosecution to obtain better evidence that a witness examined on the preliminary enquiry is absent from Canada so as to admit his deposition in evidence. R. v. Morgan (1893), 2 B.C.R. 329.

Notwithstanding this section, it is not competent for a judge trying a charge without a jury under the Speedy Trials Clauses of the Code to postpone his decision on the first charge until he has heard the evidence on several other charges against the same accused party, 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. If time be required in the first case for deliberation on the question of guilt after hearing the evidence, an adjournment may be made, but the trial of the subsequent charges must likewise be postponed. R. v. McBerny, 3 Can. Cr. Cas. 339 (N.S.).

This section applies only to "speedy trials" held under the provisions of secs. 762-781, with the prisoner's consent for trial thereunder without a jury.

The result would appear to be that, although these sections were intended to give the prisoner the benefit of a trial at an earlier date than if he took his trial with a jury (sec. 772), the exercise of the power of adjournment may place him under the disadvantage of having to remain in custody awaiting trial, for a longer period than would be possible if his trial were before a jury.

The following cases indicate the common law practice, in jury trials, after the trial proceedings have commenced:

In R. v. Wenborn (1842), 6 Jurist 267, the prisoner was indicted for stealing a grate. All the witnesses for the prosecution having been examined, it was discovered that the stolen property was not ready to be produced for the inspection of the jury, it having been deposited at an inn at some distance from the court house, but in the same town. Gurney, B., directed that a messenger be sent to bring the stolen article and that another case be proceeded with, but that the prisoner be not taken from the dock. On the return of the messenger with the stolen article, the trial was resumed, several other cases having been tried in the meantime.

And where, owing to the detention of a train, the witnesses for the prosecution had not arrived, and the case for the prosecution had been opened, the trial was adjourned and the jury locked up. R. v. Foster, 3 Car. & K. 206.

On a trial for bigamy before Willes, J., and a jury in 1864, the jury were sworn, and counsel for the prosecution opened the case and called and examined the first witness. The other witnesses, on being called, did not answer, being temporarily absent, and Willes, J., said: "I could have adjourned the case, if no evidence had been called, but not after evidence called. If the witnesses do not appear, the prisoner is entitled to be acquitted for want of evidence." R. v. Robson (1864), 4 F. & F. 360.

In R. v. Tempest (1858), 1 F. & F. 381, Watson, B., held that without statutory authority such as had been enacted in respect to civil causes there was no power to adjourn a criminal trial, even until a later part of the same day, after the jury had been sworn and the case opened for the prosecution; but in a note to the report of that case an instance is stated where Willes, J., in a case where the prosecutrix had not appeared waited until the next case was ready.

The case of R. v. Tempest was, however, disapproved of by Cockburn, C.J., in R. v. Fernandez, Q.B. (1861), referred to in a note to R. v. Parr (1862), 2 F. & F. 861, where a distinction is drawn between an adjournment, which in strictness means to another day, and a mere suspension of proceedings for a short time on the same day, not necessitating the jury leaving the box nor locking up the jury, which would be improper for a mere default on the part of the prosecution or for a mere defect in the proof.

In R. v. Parr (1862), 2 F. &. F. 861, it was held by Wightman, J., that on a jury trial for felony the judge has no authority to order an adjournment to another day, because of the absence of the prosecutor and his witnesses, after the prisoner had been arraigned and given in charge of the jury; and in a note to the report a similar ruling is referred to as having been made by Alderson, B. (2 F. & F. 862).

**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.

**779. Recognizance to prosecute or give evidence to apply to proceedings under this Part.**—Any recognizance taken under section 598 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 and the conviction for contempt in the form PP in schedule one to this Act, 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.

FORM OO.—

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.*

FORM PP.—

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 sub-

pœnaed (*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 His Majesty a fine of dollars, and in default of payment, that the said fine, with 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.*

PART LV.

## SUMMARY TRIAL OF INDICTABLE OFFENCES.

SECT.



---

**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 jus-

tice 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;

*(Amendment of 1895.)*

(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.

(*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.

*Appointment and jurisdiction of police magistrates.*]—The appointment of police magistrates in the several provinces of Canada comes within the jurisdiction of the provincial legislatures. Sec. 1 of the Ontario Act respecting police magistrates, R.S.O. 1897, ch. 87, declares as to that province that every police magistrate shall be appointed by the Lieutenant-Governor and shall hold office during pleasure; and by sec. 18 of the same Act, where the Lieutenant-Governor-in-Council is of opinion that the due administration of justice requires the temporary appointment of a police magistrate for a county or district, the Lieutenant-Governor-in-Council may appoint a police magistrate accordingly. Every police magistrate in Ontario is, ex officio, a justice of the peace for the whole county or union of counties or district, for which or for part of which he has been appointed. R.S.O. 1897, ch. 87, sec. 27.

A town police magistrate in Ontario may, in respect of an offence under a provincial statute committed in a part of the same county for which there is no police magistrate, take the information at a city or town (within the county) having a separate police magistrate; and may there try the case as an ex-officio justice of the peace, having the powers of two justices of the peace under the Ontario Police Magistrates' Act. R. v. McLean (1899), 3 Can. Cr. Cas. 323 (Ont.).

In case of the absence or illness or at the request of a police magistrate in Ontario, any two or more justices of the peace may act in his place in any matter within the jurisdiction of the police magistrate. R.S.O. 1897, c. 87, s. 29.

A person was convicted before the police magistrate for Ottawa, of unlawfully and feloniously wounding M.K. with intent to do her grievous bodily harm, and was sentenced to be imprisoned for one year at hard labour in the Central Prison. It was contended on behalf of the prisoner that the assignment of the jurisdiction to try the offence to the police magistrate was unauthorized by the Constitution, the magistrate being appointed by the provincial government, and under the authority of a provincial statute. This was put as a violation either of sec. 91, sub-sec. 27 of the B.N.A. Act as being legislation by the local legislature respecting criminal law, or the procedure in criminal matters; or of sec. 92, sub-sec. 14, as being an assumption by the Dominion Parliament to constitute a Court of criminal jurisdiction in the province. The court held that it had the concurrent Act of both legislatures, the tribunal being constituted by the statute of the province, and the jurisdiction over the offence assigned to it as an existing tribunal by the laws of the Dominion. Re Boucher (1879), 4 Ont. App. R. 191.

In Re County Courts of British Columbia, 21 Can. S.C.R. 446, Chief Justice Strong said: "The powers of the federal government respecting provincial courts are limited to the appointment and payment of the judges of those courts, and to the regulation of their procedure in criminal matters. The jurisdiction of parliament to legislate as regards the jurisdiction of criminal courts is, I consider, excluded by sub-sec. 14 of sec. 92, before referred to, inasmuch as the constitution, maintenance and organization of provincial courts plainly includes the power to define the jurisdiction of such courts, ter-

ritorially as well as in other respects. This seems to me too plain to require demonstration. Then, if the jurisdiction of the courts is to be defended by the provincial legislations, that must necessarily also involve the jurisdiction of the judges who constitute such courts."

Following this reason and conclusion it was held by the Supreme Court of New Brunswick that the Parliament of Canada cannot give jurisdiction to parish court commissioners in that province which otherwise they would not have.

In Ontario a provincial statute, 53 Viet., ch. 18, was passed, by which it was declared that courts of General Sessions should have jurisdiction to try any person for any offence under certain sections of the Forgery Act, R.S.C. ch. 165. It was held that the provincial legislature had power to so enact and that such a provision was one relating to the constitution of a court rather than to criminal procedure. R. v. Levinger, 22 Ont. R. 690. But a provision in the same statute authorizing police magistrates to try and to convict persons charged with forgery was declared ultra vires. R. v. Toland, 22 Ont. R. 505.

*As to Appeal.*]—No appeal lies from the decision of a judge of the sessions, police magistrate, district magistrate or other functionary mentioned in sec. 782 (*a*1), holding a "summary trial" under this section. R. v. Racine (Que.), 3 Can. Cr. Cas. 446.

But where two justices of the peace exercise jurisdiction under this Part under sec. 783 sub-secs. (*a*) and (*f*) a special right of appeal in like manner as under Part LVIII, is conferred by sub-sec. (*a* 5), supra.

Though there is no appeal where the proceedings are taken under sec. 783, an appeal by way of reserved case may be had when the magistrate's jurisdiction is dependent upon sec. 785, which now applies to police magistrates of cities and towns in all the provinces (amendment of 1900), but was formerly limited to Ontario. See. 742.

*Recorders in Quebec and Montreal.*]—By Article 2489 R.S.P.Q., all powers and jurisdiction conferred upon the Judges of the Sessions of the Peace for the cities of Quebec and Montreal, or upon two or more justices of the peace, by the provisions of the see. 2490 of the same statute were vested in and may be exercised by the Recorders and by the Recorder's Courts of and for the said cities, and by those who by law act in the absence on account of sickness or otherwise of the said Recorders, or when there is no Recorder, and discharge the duties of that office.

The effect of this provision of the law is to bring the Recorder's Court under and within the meaning of see. 782 (*a* i), and to give to its decisions the same character as those of a "magistrate." R. v. Portugais (1901), 5 Can. Cr. Cas. 100 (Que.).

No appeal lies from the decision of the Recorder's Court of Montreal holding a "Summary trial" under see. 783. R. v. Portugais (1901), 5 Can. Cr. Cas. 100 (Que.).

The recorder of the City of Montreal may, as a "magistrate" under see. 782, summarily try and condemn a person keeping a disorderly house in a manner constituting a nuisance, to a period of imprisonment of six months and to a fine of $100, or, in default of payment of this fine, to six other months. R. v. Bougie, 3 Can. Cr. Cas. 487 (Que.).

**783. Offences to be dealt with under this Part.**—Whenever any person is charged before a magistrate—

(*a*) with having committd theft, or obtained money or property by false pretenses, 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 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 inmate, 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—

(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.

*Procedure.*]—Sec. 783 is one relating to procedure only, and has reference to various offences, the illegality of which is declared by other sections of the Code. Its object is to provide a summary method of disposing of certain classes of offences for which, in the interests of justice, the utmost expedition is required in bringing them to trial, and which were thought not to be of too serious a nature to entrust to the judgment of the selected officials designated by Code sec. 782, when hedged about with the limitations of sec. 786 et seq.

Where the accused found committing an offence under this section is arrested without warrant by a peace officer, and on being brought before a police magistrate a written charge not under oath is read over to him, and he thereupon consents to be tried summarily, the police magistrate has jurisdiction to try the case although no information has been laid under oath. R. v. McLean (1901), 5 Can. Cr. Cas. 67 (N.S.).

No appeal lies from the decision of a judge of the sessions, police magistrate, district magistrate, or other functionary mentioned in sec. 782 (*a* 1), holding a "summary trial" with the consent of the accused under sec. 783. R. v. Racine, 3 Can. Cr. Cas. 446 (Que.); R. v. Nixon (1900), 4 Can. Cr. Cas. 32 (Ont.). But where the jurisdiction is absolute without consent, habeas corpus will lie. R. v. St. Clair (1900), 3 Can. Cr. Cas. 551 (Ont.).

Although secs. 782 and 783 appear under the general heading given to Part LV., i.e. "Summary trial of indictable offences," the inclusion therein of the offences of being an inmate of a bawdy-house or being an habitual frequenter of same, must be taken as referring to the vagrancy clauses, secs. 207 and 208, and as providing an alternative procedure for the enforcement of those sections as well under the "summary trials" procedure (Part LV.), as under the procedure by "summary convictions by justices" (Part LVIII.), as there are no other sections of the Code dealing with "inmates" and "frequenters."

*Theft not exceeding $10.*]—An appeal does not lie from the decision of a police magistrate who tries a charge of theft summarily with the consent of the accused, for sec. 808 prevents the application of any of the provisions as to appeals from summary convictions (secs. 879-884), to convictions under Part LV. (secs. 782-808). R. v. Egan (1896), 1 Can. Cr. Cas. 112 (Man.).

It is competent for a magistrate upon the summary trial before him of a prisoner charged under sec. 783 (*a*) with having committed theft to convict him of the offence of attempting to commit it provided for in sec. 783 (*b*). R. v. Morgan (1901), 5 Can. Cr. Cas. 63 (Ont.).

In R. v. Conlin (1897), 1 Can. Cr. Cas. 41, it was held by Boyd, C., Ferguson, J., and Robertson, J., of the Ontario High Court of Justice, that a prisoner summarily tried, with his own consent, by a police magistrate in Ontario, on a charge of theft from the person, where the value of the property stolen was under $10, was properly sentenced to three years' imprisonment. Mr. Justice Ferguson there held that stealing *from the person* constituted what was formerly known as "aggravated larceny," and that the omission to include in Code section 783 "stealing from the person" as well as "theft," left the former offence punishable only under section 344. That section is taken from the Larceny Act, R.S.C. ch. 164, sec. 32, which was taken from 32-33 Vict. ch. 21, sec. 39. Mr. Justice Robertson also held that theft from the person was not within section 783. Boyd, C., however, favoured the argument that the word "theft" in section 783 is of generic import, and would include a case of "stealing from the person," but that a *police* magistrate trying an accused person, with his own consent, under the special powers conferred by section 785 was not limited by section 787 as to the punishment he might impose. The latter view is now embodied in the amendment of the Code.

By the Criminal Code Amendment Act of 1900 the present sub-section 3 of section 785 was added, which declared that sections 787 and 788 do not extend to or apply to cases tried under section 785. By the same Act these special powers exercisable by police and stipendiary magistrates in Ontario were extended to "police and stipendiary magistrates of cities and incorporated towns in every other part of Canada, and to recorders where they exercise judicial functions." (Now sub-section 2 of section 785.)

It would therefore appear that if the accused be charged with

(1) Theft, under $10;
(2) Receiving stolen property, under $10;
(3) Obtaining money or property, under $10, by false pretences; or
(4) Attempt to commit theft (any amount);

he may, on "summary trial" in Ontario, before

(*a*) a County Court Judge (being a J.P.);
(*b*) a Judge of Sessions; or
(*c*) a District Magistrate;

exercising the powers of a "magistrate," under sections 782 and 783, be punished only under the provisions of section 787, and the sentence will be limited to six months' imprisonment (with or without hard labour).

But if the accused comes before

(*d*) a Police Magistrate; or
(*e*) a Stipendary Magistrate;

section 787 no longer applies, and he may, on summary trial in Ontario, be sentenced to the same punishment as might be imposed on a trial before the General Sessions on indictment, viz.:

(1) In the special cases referred to in sections 319-355 inclusive, the punishment therein specified.
(2) Theft (not over $200) in cases not otherwise provided for, and where there is no charge of a previous conviction for theft—seven years.
(3) Theft as above, where offender has been previously convicted *of theft*—ten years.
(4) Theft (over $200), the above punishments and two years additional. (Cr. Code, sec. 357.)
(5) Receiving—fourteen years. (Cr. Code, sec. 314.)
(6) Obtaining money or property by false pretences—three years. (Cr. Code, sec. 359.)
(7) Attempt to commit theft—one-half of the term to which a person who actually committed the theft would be liable to be sentenced. (Cr. Code, sec. 529.)

*Aggravated assault.*]—In order to constitute "grievous bodily harm" it is not necessary that the injury should be either permanent or dangerous; and an injury is within the meaning of the term if it be such as seriously to interfere with comfort or health. R. v. Archibald (1898), 4 Can. Cr. Cas. 159 (Ont.); R. v. Ashman (1858), 1 F. & F. 88; R. v. Clarence (1888), 22 Q.B.D. 23.

On a charge under sec. 783 (*c*) of aggravated assault with grievous bodily harm before a police magistrate in Ontario trying the case on the consent of the accused to be tried summarily, the sentence which the magistrate may impose is not limited to six months' imprisonment, but may be as great as can be imposed therefor on a trial on indictment at General Sessions. R. v. Archibald (1898), 4 Can. Cr. Cas. 159 (Ont.).

A summary conviction for "assault occasioning bodily harm" and the payment of the fine imposed has been held in Ontario not to bar a civil action. Nevills v. Ballard (1897), 1 Can. Cr. Cas. 434; but in the Province of Quebec it was held by Archibald, J., that upon a conviction by a magistrate

under sec. 783, on a charge of having committed an "aggravated assault by unlawfully and maliciously inflicting upon another person grievous bodily harm," the civil action was barred on payment of the fine. Hardigan v. Graham (1897), 1 Can. Cr. Cas. 437.

If the complaint is not preferred by or on behalf of the person aggrieved, but by a constable of his own motion, and the person assaulted merely gives evidence at the hearing, his right of action will not be barred. Miller v. Lea (1898), 2 Can. Cr. Cas. 282 (Ont.).

*Disorderly house cases.*]—The term "disorderly house" in 783 (*f*) is held in British Columbia to be governed by the statutory definition of that term given in Cr. Code 198; and upon a charge under secs. 783 and 784 of keeping a 'disorderly house' in that the accused is alleged to be keeping a gaming house, the police magistrate was held to have jurisdiction to hear and determine the charge summarily without the consent of the accused. Ex p. John Cook, 3 Can. Cr. Cas. 72, 4 B.C.R. 18, per Drake, J.

But in R. v. France, 1 Can. Cr. Cas. 321, decided by the Court of Queen's Bench for Quebec (appeal side), it was held that it is governed by the rule "noscitur a sociis," and is therefore restricted to houses of the nature and kind of a house of ill-fame or bawdy house and, that it is immaterial whether the generic term precedes or follows the specific terms which are used: in either case the general word must take its meaning, and be presumed to embrace only things or persons of the kind designated in the specific words.

A prosecution before a magistrate for the offence of being an inmate of a house of ill-fame is none the less a "summary trial" proceeding, although the magistrate's jurisdiction is absolute and is exercisable without the consent of the accused. R. v. Roberts (1901), 4 Can. Cr. Cas. 253 (N.S.). In the same case it was held that the extended jurisdiction by which magistrates and certain other functionaries are empowered to summarily try that and other offences under Part LV., and to impose imprisonment up to six months and a fine not exceeding, with costs, $100, is not restricted as to the offence of being an inmate of a house of ill-fame by the fact that, if the accused had been prosecuted before such magistrate in his capacity of justice of the peace, under the "summary convictions" clauses for the similar offence of being a "vagrant" by reason of being such inmate, the fine could not have exceeded $50 in addition to six months' imprisonment. Ritchie, J. Sed quære.

It has been held in Nova Scotia that an information charging the accused, for that she was "the keeper of a disorderly house, that is to say, a *common* bawdy house," must be taken to be a charge under sec. 198, for the indictable offence of keeping a common bawdy house, and is not cognizable under the special jurisdiction given to magistrates by sec. 783 (*f*), because not laid in the exact language of the latter section; and that such charge could not be summarily tried by a city stipendiary magistrate without the consent of the accused under sec. 785 (amendment of 1900). R. v. Keeping (1901), 4 Can. Cr. Cas. 494 (N.S.).

But there does not seem to be any real distinction between a "bawdy house" and a "common bawdy house," as those terms are used in the Code, and it is submitted that the decision in Keeping's Case was not well founded in that respect.

There may be a joint conviction against 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. R. v. Warren (1888), 16 Ont. R. 590.

A conviction for keeping a house of ill-fame was held defective in R. v. Cyr (1887), 12 Ont. Pr. R. 24, per O'Connor, J., because it did not contain an adjudication of forfeiture of the fine imposed, as well as an adjudication that the prisoner pay such sum.

On a charge of being an inmate of a bawdy house it is competent for accused or her counsel to consent that the evidence which had been given before the magistrate upon a concluded trial of another person for keeping the bawdy house, should be read as evidence in the case. R. v. St. Clair (1900), 3 Can Cr. Cas. 551 (Ont. C.A.).

*Indecent assault.*]—Where the girl alleged to have been indecently assaulted makes a complaint not of her own initiative but in answer to a question, the particulars of such complaint although otherwise admissible within the rule in R. v. Lillyman, [1896] 2 Q.B. 167, cannot be given in evidence; a conversation is not a complaint. R. v. Merry (1900), 19 Cox C.C. 442, per Bruce, J., at the Worcester Assizes.

**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 ill-fame 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 seafearing 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.

*(Amendments of 1895 and 1900.)*

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.

There is no right of appeal from a conviction by a police magistrate under this section although the offence is one which the magistrate may try thereunder without the consent of the accused. R. v. Nixon (1900), 5 Can. Cr. Cas. 32 (Ont.).

Where the jurisdiction of the magistrate to try under Part LV. is absolute and not dependent upon the consent of the accused it is probably subject to be set aside on motion on proper grounds. R. v. St. Clair (1900), 3 Can. Cr. Cas. 551 (C.A.).

Such a conviction, although a record or matter of record in the sense in which all summary convictions by justices are so (Paley on Convictions, 5th ed., pp. 157, 158), is of a different character from the judgment of the court of record expressly constituted as such under Part LIV. of the Code, and may be enquired into upon habeas corpus and certiorari in the same manner and to the same extent as any other summary conviction, notwithstanding sec. 798, which says that such a conviction shall have the same effect as a conviction upon an indictment for the same offence. Ibid; Cremetti v. Crom (1879), 4 Q.B.D. 225; In re Frankland (1872), L.R. 8 Q.B. 18; Best v. Pembroke (1873), L.R. 8 Q.B. 363.

Sub-sec. 3 making the jurisdiction of the magistrate under Part LV. absolute in British Columbia, Prince Edward Island, etc., without the consent of the accused, with certain exceptions, has not the effect of preventing an appeal when two justices of the peace exercise the powers of a magistrate under sec. 782 (*a*3) and (*a*5). R. v. Wirth, 1 Can. Cr. Cas. 231 (B.C.).

*(Amendment of 1900.)*

**785. Magistrate may try with consent.**—If any person is charged in the Province of Ontario before a public 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.

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.

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.

The only change made by the amendment was in the addition of subsecs. 2 to 3. Section 785 formerly applied to Ontario only, and it is by this amendment extended to cities and incorporated towns elsewhere.

Sub-section 3 is intended to make it clear that where a prisoner elects to be tried under this section the punishment, if he is found guilty, is to be the same as if he were tried otherwise. Sections 787 and 788 provide for the punishment by the magistrate in ordinary cases under the Summary Trials Part. Section 785 declares that in cases under that section a prisoner may be sentenced to the same punishment to which he would have been liable if he had been tried before the Court of General Sessions of the Peace, and at such general sessions a greater punishment might by law be inflicted than where the magistrate convicts under secs. 787 and 788. A doubt having been expressed whether, notwithstanding the terms of the former sec. 785, the punishment to be imposed thereunder was not limited by secs. 787 and 788, it was thought expedient to remove any such possible doubt. See R. v. Conlin (Ont.), 1 Can. Cr. Cas., 41.

A police magistrate trying a prisoner by virtue of this section with his own consent for an offence triable at a court of general sessions, is not a "court of record" within the meaning of the Ontario Habeas Corpus Act. R. v. Gibson (1898), 2 Can. Cr. Cas. 302.

**786. Proceedings on arraignment of accused.**—Whenever the magistrate before whom any person is charged as aforesaid, proposes 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.

A conviction on a summary trial to which the consent of the accused is required will be quashed if the magistrate fail to inform the prisoner of his right to be tried by a jury. R. v. Cockshott, [1898] 1 Q.B. 582. In that case, after the trial had proceeded, the prisoner pleaded guilty and was convicted; but the omission to give him the notice required by the Imperial Statute, 42 & 43 Vict., ch. 49, sec. 17, sub-sec. 2, corresponding with Code sec. 786, was held to be fatal, it being considered immaterial whether the prisoner did or did not know of his right to be tried by a jury, or whether or not the court knew before the proceedings commenced that the prisoner intended to plead guilty.

If after election of summary trial the charge is amended so as to charge a different or distinct offence the accused must be again asked to elect. R. v. Woods (1898), 19 Can. L.T. 18.

The defendant on being charged before a stipendiary magistrate with felonious assault, pleaded guilty to a common assault, but denied the more serious offence. The magistrate, without having asked the defendant whether he consented to be tried before him or desired a jury, proceeded to try and convicted the defendant on the charge of the felonious assault. It was held that the defendant was entitled to be informed of his right to trial by a jury, and that the conviction must be quashed. R. v. Hogarth (1893), 24 O.R. 60.

Where a statute requires something to be done in order to give a magistrate jurisdiction, it is advisable to shew, on the face of the proceedings, a strict compliance with such direction. Ibid.

The magistrate must take down the depositions of the witnesses both for the prosecution and for the defence. Sec. 801. The provision of sec. 590 (7) for the taking of the evidence in shorthand by a stenographer does not apply to proceedings under Part LV. Sec. 808. And quære whether the depositions as taken down by the magistrate's clerk or otherwise than by the magistrate himself noting the evidence, can be properly authenticated.

The provisions of sec. 144 fixing the punishment for which anyone guilty of obstructing a peace officer shall be liable "on summary conviction," are controlled by secs. 783 and 786, and the charge cannot be summarily tried by a magistrate except with the consent of the accused given in conformity with sec. 786. R. v. Crossen (1899), 3 Can. Cr. Cas. 152 (Man.).

**787. Punishment for certain offences under this Part.**—In the case of an offence charged under paragraph (*a*) or (*b*) of section 783, 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.

By the Code Amendment Act of 1900, which came in force January 1, 1901, it was declared that secs. 787 and 788 do not extend to or apply to cases tried under sec. 785. The decision to the contrary in R. v. Randolph (1900), 4 Can. Cr. Cas. 165, no longer applies.

A conviction which declares that the convicted person is condemned to be imprisoned during the space of six months to be computed from the day of her arrival as a prisoner in the common gaol of the district is sufficient, and the day from which the term of the sentence is to be commuted is thereby sufficiently expressed. R. v. Bougie (1899), 3 Can. Cr. Cas. 487 (Que.).

Where the limit of punishment fixed by statute in respect of an offence is "imprisonment not exceeding one month," a sentence for a term of thirty days commencing in the month of February, and therefore exceeding a calendar month, is invalid. R. v. Lee (1901), 4 Can. Cr. Cas. 416, per McDougall, Co. J.

**788. Punishment for certain other offences.**—In any case summarily tried under paragraph (*c*), (*d*), (*e*), (*f*), (*g*), (*h*) or (*i*) of section 783, 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 applies to authorize six months' imprisonment in default of payment of a fine only in cases in which a fine and imprisonment are conjointly imposed in the first instance. R. v. Stafford (1898), 1 Can. Cr. Cas. 239 (N.S.).

Section 955 (6) directs that imprisonment in a common gaol awarded under this section shall be with or without hard labour in the discretion of the person passing sentence.

A fine under this section must not be in the full sum allowed for fine and costs; and where a fine of $100 is imposed the conviction should disclose that there were no costs. R. v. Perry (1899), 35 C.L.J. 174 (N.B.); R. v. Cyr, 12 Ont. P.R. 24.

A conviction whereby it is adjudged that, in addition to the imprisonment ordered, the accused do "pay a fine of $5 to be paid and applied according to law," is invalid for want of any adjudication of forfeiture of the fine, and the accused imprisoned under a warrant of commitment based thereon should be discharged upon habeas corpus. R. v. Crowell (1897), 2 Can. Cr. Cas. 34; R. v. Burtress (1900), 3 Can. Cr. Cas. 536 (N.S.).

On a charge under sec. 783 (*c*) of aggravated assault with grievous bodily harm, a police magistrate in Ontario trying the case on the consent of the accused to be tried summarily, the sentence which the magistrate may impose is not limited to six months imprisonment, but may be as great as can be imposed therefor on a trial on indictment at General Sessions. R. v. Archibald (1898), 4 Can. Cr. Cas. 159 (Ont.).

By a part of the Criminal Code Amendment Act of 1900, now embodied in sec. 785 as sub-sec. (3), any doubt as to the application of Code sec. 788, to summary trials by police or stipendiary magistrates in Ontario under sec. 785 was removed, and the law declared in accordance with the decision in R. v. Archibald.

Before the amendment it had been held in R. v. Randolph (1900), 4 Can. Cr. Cas. 165, per Ferguson, J., that a person accused of the theft of a sum

of money less than $10, not charged as a "stealing from the person" (Cr. Code, sec. 344), was liable, on his summary trial with his own consent before a police magistrate, to no greater term of imprisonment than six months (Cr. Code, sec. 787), but that decision is no longer applicable.

A magistrate summarily trying, with the consent of the accused, a charge of aggravated assault has jurisdiction to award costs against the accused as well as to impose both fine and imprisonment. R. v. Burtress (1900), 3 Can. Cr. Cas. (N.S.).

It has been held in Nova Scotia by Ritchie, J., that the extended jurisdiction by which magistrates and certain other functionaries are empowered to summarily try that and other offences under part LV. of the Code, and to impose imprisonment up to six months and a fine not exceeding, with costs, $100, is not restricted as to the offence of being an *inmate* of a house of ill-fame by the fact that, if the accused had been prosecuted before such magistrate in his capacity of justice of the peace, under the "summary convictions" clauses for the similar offence of being a "vagrant" by reason of being such inmate, the fine could not have exceeded $50 in addition to six months' imprisonment. R. v. Roberts (1901), 4 Can. Cr. Cas. 253 (N.S.). Sed quære; see 4 Can. Cr. Cas. 499.

*(Amendment of 1900.)*

**789. False pretences, theft or receiving.**—When any person is charged before a magistrate with theft or with having obtained property by false pretences, 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, sub-section 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.

One amendment consists in striking out the words "and may be adequately punished by virtue of the powers conferred by this Part," which in the original followed the words "appears to him to be one which may properly be disposed of in a summary way." That section gave the magistrate, under certain circumstances, jurisdiction to try theft, etc., where the value of the property exceeded $10, if he thought the offence might be adequately punished under this Part. The words struck out were considered to be no longer necessary and as liable to mislead, because since the passing of the Act of 52 V., c. 46, the magistrate may in such cases impose the same punishment as if the accused had been convicted upon indictment.

The latter part of the section formerly read "unless such person is one who can be tried summarily without his consent" and in this the words "under section 784, sub-section 2" are now inserted.

*(Amendment of 1900.)*

**790. Punishment on plea of guilty.**—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 gaol to await his trial in the usual course.

The amendment consists in the substitution of the words "he shall be remanded to gaol to await his trial in the usual course" for "the magistrate shall proceed as provided in sec. 786." The section formerly provided that if a person charged under the preceding section with theft, etc., where the value of the property *exceeds* $10, pleads not guilty, the magistrate shall proceed as provided in sec. 786. So proceeding, he could, in case of conviction, impose a sentence of only six months' imprisonment (sec. 787), while if the prisoner pleaded guilty, he could, under sec. 790, impose the same punishment as if the case had been tried in the ordinary way. The amendment does away with this anomaly. It takes away the jurisdiction of the magistrate to try such cases at all where the prisoner says he is not guilty. This makes the law as it was up to the time the Code was passed. It was thought best that in such serious cases as may arise under these sections, the magistrate should have jurisdiction to try only where the accused pleads guilty. It will be seen, however, that so far as magistrates in cities and towns are concerned, this Act largely extends their jurisdiction, making it the same in all the provinces as that of magistrates in Ontario under sec. 785.

The direction in this section that the accused shall be "remanded to gaol to await his trial" does not take away the right of the accused to apply for and be granted bail. Senate Debates 1899, p. 547.

**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 magistrate from trying the offender summarily if he thinks fit so to do. R.S.C. c. 176, s. 14.

Where the offence is one which may be summarily tried by a police magistrate on consent, and the accused has consented and made his defence to the charge and been acquitted, it is no longer competent for the magistrate to turn the proceedings into a preliminary inquiry and to accept the prosecutor's recognizance to prefer an indictment. R. v. Burns (No. 2) (1901), 4 Can. Cr. Cas. 330 (Ont.).

**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.

The police are not officers of the Crown, and have no right to take over a prosecution not instituted by them, nor has a police officer any right to act as an advocate except where he is the informant. Webb v. Catchlove, 50 J.P. 795.

*Full answer and defence.*]—See note to sec. 659 at p. 580.

**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.

As to excluding the public from the court room in certain cases, see sec. 550A.

**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 the 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.

See also secs. 581-585.

**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.

To raise the question whether proper service has been made and jurisdiction over the person acquired, certiorari is an appropriate remedy. R. v. Smith L.R. (1875), 10 Q.B. 604. Appeal is not an adequate remedy, because the defendant, in order to assert his appeal, gives the court jurisdiction over his person. Re Ruggles (1902), 5 Can. Cr. Cas. 163 (N.S.); Rand v. Rockwell, 2 N.S.D. 199.

In R. v. Farmer, [1892] 1 Q.B. 637, a certiorari was granted because service of a summons was made at a house which the defendant had left for a residence in America, the former not being "his last place of abode." Lord Esher, M.R., said: "If there was no service of the summons, the magistrate had no jurisdiction to make an order on it."

See also sec. 562.

**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.

A summary conviction by a magistrate in respect of a charge under Part LV. of the Code, of an indictable offence which the magistrate has absolute jurisdiction to try without the consent of the accused, is subject to be enquired into upon habeas corpus and certiorari proceedings, notwithstanding this provision. R. v. St. Clair (1900), 3 Can. Cr. Cas. 551 (Ont. C.A.).

**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.

This section, formerly sec. 45 of 32 & 33 Vict., ch. 20, was held not to be ultra vires as interfering with civil rights. Wilson v. Codyre (1886), 26 N.B.R. 516. That was an action of damages for assault and the defendant pleaded that an information had been laid against him by plaintiff before a magistrate in respect to the trespass declared on, and that the magistrate, after hearing, dismissed the information and gave the defendant a certificate of dismissal, whereby, and by force of the statute, he was released from the action. It was held on demurrer that the plea was insufficient in not stating that the complainant had prayed the magistrate to proceed summarily. Ibid.

**800. Proceedings 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.

This section does not validate a defective commitment if it recites a conviction which is on its face invalid. R. v. Gibson (1898), 2 Can. Cr. Cas. 302, per Rose, J.

A summary conviction by a magistrate in respect of a charge in which he has jurisdiction only upon the consent of the accused to a summary trial, is not invalid merely because it omits to state that the accused so consented, if in fact the consent was given. The omission to state the consent in the conviction is a "want of form" which is cured by this section. R. v. Burtress (1900), 3 Can. Cr. Cas. 536 (N.S.).

Where a conviction by a police magistrate on a "summary trial" of the accused under Part 55 imposes a longer term of imprisonment than is authorized by law, the warrant of commitment cannot be amended, as in such case there is not "a valid conviction to sustain the same." R. v. Randolph (1900), 4 Can. Cr. Cas. 165 (Ont.).

*(Amendments of 1900 and 1901.)*

**801. Transmitting depositions, etc.** 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 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.

The former provision was that the records were to be sent to the next court of General or Quarter Sessions. The amendment is adapted from sec. 822 in Part LVI, "Juvenile Offenders." A former sub-section (2) which excepted from the enactment police magistrates, etc. (1900, ch. 46), was repealed as of January 1, 1901, by the Code Amendment Act of 1901, 1 Edw. VII., ch. 42.

In the Territories it was held by [Rouleau, J., that if a conviction has been filed by the magistrate under sec. 801 in a court of superior criminal jurisdiction, a motion may be made to quash the same without the necessity of a writ of certiorari. R. v. Asheroft (1899), 2 Can. Cr. Cas. 385; but in R. v. Monaghan (1897), 2 Can. Cr. Cas. 488, the full court of the Territories was equally divided on the point.

**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 pretences, 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 783, 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 586; 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 587, to take on the remand of a person accused, conditioned for his appearance before a magistrate, 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 prima 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.**—Repealed 1900.

**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; 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.

FORM QQ.—

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 the 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.)*

FORM RR.—

CONVICTION UPON A PLEA OF GUILTY.

Canada,
County of , }
Province 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.)*

FORM SS.—

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.)*

The conviction should be framed in such terms as will shew upon the face of it that what was charged came under some statute which gives power to convict summarily. R. v. Clark (1862), 21 U.C.Q.B. 552.

**808. Certain provisions not applicable to this Part**—The provisions of this Act relating to preliminary inquiries before justices, except as mentioned in sections 804 and 805 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.

This section prevents the application of any of the provisions as to appeals from summary convictions (secs. 879-884), to convictions under Part LV. (secs. 782-808). An appeal, therefore, does not lie from the decision of a police magistrate who tries a charge of theft summarily with the consent of the accused. R. v. Egan (1896), 1 Can. Cr. Cas. 112 (Man.); with the exception of the special appeal from two justices now given by the amendment to sec. 782 (*a* 5).

Under somewhat similar sections of the English Summary Jurisdiction Act of 1879, the practice was that there should be no appeal. In R. v. Justices of London (1892), 17 Cox C.C., 526, 528, Lawrance, J., says the result is "that the person who consents to be dealt with summarily, makes a bargain with the magistrate that he will leave the decision of the case to him, instead of having the case tried by a jury."

Where a prosecution for being an inmate of a house of ill-fame has taken place before a police magistrate under section 783, and not under the part known as the Vagrancy Act, an appeal is precluded. R. v. Nixon (1900), 5 Can. Cr. Cas. 33 (Ont.).

PART LVI.

## TRIAL OF JUVENILE OFFENDERS FOR INDICTABLE OFFENCES.

SECT.



---

**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 Gaspe, 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.

If the charge be of an offence over which, if the offence charged be true in fact, the magistrate has jurisdiction, the magistrate's jurisdiction cannot be made to depend upon the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the corpus delicti brought under investigation. Cave v. Mountain, 1 M. & G. 257. And on a habeas corpus to which a proper commitment in execution is returned, the court never enters into the question whether the magistrate has drawn the right conclusion from the evidence, when there was evidence. R. v. Munro (1864), 24 U.C.Q.B. 44.

**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.

The power of determining the age or apparent age of the accused is given exclusively to the justice; and a conviction will not be held bad for the omission to state that the accused is under the age of sixteen years. R. v. Quinn (1900), 36 Can Law Jour. 644 (N.S.).

**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 preceding 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 provision 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.

*Or a parent or guardian.*]—As to the trial of juveniles see secs. 550 and 550A.

**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 committment 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 been duly summoned, as hereinafter mentioned, or bound by recognizance, as aforesaid, either of the justices before whom 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 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.

**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, or to the like effect, under the hands of such justices, stating the fact of such dismissal. R.S.C. c. 177, s. 14.

FORM TT.—

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 at , in the said , 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.]

**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, or in any other form to the same effect, and the conviction shall be good and effectual to all intents and purposes.

2. No conviction shall be quashed for want of form, or 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.

FORM UU.—

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.]

Defendant was convicted before the stipendiary magistrate of the City of Halifax of the offence of stealing the sum of $30 and was sentenced to be imprisoned for the term of three years in the Halifax Industrial School, a reformatory for boys of the Protestant faith. His discharge was sought upon habeas corpus on the grounds that the conviction did not shew that defendant was a Protestant or that he was under the age of sixteen years. The application was refused, the court holding that the intention of sec. 820 was to dispense with recitals and averments in the particulars mentioned and that the words "shall be good and effectual to all intents and purposes" might be regarded as the equivalent of a legislative declaration that it should not be necessary to refer in the conviction to the age of the party, or to the justice's opinion on that subject. R. v. Quinn (1900), 36 Can. Law Jour. 644.

**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.

This section is similar to sec. 799 in Part LV. as to summary trials. See note to sec. 799.

**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 attended 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 committed, 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.

See also secs. 837 and 838.

*Crown witnesses in Ontario.*]—By R.S.O. 1897, c. 105, it is provided that in case of a prosecution for treason or felony (*i.e.* an offence which would have been designated a felony before the Code, see sec. 535), or any offence which is punishable by imprisonment only, or any offence for which whipping may be imposed, the judge who holds the court before which the prosecution or trial for the offence takes place, may grant to any one who attends on recognizance, or subpoena, or on request of the Crown Counsel, to give evidence, or who gives evidence on the part of the Crown, an order for payment of such sum of money as to the judge seems reasonable and sufficient to compensate the witness for his costs and charges in attending as such witness; but such sum shall not exceed the amount then payable to the like witnesses in civil cases in the High Court, R.S.O. c. 105, s. 3. But this is not to be construed as entitling a witness in any case to which the Act applies to require payment of any sum of money previous to the determination at such court of the prosecution or trial at which he attends as a witness. Ibid., sec. 17.

Where no bill of indictment has been preferred, or where the trial has not been proceeded with, the court may make a similar order in favour of any person who, in the opinion of the court, bona fide attended the court in obedience to a recognizance or subpœna. Ibid., sec. 4.

The order is not to be made except on a certificate by the counsel, if any, for the Crown in the case, and by the County Crown Attorney (unless the County Crown Attorney is also the counsel for the Crown, and certifies as such); and the certificate shall contain the particulars necessary in the affidavit required in civil cases to entitle a party to disbursements to witnesses and shall be to the like effect; but the court may require further evidence, and shall have a discretion to grant or refuse the order. If the County Crown Attorney is absent, and for this or for some other reason some other person is acting for him, the certificate of the latter may be given instead of the certificate of the County Crown Attorney. Ibid., sec. 5.

The order may embrace any number of witnesses and any number of cases, or may be for one witness only. Ibid., sec. 6.

Every order for payment shall be forthwith made out and delivered by the proper officer of the court, and shall be directed to the treasurer of the county in which the offence was committed, or was supposed to have been committed; or if the offence was committed or was supposed to have been committed in a city, or in a town separated for municipal purposes from the county, the order shall be directed to the treasurer of the city or town. Ibid., sec. 7.

In case the trial takes place in a county other than the county in which the offence was committed, the treasurer of the county in which the trial takes place, if applied to by the witnesses, shall forthwith pay the money in the first instance out of the funds of the municipality in his hands, and shall forthwith be reimbursed by the treasurer to whom the order is directed. Ibid., sec. 9.

In case witness fees paid under the provisions of this Act are, by virtue of the judgment of the court, afterwards recovered from the prosecutor or

defendant, the same shall be repaid to the municipality, and one-third accounted for by the municipality to the Crown. Ibid., sec. 13.

*Criminal justice accounts in Ontario.*]—The expenses of the administration of justice in criminal matters in the Province of Ontario and the amount of fees payable to public officers in respect thereof out of county or other public funds are regulated by the Ontario Statutes. R.S.O. 1897, ch. 101 to 104, inclusive.

**825. Proceedings when penalty imposed on accused is not paid.**—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 justice 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.**—Repealed 1900.

**827. Application of fines.**—Repealed 1900.

**828. Costs to be certified by justice.**—The amount of expenses of attending before the justices and the compensation for trouble and loss of time therein, and the 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 authorized 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 not affected.**—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.

PART LVII.

## COSTS AND PECUNIARY COMPENSATION—RESTITUTION OF PROPERTY.

SECT.



---

*(Amendment of 1900.)*

**832. Costs.**—Any court by which any judge under Part LIV., or magistrate under Part LV., 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 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 so 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.

**833. Costs in libel case.**—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. 174, ss. 153 and 154.

The mere fact that the Crown prosecutes in this country by a counsel it appoints for the purpose will not necessarily make it a proceeding not carried on by or for a private prosecutor, within the proper meaning of the statute, otherwise every criminal prosecution in Ontario would be a Crown prosecution, and this enactment be of no kind of use. Adam Wilson, J., in R. v. Patteson (1875), 36 U.C.Q.B. 129, 150.

See also note to sec. 669.

**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 832, 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.

*Taxation of costs.*]—The person filling the office of Commissioner of the Dominion Police has, as such, no legal capacity to represent and act on behalf of the Crown, and in laying an information in which he desig-

nated himself as such Commissioner of the Dominion Police he acted as a private individual and not as the legal representative of the Crown, although he declared that he was acting as such commissioner on behalf of the Sovereign. The accused having been discharged, and 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 bill of indictment, the commissioner was held to be personally liable under sec. 595 for the costs incurred by the accused on the preliminary enquiry and before the Court of Queen's Bench. R. v. St. Louis (1897), 1 Can. Cr. Cas. 141 (Que.).

The costs allowed were not the fees and disbursements paid by the accused to his counsel, such payment being a matter between client and counsel, but such costs as were held by analogy with the costs allowed in civil suits to be costs recoverable from a losing party. Such costs should be taxed according to a tariff made for criminal proceedings, and in the absence of such tariff they are to be taxed in the discretion of the judge, by implication, according to the spirit of the provisions contained in this section. Ibid.

The inference from the last mentioned case is that sec. 835 applies only to costs awarded under sections 832 to 834 inclusive, the only sections preceding it in part LVII.

But quære whether the words "foregoing provisions" are not in themselves wide enough to include all preceding sections of the Code, instead of being applied to the preceding sections of part LVII. alone.

The word "foregoing" is synonymous with the word "preceding" (Century Dict.); and the latter word is not confined to the next preceding sections. Attorney-General v. Temple (1896), 29 N.S.R. 279.

In all proceedings under these rules the party entitled to costs shall tax the same according to the scale in force in the Supreme Court, and if no provision is made for work done under these rules, then the taxing officer shall allow such reasonable amount according to scale in force, or as near thereto as circumstances will admit of. B.C. Rule 61.

**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 if 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 832. 33-34 V. (U.K.) c. 23, s. 4.

*Compensation or restitution.*]—See note to sec. 838.

**837. Compensation to bona 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.

3. If it appears before any award or order is made, that any valuable security has been bona fide paid or discharged by any person liable to the payment thereof, or being a negotiable instrument, has been bona 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 it 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.

*(Amendment of 1893.)*

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 320 or 363 of this Act. R.S.C. c. 174, s. 250.

*Awarding restitution of stolen property.*]—To entitle the aggrieved party to an order for the restitution to him of money found on the prisoner convicted of stealing money from the person, proof must be adduced identifying the money so found as the money which was stolen. R. v. Haverstock (1901), 5 Can. Cr. Cas. 113, per Wallace, Co.J., at Halifax.

Where the accused was convicted of the theft of bank notes but there was no evidence to identify the same with the bank notes found on and taken from the prisoner at the time of arrest, and no application was made immediately after the conviction for an order of compensation to the prosecutor for his loss, an order may be properly made ex parte for the restoration to the prisoner of the money so taken from him. Ibid.

Where it is impossible to identify the money found on the prisoner as the stolen money, and the prisoner claims the money as his own, the proper course for the prosecutor to take is to apply, under sec. 836, immediately after the conviction of the prisoner, for compensation for loss of property, and thus obtain an order that the money of the prisoner shall be paid to him to such extent as will compensate him for the loss sustained.

The summary power of the court under this section exists only where the prisoner is convicted. The criminal court had by the common law no power to order restitution to the owner of the property where the prisoner is acquitted. R. v. McIntyre (1877), 2 P.E.I. 154, 157. And it does not extend in cases of conviction to property other than that in respect of which the charge was brought. R. v. Corporation of London (1858), E. B. & E. 509; R. v. Pierce (1858), Bell C.C. 235.

Current coin stolen and passed as currency to innocent persons is not subject to restitution. Moss v. Hancock, [1899] 2 Q.B. 111. But a coin which was sold by the thief as an article of vertu and which had not been passed into circulation as current coin may be ordered to be returned to the owner in like manner as other stolen property. Ibid.

Where money taken from a prisoner on his arrest is admitted by the Crown authorities not to be required for the purpose of evidence at the trial the court may order it to be restored to the prisoner. R. v. Harris, 1 B.C.R., pt. 1, p. 255.

*Property.*]—The expression property includes 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. Sec. 3 (v).

PART LVIII.

## SUMMARY CONVICTIONS.

---

**839. Interpretation.**—In this part unless the context otherwise requires—

(*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 879;

(*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.

*Disqualification of justices.*]—A justice of the peace is not disqualified by the fact that he and the counsel for the prosecution are partners in the business of attorneys provided they have no joint interest in the fees earned by the counsel for the prosecution or in any fees payable to the justice on the trial of the information. Neither is it a ground of disqualification that the justice was appointed and paid by the town council at whose instance the complaint was made and the prosecution carried on, his salary being a fixed sum, not dependent on the amount of fines collected. R. v. Grimmer, in Re Macdonald (1886), 25 N.B.R. 424.

Every person having a personal interest in any litigation, or having a direct or indirect motive for desiring a particular decision to be come to, should abstain from putting himself in such a position as that unconsciously to himself a bias adverse to the due administration of justice might take possession of his mind. R. v. Justices of Great Yarmouth (1881), L.R. 8 Q.B.D. 525; R. v. Chapman (1882), 1 Ont. R. 582.

A magistrate who is engaged in the same kind of business as a trader prosecuted under a transient traders' license law is thereby disqualified from adjudicating upon the charge. R. v. Leeson (1901), 5 Can. Cr. Cas. 184 (Ont.).

Defendant was convicted of a breach of a by-law in selling land by auction without license; two of the four convicting justices were licensed auctioneers for the county and persisted in sitting after objection taken on account of interest, though the case might have been disposed of by one justice. It was held that they were indirectly interested in the result of the case, in so far as it was to their interest either to limit the number of persons acting as auctioneers in the town, or to confine the business of selling lands by auction to persons holding, as they did, auctioneer's licenses, and the conviction was quashed with costs against the two justices. R. v. Chapman (1882), 1 Ont. R. 582.

The magistrate must not unite in his own person the functions of judge and prosecutor. Monson's Case, [1894] 1 Q.B. 750.

If a prosecution be brought for the benefit of a small class of privileged persons, of whom the magistrate is one, the conviction will be quashed on the ground of the pecuniary interest of the justice. R. v. Huggins, [1895] 1 Q.B. 563. But if the ordinary members of the society or association on whose behalf the prosecution is brought have no control over or responsibility for any prosecution brought by the society, the fact that the magistrate is one of the ordinary members will not suffice to disqualify him. Allinson

v. General Council, [1894] 1 Q.B. 750. So where a prosecution was brought at the instance of the Incorporated Law Society, and a conviction obtained for falsely pretending to be a solicitor, but no part of the fine was payable to the society, it was held that the fact of one of the magistrates being a member of the society furnished no reasonable ground for supposing that he was biased, nor did it constitute him a party on whose behalf the prosecution was taken or give him a pecuniary interest therein, although the society was under the liability of having an order for costs made against it. R. v. Burton, [1897] 2 Q.B. 468; R. v. Mayor of Deal, 45 L.T. 439.

It has been held by the Supreme Court of New Brunswick that a stipendiary magistrate is not disqualified from trying cases brought under the Canada Temperance Act, by reason of his being a ratepayer of the town into whose treasury the fines collected under the Act were payable. Ex parte Gorman (1898), 4 Can. Cr. Cas. 305, 34 C.L.J. 175; Ex parte Driscoll, 27 N.B.R. 216, followed; Town of Moncton v. Hebert (1897), (N.B.), not reported, overruled.

That one of the convicting magistrates held the office of Liquor License Inspector in an adjoining district to that in which he adjudicated upon a charge under the Liquor License Act (N.B.) is no evidence of bias. Ex parte Michaud (1896), 32 C.L.J. 779.

The fact that a qui tam action is pending against the magistrate at the suit of the father of the accused is not a sufficient ground of bias. Ex parte Thomas Gallagher (1897), 33 C.L.J. 547.

The relationship, subsisting because of being married to sisters, between the magistrate and the chief inspector of licenses, who was the informant and prosecutor in the proceedings in which the conviction was made, will not disqualify the magistrate from hearing the case. R. v. Major (1897), 33 C.L.J. 162 (S.C.N.S.).

Where one of the magistrates trying several connected charges of assault was married to a first cousin of one of the complainants, and the other complainants were acting as servants of the related complainant in the matter in which the assault arose, all the convictions were set aside on the ground of affinity. Campbell v. McIntosh (1872), 1 P.E.I. Rep. 423, per Hensley, J.

The justice of the peace before whom the information was laid, and who issued the summons was alleged to be interested; but the hearing took place before, and the adjudication and conviction were made by another justice whose qualification was not attacked, while the defendant pleaded to the charge and raised no objection to the validity of the proceedings until the application for a certiorari: it was held that the conviction could not be impugned. (R. v. Gibbon, 6 Q.B.D. 168, distinguished); R. v. Stone (1892), 23 Ont. R. 46.

Where the defendant's wife was the widow of the committing magistrate's deceased son, it was held that there was no relationship by affinity between the magistrate and the defendant to disqualify the magistrate from hearing the case. Ex parte William Wallace (1887), 25 N.B.R. 593.

A magistrate is not disqualified from trying a case by reason of the fact that his salary is paid out of a municipal fund largely made up of fines imposed for the infraction of the statute under which the charge is laid: nor because of his being a ratepayer of the municipality to which, in case of conviction, the fine would be payable. Ex parte Gorman (1898), 4 Can. Cr. Cas. 305 (N.B.); R. v. Fleming, 27 Ont. R. 122; Ex parte McCoy (1896), 1 Can. Cr. Cas. 410 (N.B.); R. v. Hart (1887), 2 B.C.R. 264.

The fact that a convicting justice for an offence against the provisions of the Liquor License Act, 1896, is an inspector under the Act, but not for the district where the offence is alleged to have been committed, is not such an interest as to disqualify him. Ex parte Michaud (1896), 4 Can. Cr. Cas. 569 (N.B.).

When the magistrate's position would be a good ground of challenge to a juror for favour, he is disqualified to act. Ex parte Wallace, 27 N.B.R. 174; Ex parte Jones, 27 N.B.R. 552; Ex parte Hannah Gallagher (1898), 4 Can. Cr. Cas. 486 (N.B.).

It is sufficient to shew that the magistrate might have been influenced, and it need not appear that he was in fact influenced. R. v. Milledge, 4 Q.B.D. 332; R. v. Gaisford, [1892] 1 Q.B. 383.

A magistrate is disqualified from trying an information for an offence punishable on summary conviction where there is a bona fide action pending against him brought by the husband of the accused for alleged malicious conduct as a judicial officer and for assault. Ex parte Hannah Gallagher (1898), 4 Can. Cr. Cas. 486.

If the action against the justice is not bona fide but a mere sham to attempt to disqualify him, its pendency will not operate as a disqualification. Ibid.; Ex parte Scribner, 32 N.B.R. 175.

The disqualification of a justice arising from an action pending against him ceases when he has recovered judgment, though an execution has issued which is unsatisfied. Ex parte Ryan (1894), 4 Can. Cr. Cas. 485 (N.B.).

With the exception of where a magistrate acts upon view of an offence, he should not be a promoter of the prosecution, or be interested personally in the matter he is called on magisterially to investigate. It is contrary to natural justice that the judge should be interested in securing the conviction of the accused, or be influenced by any bias other than that produced by the evidence on the mind of one unpredisposed by any kind of interest to have his judgment so warped as to prevent his giving an impartial decision. If such an interest exists, the magistrate is disqualified from acting judicially, be the interest never so small. The court cannot weigh the interest or estimate its force. R. v. Sproule (1887), 14 Ont. R. 375, 381.

The mere fact of a magistrate being a druggist, and in that capacity filling medical prescriptions containing small quantities of liquor, would not constitute a disqualifying interest in a prosecution for unlawfully selling intoxicating liquor without al icense. R. v. Richardson (1891), 20 Ont. R. 514.

The connection of the magistrate with a society, which supplied funds part of which were used to make the purchase upon which the prosecution of illegal sale of liquor was based, because of his being an honorary member of the society but not entitled to take any part in its affairs, is not a ground of disqualification. R. v. Herrell (1898), 1 Can. Cr. Cas. 510 (Man.).

Where a conviction is set aside on the ground of disqualification of the magistrate costs are not generally given against him. R. v. Meyer, 1 Q.B.D. 173; but they may be if he has been guilty of some gross impropriety in the exercise of his summary jurisdiction. R. v. Goodall, L.R. 9 Q.B. 557, per Cockburn, C.J.; R. v. Klemp (1885), 10 Ont. R. 143, 158.

*Powers of two justices.*]—The Parliament of Canada has not the power to give to a provincial court a jurisdiction which is not within the scope of such court's powers as established by the Provincial Legislature. Sec. 103 of the Canada Temperance Act, R.S.C. 1886, ch. 106 (amended by 51 Vict., ch. 34, sec. 6) is therefore ultra vires of the Dominion Parliament in so far as it purports to confer jurisdiction upon parish court commissioners in New Brunswick to entertain prosecutions thereunder. Ex p. Flanagan (1899), 5 Can. Cr. Cas. 82 (N.B.).

A stipendiary magistrate is none the less a justice of the peace because he receives a stipend, nor is he any the less a justice because the policy of the legislature has been to give him the powers of two justices in order to facilitate the transaction by him of the business which would otherwise fall on the other justices. R. v. McFadden (1885), 6 N.S.R. 426.

And the Canada Temperance Act, 1878, which provides that trials may be had before a stipendiary magistrate *or* any two *other* justices of the peace for the county, does not by the use of the word "other" disqualify a stipendiary magistrate from sitting with another justice to try a case under that Act. R. v. Graham, 6 N.S.R. 455.

**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.

*Jurisdiction of justices.*]—The Dominion Parliament has jurisdiction to confer upon justices of the peace appointed under provincial authority jurisdiction to summarily try criminal offences. R. v. Wipper (1901), 5 Can. Cr. Cas. 17 (N.S.).

Section 103 of the Canada Temperance Act, R.S.C. (1886), ch. 106, as amended by 51 Viet. ch. 34, sec. 6, enabling any two justices of the peace to adjudicate upon prosecutions under that Act, is therefore intra vires of the Parliament of Canada. Ibid.

If the accused is in fact present before the magistrate, and the magistrate has jurisdiction over the person and the offence, he may lawfully proceed with the hearing of the charge, notwithstanding that the warrant on which the accused was arrested was executed by a person not legally qualified for that purpose. Ex parte Giberson (1898), 4 Can. Cr. Cas. 537 (N.B.).

As to cases of assault or battery in which a question of title to land arises, see sub-section 8 of section 842.

*Corporations.*]—It has been held by the Supreme Court of New Brunswick that the procedure of the Criminal Code as to summary convictions does not apply to corporations, and that as regards charges of a criminal nature, a corporation is not within the statutory term "person," which by the Interpretation Act, R.S.C. 1886, ch. 1, is declared to include "any corporation to whom the context can apply," etc. Ex parte Woodstock Electric Light Co. (1898), 4 Can. Cr. Cas. 107.

But a different conclusion was arrived at by a Divisional Court of the High Court of Justice of Ontario in R. v. Toronto Ry. Co. (1898), 2 Can. Cr. Cas. 471, in which it was held that the procedure of the Code as to summary convictions applies as well to corporations as to natural persons, and 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.

**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.

This section was originally sec. 5 of 52 Viet., ch. 45 (Can.), an Act to amend the Summary Convictions Act, and its provisions apply only to cases arising, and in which proceedings are had, under the provisions regarding summary convictions. R. v. Edwards (1898), 2 Can. Cr. Cas. 96 (Ont.).

An information may be laid and proceedings taken thereon for the prosecution by indictment of an indictable offence, although the case is one which might have been summarily tried by a justice had the information been laid within the six months' limit provided by Cr. Code sec. 841, and although that period had expired before the laying of the information. R. v. Edwards (1898), 2 Can. Cr. Cas. 96. And as an indictment for rape includes the lesser charge of assault, a verdict thereon of common assault is properly followed by a conviction although the information was laid more than six months after the offence was committed. Ibid.

A prosecution under the revenue tax laws of a province to enforce payment of the tax is a proceeding for the recovery of a Crown debt, and is not governed by a general statute of limitation, not expressly applying to the Crown, but requiring complaints in matters of summary conviction to be made within three months from the time when the matter of the complaint arose. R. v. Lee How (1901), 4 Can. Cr. Cas. 551 (B.C.).

**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 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.

*Territorial limits.*]—Defendant was tried at Belleville before the police magistrate of the county of Hastings and convicted on a charge of fraud on a cheese factory in Hastings, an offence under a provincial law. It was proved that the milk (alleged to have been fraudulently handled) had been supplied in the county of Lennox and Addington. It was held that as the supplying was not within Hastings it was not within the jurisdiction of the police magistrate of Hastings. R. v. Dowling (1889), 17 O.R. 698.

A justice of the peace cannot exercise his judicial functions outside the limits of his territorial jurisdiction. Where, therefore, defendant was brought before the stipendiary magistrate for the county of Halifax charged with an assault committed on the high seas, and tried and convicted at the office of the stipendiary magistrate in the city of Halifax, which was outside the limits of the county, the conviction was held bad; but the opinion was expressed that if the conviction had been made at the dwelling house of the magistrate, though outside the limits of his jurisdiction, the conviction might have been covered by the Imperial Act 9 Geo. I., ch. 7, which enacts that "if any justice of the peace shall happen to dwell in any city or other precinct that is a county of itself, situate in the county at large for which he shall be appointed a justice, although not within the same county, it shall be lawful for any such justice to grant warrants, take examinations, and make orders, for any matters which one or more justices of the peace may act in, at his own dwelling house, although such dwelling house be out of the county where he is authorized to act as a justice, and in some city or other precinct adjoining, that is a county of itself." R. v. Hughes (1884), 17 N.S.R. (5 R. & G.) 194.

*Every complaint and information.*]—The words "every complaint or information" mean a complaint or information under the summary convictions clauses. R. v. Edwards (1898), 2 Can. Cr. Cas. 96, 100 (Ont.).

Notwithstanding this section where a prosecution for an offence under the Canada Temperance Act is to be proceeded with before two justices of the peace, the information must be laid before two justices. Ex parte White (1897), 3 Can. Cr. Cas. 94 (N.B.). Both justices must concur in directing the issue of the summons, but it is not necessary that the information or the summons issued thereon should be signed by more than one of such justices. R. v. Ettinger (1899), 3 Can. Cr. Cas. 387 (N.S.).

In cases where a magistrate has authority to hear and determine a matter, but refuses to do so to the frustration of justice, the court has jurisdiction in the exercise of its mandatory authority to direct him to hear and determine. But while the case is under consideration by him the court will not issue a mandamus to control his conduct of the case, or to prescribe to him the evidence which he shall receive or reject as the case may be. R. v. Carden (1879), 5 Q.B.D. 1, 5; R. v. Connolly (1891), 22 Ont. R. 220, 226.

*Associate justices.*]—When 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 summary trial, or to be associated with the summoning justice, except at the latter's request. R. v. McRae (1897), 2 Can. Cr. Cas. 49 (Ont.).

A summary conviction by the magistrate who summoned the accused and heard the charge will be supported, although three other magistrates attended the hearing and purported to dismiss the charge, if the latter magistrates sat without the request or consent of the summoning magistrate. Ibid.

*Question of title to lands.*]—The general rule of law applicable to justices exercising summary jurisdiction is that they are not to convict where a real question as to the right to property is raised between the parties; then their jurisdiction ceases, and the question of right must be settled by a higher tribunal; for the justices, by convicting, would be settling a question of property, conclusively and without remedy, if their decision happened to be wrong. Per Blackburn, J., in R. v. Stimpson, 4 B. & S. 301, cited by Galt, J., in R. v. Davidson, 45 U.C.Q.B. 91.

It is not within the province of the magistrate to decide on the title to lands (sec. 842 (8)) but merely on the good faith of the parties alleging that the title is called in question. R. v. Davidson (1880), 45 U.C.Q.B. 91.

*Petty trespasses.*]—The Code does not deal with the offence of petty trespass, that being left to be dealt with by the respective provincial legislatures under their powers to legislate regarding property and civil rights. The Ontario Act respecting trespasses is cap. 120 of R.S.O. 1897, and makes the following provisions:

(1) Any person who unlawfully enters into, comes upon, or passes through or in any way trespasses upon any land or premises whatsoever, being wholly enclosed, and being the property of another person, shall be liable to a penalty of not less than $1 nor more than $10 for any such offence, irrespective of any damage having or not having been occasioned thereby; and such penalty may be recovered, with costs, in every case of conviction before any one justice of the peace, who shall decide the matter in a summary way, and award costs in case of conviction, which may be had either on view or on confession of the party complained against, or on the oath of one credible witness; but nothing herein contained shall extend to any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of, or to any case within the meaning of sec. 511 of the Criminal Code 1892.

(2) Any person found committing such trespass as aforesaid, may be apprehended without a warrant by any peace officer, or by the owner of the

property on which it is committed, or the servant of, or any person authorized by such owner, and be forthwith taken to the nearest justice of the peace, to be dealt with according to law.

(3) Except as herein otherwise provided, all proceedings under this Act shall be subject to and in accordance with the provisions of the Ontario Summary Convictions Act, which shall apply to cases arising under this Act.

(4) Nothing in this Act contained shall authorize any justice of the peace to hear and determine any case of trespass in which the title to land, or any interest therein or accruing thereupon, shall be called in question or affected in any manner howsoever; but every such case of trespass shall be dealt with according to law in the same manner, in all respects, as if this Act had not been passed.

The question of a fair and reasonable supposition of right to do the act complained of (e.g. removing a gate) is a fact to be determined by the justice, and his decision upon a matter of fact will not be reviewed; R. v. Malcolm (1883), 2 Ont. R. 511; but the rule does not apply where all the facts shew that the matter or charge is one in which such reasonable supposition exists, that is, where the case and the evidence are all one way and in favour of the defendant. R. v. McDonald (1886), 12 O.R. 381.

**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 558 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 the 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 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.

*Compelling appearance of accused.*]—The magistrate acquires no jurisdiction over the person of the defendant while he is out of the province, and a conviction made on service of the summons upon his wife at his last place of abode in the province (sec. 562 (2) ), will be removed by certiorari and quashed on an affidavit made by the defendant that from a date prior to the laying of the information until after the hearing he had been continuously out of the province. Ex parte Donovan (1894), 3 Can. Cr. Cas. 286 (N.B.); Ex parte Fleming, 14 C.L.T. 106; Ex parte Simpson (N.B.), 37 C.L.J. 510. Where substitutional service is relied on, there must be proof that the person served for the defendant was an inmate of the defendant's last or most usual place of abode, and that such person was apparently of the age of sixteen years or upwards, and service on a hotel

clerk at the hotel of which the defendant was the proprietor and in which the proprietor usually resided was held insufficient without proof that the hotel clerk made the hotel his place of residence. Ex parte Wallace, 19 C.L.T. 406. But service on a person proved to be of the required age and to be employed at the defendant's residence as a domestic servant would seem to be sufficient. R. v. Chandler, 14 East 267.

If the summons is not served personally the nature of it must be explained to the person with whom it is left. R. v. Smith (1875), L.R. 10 Q.B. 604. It must also be shewn by affidavit or oral testimony that the defendant could not be conveniently met with, so as to effect personal service. R. v. Carrigan, 17 C.L.T. 224.

A summons may be issued upon an information before a justice of the peace for an offence punishable on summary conviction, although the information has not been sworn; but before a warrant can be issued to compel the attendance of the accused, there must be an information in writing and under oath. Sec. 558. R. v. William McDonald (1896), 3 Can. Cr. Cas. 287 (N.S.).

It is discretionary with the magistrate to issue either a summons or a warrant as he may deem best. R. v. McGregor (1895), 2 Can. Cr. Cas. 413.

If a magistrate's summons is issued on an information purporting to have been 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 because it is afterwards shewn that the information was not in fact sworn at such time and place. Ex p. Sonier (1896), 2 Can. Cr. Cas. 121 (N.B.).

A person who appears in answer to a summons, and takes his trial and his chance of acquittal, is considered as having waived any objection to the summons. R. v. Justices of Carrick-on-Suir, 16 Cox C.C. 571; R. v. Hazen (1893), 20 Ont. App. 633.

The fixing of an inconvenient place for hearing is improper, but within the jurisdiction of the justice of the peace and therefore not reviewable on motion for prohibition. R. v. Chipman (1897), 1 Can. Cr. Cas. 81 (B.C.).

**844. Backing warrants.**—The provisions of section 565 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 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.

*Irregularities in informations.*]—If a magistrate's summons is issued on an information purporting to have been 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 because it is afterwards shewn that the information was not in fact sworn at such time and place. Ex parte Sonier (1896), 2 Can. Cr. Cas. 121 (N.B.).

It is not a matter within the discretion of the magistrates whether a man shall be put on his trial without any proper preliminary proceedings; and in administering justice summarily, strict regularity must be observed. Blake v. Beach (1876), L.R. 1 Ex. D. 320, 334, 335. A man is not to be put at the mercy of the magistrates in granting delay where he has a right not to be put upon his trial; if he waives the want of information and summons, and by his own assent is properly before the magistrates, it would be in their discretion to grant or refuse delay in order to prepare his defence. Ibid, p. 334.

It was established by the decision in R. v. Hughes (1879), 4 Q.B.D. 614, by the full Court of Criminal appeal that when a person is before justices who have jurisdiction to try the case, they need not inquire how he came there, but may try it. In commenting upon that decision in Dixon v. Wells (1890), 25 Q.B.D. 249, Lord Coleridge, C.J., said (p. 256):—

"I do not, however, feel able to decide in his (appellant's) favour on that point alone (i.e., that objection had been taken before the magistrate), for although the fact of his protest ought to be a complete answer to the assumed jurisdiction, I cannot disguise from myself the fact that from the language of many of the judges in R. v. Hughes, 4 Q.B.D. 614—although, perhaps, not necessary for the decision of the case—and the judgments of Erle, C.J., and Blackburn, J., in R. v. Shaw (1865), 34 L.J.M.C. 169, they seem to assume that if the two conditions precedent, of the presence of the accused and jurisdiction over the offence, were fulfilled, his protest would be of no avail. It would have been easy to say that a protest would have made a difference; but I find no such qualification in R. v. Hughes, although something like that is said in one of the cases; it is an important question well worth consideration in the Court of Appeal."

The warrant of a magistrate is only prima facie evidence of the fact recited therein that an information on oath and in writing had been laid. Friel v. Ferguson (1865), 15 U.C.C.P. 584.

An information should include a statement of the following particulars: (1) the day and year when exhibited; (2) the place where exhibited; (3) the name and style of the justice or justices before who it is exhibited, and (4) the charge preferred. Pritchard's Q.S. Prac. (1875), 1058.

A complaint or information is essential as the foundation of summary proceedings, and without it the justice is not authorized in intermeddling, except where he is empowered by statute to convict on view. Paley on Convictions, 7th ed., 72; 1 Wms. Saunders, 262, n. 1; R. v. Justices of Bucks, 3 Q.B. 800, 807; R. v. Bolton, 1 Q.B. 66; R. v. Fuller, 1 Ld. Raym. 509; R. v. Millard (1853), 17 Jur. 400, 22 L.J.M.C. 108.

The proceeding which forms the groundwork of a "conviction" is termed laying or exhibiting an information, while the proceeding for the obtaining

of an "order" of justices is termed making a complaint. Paley on Convictions, 7th ed., 75.

By sub-section 2, an information or complaint for any offence or act "punishable on summary conviction" need not be under oath unless specially required by the particular Act or law. The statute which authorizes summary proceedings against a tenant for the fraudulent removal of goods is one of these, and specially requires that the complaint be made in writing by the landlord, his bailiff, servant or agent; 11 Geo. II. (Imp.), ch. 19, sec. 4; and a conviction under that Act must shew that the complaint was so made. R. v. Fuller, 2 D. & L. 98; Coster v. Wilson, 3 M. & W. 411; R. v. Davis, 5 B. & Ad. 551.

A variance between the information and the evidence adduced in support thereof at the hearing, in a matter to which the summary convictions clausse of the Code apply, will not invalidate a conviction based on the evidence unless (1) objection was made before the convicting justice, or (2) an adjournment of the hearing was refused notwithstanding that it was "shewn to such justice" that by such variance the defendant had been deceived or misled. Sec. 882. If any variance between the information and the evidence adduced in support thereof as to the place in which the offence is alleged to have been committed, or any other variance between the information and the evidence, appears to the justice 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. Sec. 847. The intention of the adjournment is that the accused may be prepared to meet the varied charge disclosed by the evidence, and the better practice is to have the information amended and re-sworn by the complainant. These provisions as to variance do not, however, extend to a case where the information has been laid and the party summoned for one offence, and the justices have convicted him of another and different offence punishable in another and a different way. Martin v. Pridgeon (1859), 28 L.J.M.C. 179, 1 E. & E. 778; R. v. Brickhall, 33 L.J.M.C. 156.

*One matter of complaint only.*]—In the case of Hamilton v. Walker, [1892] 2 Q.B. 25, two informations were laid before justices of the peace, charging defendant (1), with delivering to a certain person indecent advertisements, and (2), with aiding and abetting this person in exhibiting the same. The justices heard the evidence on the first information, and without deciding on the defendant's guilt or innocence, heard the evidence on the second, and committed him on both. The court held that, as the evidence on the second charge was substantially the same as on the first, "each case ought to have been decided on the evidence given with relation to the particular charge, and, therefore, the justices were wrong in hearing the evidence on the second information, before deciding on the first, and both convictions were bad. Vaughan Williams, J., puts his reasons as folllows: "I am of opinion that this course of procedure makes both convictions bad, the first, because the magistrates were bound to decide on the evidence given with respect to that particular charge, and the second, because the defendant had a right to set up the defence that he had already been convicted, or acquitted, as the case might be, on the same facts."

If an information can only be laid for one offence, it is very evident that a person can only be convicted of one offence. A person cannot be charged with one offence and convicted of two offences. R. v. Farrar (1890), 1 Terr. L.R. 308.

Defendant was summoned to appear before two justices of the peace to answer two charges for violations of the Canada Temperance Act, one for selling intoxicating liquor contrary to the provisions of the Act, and the other for keeping such liquor for sale. After hearing evidence on the first charge, the justices heard formal evidence of the service of the second summons. They then dismissed the second charge and convicted defendant on the first.

Held, that the case was sufficiently distinguished from Hamilton v. Walker, [1892] 2 Q.B. 25, by the fact that no evidence was heard on the second charge that would be likely to prejudice the minds of the justices in the consideration of the first. R. v. Butler (1896), 32 C.L.J. 594 (N.S.).

A charge of stealing "in or from" a building is for one offence only. R. v. Patrick White (1901), 4 Can. Cr. Cas. 430.

It is essential to the validity of a conviction that the party charged should be convicted of a single, distinct, positive and definite charge. A conviction under 37 Vict., ch. 32 (Ont.), that defendant attempted to compound a certain offence with which defendant was charged "with a view of stopping *or* having the said charge dismissed for want of prosecution," was quashed on the ground that the charge was laid, in the alternative, of two distinct offences by the 30th section, and the conviction was not of one of the offences, but of one or the other of them. R. v. Mabey (1875), 37 U.C.Q.B. 248 (following R. v. Hoggard, 30 U.C.Q.B. 152).

In R. v. Hazen, 20 Ont. App. 633, it was held that the disclosure of two offences in the information and evidence taken in reference to both at the trial did not invalidate the conviction for a single offence; or, to put it in another way, for one of the offences alleged in the information.

The information there charged that the defendant "within the space of 30 days last past, to wit on the 30th and 31st days of July, 1892, did unlawfully sell liquor," etc. The court was divided in opinion as to whether the information charged two several offences, or only the single offence of selling unlawfully within the thirty days, but it was held that the defect was one "in substance or form" within the meaning of section 847, and did not invalidate an otherwise valid conviction for a single offence. R. v. Hazen (1893), 20 Ont. App. R. 633.

If objection is taken before the magistrate all but one charge should be struck out and evidence heard as to that one only. R. v. Alward (1894), 25 Ont. R. 519.

A conviction for keeping a house of ill-fame on a date named, "and on other days and times before that day," is sufficiently certain as to time and does not constitute a charge of a distinct offence upon each of those days. R. v. Williams (1876), 37 U.C.Q.B. 540; Onley v. Gee, 30 L.J.M.C. 222.

In R. v. Fry, 19 Cox 135, there were several separate charges against the same defendant, but the justices stated that, in adjudicating on each case, they applied to that case the evidence that was given in reference to it and no other. It was held that the postponement by the justices of their decision in the first case until they had disposed of the other cases did not, under the circumstances, render the conviction in the first case bad in law. And see Re A. E. Cross (1900), 4 Can. Cr. Cas. 175 (Ont.).

Where a liquor license statute expressly provides that several charges may be included in the one information, and the magistrate adjudges the accused guilty upon each charge, it is not necessary that separate convictions should be drawn up: and the fines may be imposed in and by the one conviction adjudging a forfeiture in respect of each offence. R. v. Whiffin (1900), 4 Can. Cr. Cas. 141 (N.W.T.).

*(Amendment of 1900.)*

**846. Objections.**—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 the 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.

This section as amended is adapted from the Imperial Act, 42 and 43 V. (1879), c. 49, s. 39. As to the former law see R. v. Coulson, 1 Can. Cr. Cas. 114, 117.

A conviction is not to be quashed on certiorari, although it does not describe an offence against the law, ex. gr., by reason of an omission to state scienter of the accused, if the court, upon perusal of the depositions, is satisfied that an offence of the nature described in the conviction has been committed. Sec. 889. R. v. Crandall (1896), 27 O.R. 63.

And see note to sec. 845.

**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 of 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 material if the offence or act is proved to have been committed within the jurisduction 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.

A magistrate hearing a charge for a second offence cannot, in the absence of the defendant or his solicitor, and without notice to them, hear a motion to amend the summons by changing the date of the previous conviction. R. v. Grant (1898), 34 C.L.J. 171 (N.S.).

Where an information in a prosecution under the Canada Temperance Act stated a sale of liquor by the defendant on the 2nd of March, but the summons stated the sale to have been on the 7th of April, and the evidence proved sales on both days, and the conviction was for selling on the 7th April, and no objection was taken at the trial that the defendant was misled by the variance, an application for a rule nisi for a certiorari to remove the conviction was refused, and the court expressed the opinion that if such an objection had been taken the variance might have been amended under sec. 116 of the Can. Temperance Act. Ex p. Groves (1887), 26 N.B.R. 437.

See also note to sec. 845.

**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.

No warrant or other process can be issued on a Sunday for offences punishable only on summary conviction. 63 J.P. 755. R. v. Winsor (1866), L.R. 1 Q.B. 289.

Where a warrant was issued by one magistrate for the apprehension of the defendant to be brought before him or a justice of the peace for the county and the accused was brought before another magistrate thereon, convicted and fined, and subsequently the magistrate who had issued the warrant caused the defendant to be summoned before him for the same offence, and convicted and fined him, refusing to receive evidence of the prior conviction, the court quashed the second conviction with costs. R. v. Bernard (1884), 4 O.R. 603.

**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.

*Exclusion of public in certain cases.*]—An order that the public be excluded during the trial from the room or place in which the court is held may be made if the justice is of opinion that such order will be in the interests of public morals. Sec. 550A. The latter section is not to be con-

strued 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. Sec. 550A.

*View.*]—In a summary proceeding for an illegal sale of liquor under the Indian Act, a conviction was quashed where, after the close of the evidence, the magistrate went alone and took a view of the place of sale, and so stated when giving his judgment, and this notwithstanding that the defendant was present when the view was had. Re Sing Kee (1901), 5 Can. Cr. Cas. 86 (B.C.).

**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 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.

*Full answer and defence.*]—The accused is not denied the right to make "full answer and defence" to the charge by reason of the magistrate having stated, after hearing the evidence for the prosecution, that a denial on oath by the accused would not alter his opinion as to her guilt. R. v. McGregor (1895), 2 Can. Cr. Cas. 410.

Where one of two magistrates hearing an information was called as a witness for the defence but refused to be sworn and give evidence, and the associate magistrate refused to use his authority to require him to be sworn, it was held that the defendant was thereby deprived of the right of making a full defence, and his conviction was quashed on this ground. It was also held that his being called as a witness did not of itself disqualify him from further acting in the case. R. v. Sproule (1887), 14 O.R. 375. That case was, however, disapproved in R. v. Brown (1888), 16 O.R. 375, where it was held that the defendant is not entitled to shew by witnesses at the hearing that the magistrate had a disqualifying interest in the case. (Per Armour, C.J., and Street, J.).

Where in summary proceedings it is desired to call the presiding magistrate as a witness, the application should be supported by an affidavit stating not only that the magistrate is a necessary and material witness, and that the application is made in good faith, but disclosing specifically what the party proposes to prove by the magistrate's testimony. Ex p. Hebert (1898), 4 Can. Cr. Cas. 153 (N.B.).

Where the presiding magistrate is called as a witness for the defence but refuses to be sworn a summary conviction made without his evidence should not be quashed unless it is shewn that the request to have the magistrate called as a witness was made in good faith by the defence, that the magistrate could give material evidence and that the accused was therefore prejudiced. Ex p. Flannagan (1897), 2 Can. Cr. Cas. 513 (N.B.).

The prosecutor must answer questions relative to the disqualification of the magistrate to sit on account of interest, and must state on cross-examination whether he saw the magistrate about the matter before laying the information. R. v. Sproule (1887), 14 O.R. 375, (Cameron, C.J. C.P.).

The fact that a magistrate is sworn as a witness will not disqualify him from resuming his seat as one of the adjudicating justices. Bacon's Abridgment, 7th ed., vol. III., p. 206; Morth v. Champernoon, 2 Ch. Cas. 79.

A solicitor appearing for the accused at a trial before a magistrate of a charge of a second or subsequent offence against the Canada Temperance Act represents his client for the purpose of being interrogated as to the previous conviction although the client is not then present; and the magistrate on his failure to answer, is justified in receiving evidence of the previous conviction. R. v. O'Hearon (1901), 5 Can. Cr. Cas. 187 (N.S.).

**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.

It is a principle and rule of the first consequence in every system of jurisprudence which assumes to decide fairly the rights of a controversy, that both parties shall be heard. Re Holland, 37 U.C.Q.B. 214. In the absence of any provision expressly taking away the right to examine them, witnesses for the defence are admissible as a matter of unquestionable right. R. v. Washington (1881), 46 U.C.Q.B. 221, 233; R. v. Sproule (1887), 14 Ont. R. 375.

And see note to preceding section.

**852. Negativing exceptions.**—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.

In prosecutions under liquor license laws magistrates have not the right when the formal existing license is produced to go behind it for the purpose of enquiring, not into the simple issue is the defendant licensed or unlicensed, but whether certain preliminary requisites have or have not been complied with before the license produced had been given to the tavern keeper. R. v. Stafford (1872), 22 U.C.C.P. 177. Where, therefore, a certificate had been granted and a license issued for the sale of spirituous liquors under a by-law which was subsequently quashed, it was held that such quashing did not nullify the license, so as to support a conviction for selling liquors without license. Ibid.

*(Amendment of 1893.)*

**853. Non-appearance of accused.**—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 s. 563 of this Act and adjourn the hearing of the complaint or information until the defendant is apprehended. R.S.C. c. 178, s. 39.

This section originated in sections 7 and 32 of the Canadian statute 32-33 Vict., c. 31. In R. v. Smith, L.R. 10 Q.B. 604, Cockburn, C.J., said: "To convict an accused person unheard is a dangerous exercise of power, there being an alternative mode of procedure by issuing a warrant to apprehend him. Justices ought to be very cautious how they proceed in the absence of a defendant, unless they have strong grounds for believing that the summons has reached him and that he is wilfully disobeying it." L.R. 10 Q.B. 607.

By sec. 562 it is provided that the summons shall be served by a constable or other peace officer upon the person to whom it is directed, either (*a*), by delivering it to him personally, or (*b*), 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.

The hearing before a justice trying a person for an offence punishable on summary conviction may be adjourned from time to time under this section, although the accused be not present, provided the adjournments are made in the presence and hearing of his solicitor or agent. Proctor v. Parker (1899), 3 Can. Cr. Cas. 374 (Man.).

The authority of a magistrate to determine the case in the defendant's absence on his default in appearance, must be restricted to the particular charge in the original information and cannot cover a distinct offence. Ex parte Doherty (1894), 1 Can. Cr. Cas. 84 (N.B.). And see sec. 847 (4).

Service of a summons to appear before a magistrate to answer a charge of having committed an offence punishable by summary conviction is not validly made although left with the defendant's wife at his usual place of abode (sec. 562), if the defendant was then absent from Canada and remained away until after the hearing. The magistrate in such a case acquires no jurisdiction over the person of the defendant, and a conviction made in the defendant's absence upon such service will be quashed. Ex parte Donovan (1894), 3 Can. Cr. Cas. 286 (N.B.).

A defendant who has once had the opportunity to defend and has appeared and obtained an adjournment cannot by his failure to appear at the adjourned hearing defeat the administration of justice, and may be found guilty in his absence. R. v. Kennedy (1889), 17 O.R. 159; R. v. Mabee (1889), 17 O.R. 194.

Notice of a summons by justices under the Summary Convictions clauses of the Cr. Code may be given to a corporation in a manner similar to a notice of indictment under Cr. Code 637. R. v. Toronto Ry. Co. (1898), 2 Can. Cr. Cas. 471.

**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.

*Justice's duty to hear and determine.*]—It is the duty of a magistrate in all cases to consider and decide any and all questions raised before him, whether relating to the constitutionality of a law or the reasonableness of a by-law. R. v. Russell (1883), 1 B.C.R., pt. 1, p. 256, per McCreight, J. Unless a by-law is just and equal in its operation it is void. Ibid.; R. v. Johnson, 38 U.C.Q.B. 549.

It is the duty of a magistrate, at a trial under his summary jurisdiction, to take the examination and evidence in writing. The absence, illness or death of the magistrate would present an insuperable obstacle to the evidence being obtained if it were called for by the court if it were not taken down in writing at the time it was given. R. v. Flannigan (1872), 32 U.C.Q.B. 593.

An amendment of the information should not be made which would substitute a different transaction or render it necessary to plead differently. Perry v. Watts, 3 M. & G. 775; Brashier v. Jackson, 6 M. & W. 549. Nor can an amendment be made by substituting a new party, as a corporation, instead of their officer. Oxford Tramways Co. v. Sankey, 54 J.P. 564.

The defendant's appearance by counsel upon the return of a magistrate's summons is a waiver of any irregularity in respect of the service not having been effected by a peace officer, although counsel objects on that ground to the hearing being proceeded with. R. v. Doherty (1899), 3 Can. Cr. Cas. 505, 32 N.S.R. 235.

On the return of a summons in a summary proceeding before justices of the peace, the person summoned must wait a reasonable time after the hour named in the summons, when the justices are at that hour engaged in other official business. R. v. Wipper (1901), 5 Can. Cr. Cas. 17 (N.S.).

**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 shew 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 shews 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 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.

In a summary prosecution in New Brunswick an attorney, who appeared for the defendant in the latter's absence, entered a plea of guilty and afterwards made affidavit that the defendant had given him no authority to plead guilty, but had instructed him to fight the case out. Several contradictory affidavits were read tending to shew that the defendant had authorized the attorney to plead guilty. It was held that the magistrate could not receive a plea of guilty from any person but the defendant himself. Ex parte Gale (1899), 35 C.L.J. 464 (N.B.).

As in the case of a preliminary enquiry, the justice may appoint a stenographer to take down the evidence, but the stenographer must be first sworn as provided by sec. 590 (7). And by sec. 843 the provisions of sec. 590 are again included as a portion of Part XLV. made applicable in regard to the taking of evidence under Part LVIII. Except where a stenographer is appointed, it is necessary that the depositions should be read over to and signed by the witness and the justice. Sec. 590, sub-ss. 4 and 5: Re Stanbro, 1 Man. R. 325.

When 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 summary trial or to be associated with the summoning justice, except at the latter's request. R. v. McRae (1897), 2 Can. Cr. Cas. 49.

**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 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.

*Adjournment.*]—Notwithstanding earlier decisions to the contrary, it seems now to be settled that an adjournment sine die of summary proceedings before a magistrate for the purpose of delivering judgment is illegal, and a conviction thereafter made by the magistrate, in the absence of the accused, is void for want of jurisdiction. R. v. Quinn (1897), 2 Can. Cr. Cas. 153 (Ont.); Cairns v. Choquet (1900), 3 Que. P.R. 25.

In summary proceedings before justices they need not eo instanti set the penalty, but "may adjourn for a little time to consider the fine." R. v. Ellwell (1727), 2 Ld. Raym. 1514; Burn's Justice, 30th ed., vol 1, 1142. When the justice has commenced to hear the case he then has by the common law an inherent power of adjournment. R. v. Mayor of Clonmel (1858), 9 Ir. C. L. Rep. 267, 272, 278.

A limitation of time was first introduced by sec. 46 of 32-33 Vict. (Can.), ch. 31, by which it was enacted that no adjournment of the hearing should be made for more than one week, and the same provision was continued in the Summary Convictions Act, R.S.C. (1886), ch. 178, sec. 48. On the enactment of the Criminal Code in 1892 the time was made *eight* days instead of one week.

In R. v. French (1887), 13 Ont. R. 80, it was held by Rose, J., that an adjournment of the hearing for a time longer than the statutory limit avoided the conviction, although so adjourned with the consent of the accused, for the effect would be to read into the statute the qualifying words "except by consent of the defendant."

That decision was, however, disapproved in R. v. Heffernan (1887), 13 Ont. R. 616, where it was held by Robertson, J., that if the accused himself asks the adjournment for longer than the statutory period and attends on the date to which the adjournment is made and takes his chances of a dismissal on the evidence, he is estopped from afterwards urging a want of jurisdiction because of the adjournment. In some of the older cases it was said that the limitation applied only to an adjournment of the *hearing* or the further hearing of the information or complaint, and a distinction was made between that and the *adjudication* or determination of the charge. R. v. Hall (1887), 12 Ont. Pr. 142, and it was considered that when the witnesses and the evidence had been adduced (sec. 858) the adjournment is neither "before" nor "during" the hearing of the information or complaint, but

at its conclusion, in order to determine the case. R. v. Alexander (1889), 17 Ont. R. 458, 461; R. v. Hall, 12 Ont. Pr. 142.

The "eight days" should be computed from and exclusive of the day of the adjournment. Williams v. Burgess (1840), 12 A. & E. 635; R. v. Collins (1887), 14 Ont. R. 613, 617; Wharton's Law Lexicon, 6th ed., 267.

The section is not intended to prevent more than one adjournment. Messenger v. Parker (1885), 18 N.S.R. 237, 242, and in Nova Scotia in R. v. Morse (1890), 22 N.S.R. 298, it was held that where a justice adjourned the trial without day, stating in the presence of all the parties that he would make up his judgment and notify the parties affected, which he did in time for an appeal from the conviction, that no conviction could be made, the justice having lost jurisdiction by the adjournment without day.

The absence of defendant's counsel from the adjourned sittings at which the magistrate pronounced his judgment, the evidence having been closed at the former sittings at which counsel appeared, does not affect the power of the magistrate to convict, notwithstanding any irregularity in the service of the summons. R. v. Doherty (1899), 3 Can. Cr. Cas. 505, 32 N.S.R. 235.

A magistrate exceeds his jurisdiction who hears one of the parties and then pronounces sentence on a day to which the hearing was not adjourned as provided by sec. 857. Therrien v. McEachern (1897), 4 Rev. de Jur. 87; 4 Que. S.C. 87.

The provision that no adjournment shall be for more than eight days is matter of procedure, and may be waived, and a defendant who consents to an adjournment for more than eight days cannot afterwards complain in that respect. R. v. Hazen (1893), 20 Ont. App. 633.

The magistrate adjourned the hearing to Tuesday, December 28th, when Monday was in fact the 28th and Tuesday the 29th December, and on the latter day entered a conviction, the defendant not having appeared either on the return of the summons or on the day of conviction. It was held by the full court that the day of the week governed, and that the conviction was properly made on Tuesday, December 29th. Ex p. Rayworth (1897), 34 Can. Law Jour. 44 (N.B.).

A conviction in the form prescribed by the Criminal Code is not bad because it also contains recitals shewing certain adjournments of the hearing before the justice, but not shewing that no adjournment had been made for a longer period than the eight days allowed by Cr. Code sec. 857, sub-sec. 1, although more than three months had elapsed from the commencement to the end of the proceedings. The hearing may be adjourned from time to time under sec. 853 of the Code, although the accused be not present, provided the adjournments are made in the presence and hearing of his solicitor or agent. Proctor v. Parker (1899), 3 Can. Cr. Cas. 374 (Man.).

**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.

*Improper adjournment.*]—As to illegal adjournments depriving the magistrate of jurisdiction, see note to sec. 857.

*Finding of fact.*]—In summary proceedings before a justice of the peace he is substituted for the jury, so far as relates to the conviction, that is, as to finding the party guilty or not guilty. It is sufficient to authorize a con-

viction that there is such evidence before the magistrate as might in an action on an indictment be left to a jury; and the Superior Court, when the conviction is brought before it, will not examine further to see whether the conclusion drawn by the magistrate be or be not the inevitable conclusion from the evidence. Burn's Justice of the Peace, 30th ed., 1142; R. v. Davis, 6 T.R. 177; R. v. Alexander (1889), 17 O.R. 458.

The conviction must be for one offence only and not for two or more offences. Sec. 845 (3); R. v. Farrar (1890), 1 Terr. L.R. 306.

A summary conviction for an offence under the Canada Temperance Act only covers the violation actually proved, and not any violation which might have been proved. Ex p. Whalen (1894), 32 N.B.R. 274; Ex parte McManus (1894), 32 N.B.R. 481. As said by Landry, J., in the former case:—Where the law permits the inclusion of several charges of offences in one summons or indictment, and the court has jurisdiction to convict on all the charges under that summons or indictment the judicial disposal, either by acquittal or conviction, will include all charges of which evidence could have been received on the trial of the charge disposed of. But where the law allows the charge of an offence describing it as having taken place during a period in which it is possible that many similar offences of the same nature have been committed, and the tribunal can deal with only one under the one summons or indictment, then evidence given of one offence will not affect the other offences committed during that space of time. Ex p. Whalen (1894), 32 N.B.R. 274, 276.

The dismissal of a prior charge under the Canada Temperance Act in which the offence was laid as between certain dates is not necessarily a bar to a subsequent prosecution for an offence committed within the same period of time, but the question of identity of offence is for the magistrate. The onus of proving the identity of the charge is upon the defendant. Ex parte Flanagan (1899), 5 Can. Cr. Cas. 82 (N.B.); R. v. Marsh, in Re Tennant (1886), 25 N.B.R. 371.

T. was committed on 16th May of selling liquor between 21st January and 18th April, he was subsequently convicted for unlawfully keeping liquor for sale between 14th February and 24th March in the same year. It was held that the onus was on him to prove that the two charges were identical —that the keeping for sale with which he was charged was in fact the selling of which he had been convicted, and that the mere fact that the days between which he was charged with keeping liquor for sale, were included within the times stated in the conviction for selling, did not sustain a defence of autrefois convict. R. v. Marsh, in Re Tennant (1886), 25 N.B.R. 371.

Two persons who were doing business as co-partners were jointly convicted before a magistrate for keeping for sale intoxicating liquors contrary to the Canada Temperance Act. The conviction was as follows:—"And I adjudge the said G. H. and J. C. for their said offence to forfeit and pay the sum of $50 to be paid and applied according to law, and also to pay to (the informant) the sum of $3.60 for his costs in this behalf; and if the said several sums be not paid forthwith, I order that the same be levied by distress and sale of the goods and chattels of the said G. H. and J. C.; and in default of sufficient distress, I adjudge each of them the said G. H. and J. C. to be imprisoned." It was held that the offence charged was not a joint offence, and that the conviction was bad, for the magistrate ought to have adjudged a separate penalty upon each defendant. Ex parte Howard and Cringle (1885), 25 N.B.R. 191.

*Adverse witness.*]—A party's own witness cannot be treated as adverse and cross-examined by him without the leave of the magistrate. Price v. Manning, 37 W. R. 785; Stone's Justices' Manual (30th ed.), p. 706. A witness is considered adverse when, in the opinion of the magistrate, he bears a hostile animus to the party calling him, and not merely when his testimony contradicts his proof. Cf. Greenough v. Eccles (1859), 5 C.B.N.S. 786.

*Leave to withdraw the charge.*]—After the evidence has been heard the justice is not bound either to convict or discharge the defendant; he may allow the prosecutor to withdraw the charge. Ex p. Wyman (1899), 5 Can. Cr. Cas. 58 (N.B.).

Such withdrawal may be allowed even when another information covering the same offence has been laid by the same prosecutor against the same defendant, and the determination thereof is still pending. Ibid.

But although the informant gives notice that he withdraws, the justice may in his discretion grant a certificate of dismissal at the request of the defendant. Bradshaw v. Vaughton, 30 L.J.C.P. 93.

**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 as is applicable to the case or to the like effect. R.S.C. c. 178, s. 53.

FORM VV.—

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. (*etc., 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").

FORM WW.—

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. (*etc., 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.)*

FORM XX.—

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. (*etc., 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 that 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").

FORM YY.—

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 upon 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

Crim Code one hundred and twenty-three 123

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").

FORM ZZ.—

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 conveying 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.)*

FORM AAA.—

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 to 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 i 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.)*

*At common law*].—Where a form of conviction is not provided or mentioned by any express statute, it must be such as would be good on the face of it according to the principles of the common law. Therefore a conviction which did not shew on the face of it that the evidence was given in the presence of the defendant, nor that the defendant was summoned and did not appear is clearly bad on the face of it. Moore v. Jarron (1852), 9 U.C.Q.B. 233.

A summary conviction must be under seal. Haacke v. Adamson, 14 U.C.C.P. 201; Re Ryer and Plows (1881), 46 U.C.Q.B. 206; Bond v. Conmee, 16 Ont. App. R. 398.

*Describing the party.*]—A conviction must on the face of it shew sufficient identity of person to enable it to be pleaded to a second complaint against the same person for the same offence. R. v. Morgan (1881), 1 B.C.R. pt. 1, p. 245. The conviction of itself must contain the elements of identity and cannot be supplemented by the commitment. Ibid. A conviction against "Messrs. Harrison & Co." was held invalid even as against Harrison for the court could not tell upon the face of the proceedings but that the delinquency of Harrison's partners who were not before the court, might have been imputed to him. R. v. Harrison, 8 T.R. 508. If the accused person refuse to disclose his name he may be described as a person whose name is unknown to the magistrate, and he may be identified by some fact, ex gr. by describing him as having been personally brought before the magistrate by a certain constable. Anon. (1822), R. & R. 489. The magistrate is not bound to follow the information as to the name of the accused but may draw up the conviction with what appears to be the proper name, or with such other description as will enable identification. Whittle v. Frankland, 31 L.J.M.C. 81; but a summary conviction of "Mrs. Morgan" not described as of any particular local residence or occupation or as known by any other designation, is not sufficient. R. v. Morgan (1881), 1 B.C.R. pt. 1, p. 245, per Gray, J.

Where the members of a partnership firm are charged with an offence as to which each may be considered guilty the conviction should not describe them in the firm name alone, but should specifically name the persons adjudged guilty in the transaction. Re McDonald Bros. (1898), 34 C.L.J. 475 (B.C.).

*Describing the offence.*]—The charge in a conviction must be certain and must be so stated as to be pleadable in a second prosecution for the same offence. R. v. Haggard (1870), 30 U.C.Q.B. 152.

It is essential to the validity of a conviction that the party charged should be convicted of a single, distinct, positive and definite charge. Per Morrison, J., in R. v. Mabey (1875), 37 U.C.Q.B. 248.

A conviction for doing worldly labour on Sunday contrary to the Ontario Lord's Day Act is void for uncertainty unless the acts constituting the offence are specified. R. v. Somers (1893), 1 Can. Cr. Cas. 46 (Ont.).

A conviction for illegally practising medicine contrary to the Ontario Medical Act must shew the exercise of that calling upon more than one occasion within the prescriptive period within which a prosecution must be brought. The conviction must set out the particular acts of the accused which are held to constitute the illegal practising. R. v. Whelan (1900), 4 Can. Cr. Cas. 277 (Ont.).

*Adjudging forfeiture.*]—Convictions were held defective in R. v. Cyr (1887), 12 Ont. Pr. 24, and R. v. Burtress (1900), 3 Can. Cr. Cas. 536 (N.S.), because they did not contain an adjudication of forfeiture of the fine imposed, as well as an adjudication that the prisoner pay such sum. Reference was in the former case made to the statute 32 and 33 Vict. (Can.), ch. 31, sec. 50, whereby forms *d*1, *d*2, *d*3 in which the expression "forfeit and pay" is used are made applicable to all cases where no particular form is given by the law creating the offence; and that in cases where forfeiture is neither necessary nor proper and where only an order to pay money due by one person to another can be made (as in cases between master and servant) the statutory forms contain no expression of forfeiture. See Code Forms VV, WW and YY, and sec. 982. The opinion is also expressed in Paley on Convictions, 6th ed., 264, that a judgment of forfeiture is necessary under the corresponding Imperial statute, 11 and 12 Vict., ch. 34.

A minute of conviction which mentions no definite time for the payment of the penalty must be taken to mean that payment must be made forthwith. R. v. Butler (1896), 32 C.L.J. 594 (N.S.).

*Conformity with adjudication.*]—Where a minute of conviction stated that in default of payment of the fine and costs imposed the same was to be levied by distress, and in default of distress imprisonment, and a formal conviction was drawn up following the minute, and it appeared that distress was not authorized in the particular case, it was held that the fact of the minute containing such unauthorized provision did not prevent a conviction omitting such provision being drawn up and returned, in compliance with a certiorari granted. R. v. Hartley (1890), 20 Ont. R. 481; vide also R. v. Richardson (1891), 20 Ont. R. 514.

If the penalty in default of payment of the fine adjudged appears to be properly ascertained by the conviction the court will not enquire when it was fixed, for if determined at any time before the conviction is formally drawn up and returned that is sufficient. R. v. Smith (1881), 40 U.C. Q.B. 18).

Possibly the justices could not give any effect to a change of intention as regards the adjudication of guilt on the penalty without hearing the defendant. R. v. Brady, 12 Ont. R. 363; R. v. Hartley, 20 Ont. R. 485; but it is otherwise as regards the consequences which follow the infliction of the penalty. R. v. McAnn (1896), 3 Can. Cr. Cas. 110, 112, per Davie, C.J.

A conviction which illegally imposes imprisonment with hard labour in default of payment of a fine may be amended at any time before it is acted upon, by the return of an amended conviction omitting the award of hard labour but in other respects conforming to the adjudication. R. v. McAnn (1896), 3 Can. Cr. Cas. 110 (B.C.). But if the original adjudication had been acted upon, the defect could not have been cured by returning a valid conviction. Ibid, per Drake, J., p. 121.

A conviction in due form will not be quashed because it is founded 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. R. v. Whiffin (1900), 4 Can. Cr. Cas. 141 (N.W.T.).

Code sec. 872 (*a*) provides for imprisonment unless the penalty and costs, if costs are ordered, "and the expenses of the distress and of conveying

the defendant to jail are sooner paid," while in form WW and the warrant of committment form FFF, the expression is "costs and charges" and not "expenses," as in sec. 872. In providing a form containing that expression, to carry out a provision where the word "expenses" alone is used Parliament must have considered that the two expressions were synonymous, or meant the same thing. It would presumably not provide a form which, if followed, the courts must immediately declare to be bad. R. v. Vantassel (No. 1) (1894), 5 Can. Cr. Cas. 128 (N.S.).

*Amendment on certiorari.*]—On the return to a certiorari the justices are not only entitled, but may be required, to amend their conviction in matters of form. Houghton's Case (1877), 1 B.C.R. pt. 1, p. 89. But as said by Begbie, C.J., in that case:—"He cannot be allowed to convict a man of one offence and then on certiorari inform the court that he convicted him of another;" he cannot be allowed to thrust into an "amended" conviction allegations of fact which the evidence disproves. Ibid., p. 92.

An amended conviction may be made out and returned under the certiorari at any time before the conviction has been quashed or the defendant released. R. v. McDonald, 26 N.S.R. 404; R. v. Lawrence, 43 U.C.Q.B. 168; R. v. Richardson, 20 Ont. R. 514; R. v. House, 2 Man. R. 58.

Under sec. 889 the court may, on certiorari, adjudicate de novo on the evidence given before the magistrate; but the court should not amend a conviction if in so doing it has to exercise the discretion of the magistrate. R. v. Whiffin (1900), 4 Can. Cr. Cas. 141 (N.W.T.).

**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.

The omission of the magistrate to ask the accused whether he had been previously convicted does not deprive him of jurisdiction to receive proof of the prior conviction. R. v. Wallace, 4 Ont. R. 127, per Armour, J.: R. v. Brown, 16 Ont. R. 41.

**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, and he shall give the defendant a certificate in the

form CCC in the said schedule, 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.

FORM BBB.—

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 (*etc., 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.)*

FORM CCC.—

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 (*etc., 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., [SEAL.]
*J. P., (Name of County.)*

This certificate of dismissal may be granted as well where the informant neglects to appear, and the complaint is dismissed on that ground, as where he does appear and the information is dismissed on the merits. Ex parte Phillips (1884), 24 N.B.R. 119. Upon the hearing of an information for an offence against the Canada Temperance Act the defendant in answer to the charge gave in evidence a certificate stating that an information against the defendant for the same offence had been considered and was dismissed, but the police magistrate gave no effect to the certificate of dismissal, on the ground that the original information had been dismissed on the default of the informant to appear and give evidence and not on the merits, and it was held that it was within the power of a magistrate, to whom a certificate of dismissal is tendered as a bar to his proceeding, to inquire whether such prosecution was real and bona fida, or was instituted fraudulently and collusively for the purpose of escaping the penalties of the Act. Ibid.

**863. Disobedience to order of justice.**—Whenever, by any Act 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.

This section originated with sec. 52 of the Summary Convictions Act, 32-33 Vict., ch. 31. It applies only to orders of justices as distinguished from convictions. R. v. Sanderson (1886), 12 Ont. R. 178, 181; R. v. O'Leary, 3 Pugsley (N.B.) 264; Paley on Convictions, 5th ed., 288. A defendant must take notice of a conviction at his peril. Ibid.

"The commitment must be to the common gaol of the county for which the justices shall be acting." Paley, p. 337. The warrant is bad if it only orders in general terms that the defendant be carried to prison. R. v. Smith, 2 Str. 934.

A warrant of commitment is bad if it simply directs the gaoler to "imprison" the defendant for the stated time, without specifying the place of imprisonment. Re J. W. King (1901), 4 Can. Cr. Cas. 426, per Forbes, Co. J.

The description of the place of imprisonment in a warrant of commitment is sufficient if the prison be described by its situation or some other definite description. Ibid.

Where a warrant of commitment which adjudges imprisonment is delivered to a constable, and the defendant then being at large deposits money with the constable as security for his appearance when required and procures the constable to delay the execution of the commitment for a time, the defendant cannot object to a subsequent arrest, accompanied by a return of his deposit, on the ground that it was illegal as being a second arrest under the same warrant. Ex parte Doherty (1899), 5 Can. Cr. Cas. 94 (N.B.).

Semble, an unreasonable delay in issuing a warrant of commitment may be a ground for discharge on habeas corpus if the delay works an injustice to the defendant. Ibid.

*(Amendment of 1900.)*

**864. Common assault.**—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.

Before the Code, a magistrate could dispose summarily of any case of common assault. But under the Code either the complainant or the party complained against might refuse the magistrate the right to proceed, and the case had then to go before the grand jury and the party be indicted. The magistrate has by this amendment jurisdiction to summarily determine the complaint without regard to the desire of either the prosecutor or the defendant that it should be sent up for trial under indictment, and an indictment for *common* assault will only lie under the circumstances stated in sub-section 2.

The applicant C. having appeared to an information charging him with assault and praying that the case might be disposed of summarily under the statute, H., the complainant, applied to amend the information by adding the words "and falsely imprison"; this being refused H. offered no evidence, and a second information was at once laid, including the charge of false imprisonment. The magistrate refused to give a certificate of dismissal of the first charge, or to proceed further thereon, but endorsed on the information "Case withdrawn by the permission of the court, with the view of having a new information laid." It was held that the complainant could not, even with the magistrate's consent, withdraw the charge, the defendant being entitled to have it disposed of. R. v. Conklin (1871), 31 U.C.Q.B. 160. Under sub-sec. (2) the magistrate is, if he thinks the case a proper one for indictment, to proceed as upon a preliminary inquiry, and he may allow the information to be amended and re-sworn. See note to sec. 558.

**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 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.

This section does not apply to bar a civil action for assault, after conviction and payment of the fine, where such conviction is by a petit jury on a trial upon an indictment. Clermont v. Lagacé (1897), 2 Can. Cr. Cas. 1.

In Quebec it has been held that a conviction upon a charge of aggravated assault tried by a magistrate under sec. 783 (c) of the Criminal Code, with the consent of the accused, and the payment of the fine thereby imposed, will constitute a bar to a civil action for damages for such assault. Hardigan v. Graham (1897), 1 Can. Cr. Cas. 437 (Que.).

But in Ontario it is held on the contrary that the civil action is barred only where the charge is triable summarily under sec. 864 without regard to the consent of the accused, and that sec. 866 does not have that effect where the charge is under sec. 262 for the indictable offence of assault causing actual bodily harm. Nevills v. Ballard (1897), 1 Can. Cr. Cas. 434 (Ont.).

The injury to clothing or loss of property from the person by reason of the assault does not constitute a cause of action distinguishable from the civil action for assault, and any claim in respect of such injury or loss will likewise be barred where sec. 866 applies. Hardigan v. Graham, supra.

On a charge of shooting and wounding with intent, the justices holding a preliminary enquiry cannot, of their own motion, vary or reduce the charge to one of common assault and so acquire jurisdiction to adjudicate thereupon. Miller v. Lea (1898), 2 Can. Cr. Cas. 282.

A certificate of conviction by justices for common assault under those circumstances, and the payment of the fine imposed, do not bar a civil action by the injured party for damages against the wrongdoer, and this section does not apply. Ibid.

Where a magistrate invested with the powers of two justices tries a case of aggravated assault under the summary trials procedure with the consent of the accused (sec. 786), the conviction is a bar to further criminal proceedings for the same cause (sec. 799), but not to be a civil action for damages. The provisions of sec. 866 do not apply to such a case. Clarke v. Rutherford (1901), 5 Can. Cr. Cas. 13 (Ont.).

A summary conviction for assault has been held sufficient to bar a subsequent indictment, charging an assault and wounding with intent to murder, where the accused had been summoned before magistrates by the prosecutor of the indictment for the same assault, and had been imprisoned on his making default of payment of the fine imposed by the magistrates. R. v. Stanton (1851), 5 Cox C.C. 324, per Erle, J.

It was said by Coltman, J., in R. v. Walker (1843), 2 Moody & Rob. 446, that there is no difference in principle whether a party has been convicted or acquitted; and that on a complaint for a common assault the justices were to determine whether such assault was accompanied with any felonious intention, and on that question they are like any other court of competent jurisdiction, and their decision is of the same finality as if the party had been convicted by a jury. 2 Moody & Rob. 457.

The rule at common law is that where a person has been convicted for an offence by a court of competent jurisdiction, the conviction is a bar to all further criminal proceedings for the same offence; the principle is that no man shall be placed in peril of legal penalties more than once on the same accusation. R. v. Miles (1890), 17 Cox C.C. 9.

It is a well-established principal that a series of charges shall not be preferred, and, whether a party accused of a minor offence is acquitted or convicted, he shall not be charged again on the same facts in a more aggravated form. R. v. Elrington (1861), 1 Best & Smith 688, 696 (Cockburn, C.J., and Blackburn, J.).

It was held by the Court for Crown Cases Reserved in R. v. Morris (1867), L.R. 1 C.C.R. 90, that a conviction for assault and the imprisonment consequent thereon are not either at common law or under 24-25 Viet., ch. 100, sec. 45 (Can. Cr. Code 866), a bar to an indictment for manslaughter of the person assaulted, should he subsequently die from the effects of the assault. Per Martin, B., and Byles and Shee, JJ.; Kelly, C.B., dissenting.

In the last-mentioned case, Martin, B., considered the word "cause" in the statute, corresponding to sec. 866 of the Code, as used synonymously with the words "accusation" or "charge"; while Byles, J., said that the word "cause" may undoubtedly mean "act," but it is ambiguous, and it may also and, perhaps, with greater propriety be held to mean "cause for the accusation"; and in that view the cause for the indictment for manslaughter comprehended more than the cause in the summons before the magistrates, "for it comprehends the death of the party assaulted." L.R. 1 C.C.R. 95.

In a more recent case, at the Durham Assizes, November 23, 1895, the opposite view was taken by Grantham, J., the presiding judge. R. v. Hilton (1895), 59 J.P. (Eng.), 778. In that case it appeared that the defendant Hilton was indicted for the manslaughter of one Robert Jackson. The alleged assault which caused the death of Jackson occurred on the 12th of October. On the 21st of October cross-summonses for assault were heard by the justices and both cases were dismissed. At that time the deceased man's injuries were not considered serious, but on the 22nd of November he died from the effects of a clot of blood on the brain. Hilton was thereupon charged with manslaughter. Counsel for the prisoner produced a certificate of dismissal of the charge of assault by the justices under 24 & 25 Viet., ch. 100, sec. 45, and raised the plea that the prisoner had already been acquitted of the charge of assault and could not be tried again. The judge accepted this view, and the prisoner was discharged.

**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. 58.

A general power to award costs was first conferred by the statute 18 Geo. III., ch. 19, before which no such power existed except under special statutes. R. v. Brown (1888), 16 O.R. 41, 46.

The award of costs under a summary conviction should direct payment thereof to the informant and not to the justice. R. v. Roche (1900), 4 Can. Cr. Cas. 64.

**868. Costs on dismissal.**—Whenever the justice, instead of convicting or making an order, dismisses the information or complaint, 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.

*(Amendment of 1894.)*

**871. Fees.**—The fees mentioned in the following tariff and no others shall be and constitute the fees to be taken on proceedings before justices in proceeding 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 proceeding 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.*

| | $ cts. |
|---|---|
| 1. Arrest of each individual upon a warrant ..... | 1 50 |
| 2. Serving summons..... | 0 25 |

| | $ cts. |
|---|---|
| 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 conveyance 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.*

| | $ cts. |
|---|---|
| 1. Each day attending trial ..... | 0 75 |
| 2. Mileage travelled to attend trial (one way), per mile ..... | 0 10 |

*Excessive costs.*]—A justice's order dismissing an information under "The Summary Convictions Act," ordered the informant to pay as costs a sum which included items for "rent of hall," "counsel fee," "compensation for wages," and "railway fare." Held, that none of these items could legally be charged as costs. R. v. Laird (1889), 1 Terr. L.R. 179. In that case the court held that it had no power to amend the order by deducting the illegal items; though it could amend by striking out in toto all that part of the order relating to costs. R. v. Laird (1889), 1 Terr. L.R. 179; secs. 886 and 889 seem not to apply to "orders of dismissal," but to be limited to orders or convictions against the accused.

The allowance by the magistrate on a summary conviction, of excessive costs in respect of mileage to the constable for serving subpœnas upon witnesses, is not a ground for quashing the conviction. Ex parte Rayworth (1896), 2 Can. Cr. Cas. 230 (N.B.).

If the magistrate charges excessive costs, although he does so innocently, he is liable in a civil action to be made to refund the excess. Ex parte Howard (1893), 32 N.B.R. 237.

**872. Provisions respecting convictions.**—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—

*(Amendment of 1894.)*

(*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 common gaol or other prison of the territorial division for which the justice is then acting, 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

*(Amendment of 1894.)*

(*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 perod 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.

*(Amendment of 1900.)*

(*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.

2. The justice making the conviction or order mentioned in the paragraph lettered (*a*) of sub-section 1 of this section may issue a warrant of distress in the form DDD or EEE, as the case requires; and in the case of a conviction or order under the paragraph lettered (*b*) of the said sub-section, a warrant in one of the forms FFF or GGG 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, the justice may issue a warrant of commitment in the form JJJ.

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.

FORM DDD.—

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 His 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.)*

FORM EEE.—

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 the said C. D. the sum of , on or before then next, and also to pay to 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 , unless the said several sums, and all costs and charges of the distress (and of the commitment and conveying 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 His 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.)*

FORM FFF.—

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.)*

FORM GGG.—

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 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 costs 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.)*

FORM III.—

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 nine hundred and .

W. T.

FORM JJJ.—

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 (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.)*

*Warrant of distress.*]—It is not essential that a warrant of distress should be dated, and if it is not issued too soon, it is not material that it bears too early a date. R. v. Sanderson (1886), 12 O.R. 178; Newman v. Earl of Hardwicke, 3 N. & P. 368.

No warrants of distress for non-payment of penalties can be issued on a Sunday. R. v. Myers, 1 T.R. 265.

It is not necessary that the bailiff should go to the premises and search for goods on which he might distrain if he was otherwise satisfied that it would be useless to do so. R. v. Sanderson (1886), 12 O.R. 178.

A distress to enforce payment of a fine upon a conviction under the Canada Temperance Act is not a proceeding in right of the Crown, and goods seized under a distress warrant therefor are not repleviable unless the magistrate who issued it acted without jurisdiction. Hannigan v. Burgess (1888), 26 N.B.R. 99.

The court refused a mandamus to the mayor of a municipality to issue a distress warrant on a conviction made by him under the Canada Temperance Act where the by-law and conviction were open to grave objections, which had been taken on the trial before him, and which he claimed made it illegal for him to proceed. R. v. Ray (1878), 44 U.C.Q.B. 17.

*Remand pending distress.*]—See sec. 876.

*Costs of distress.*]—If the justice making a summary conviction adjudges a pecuniary penalty and a distress to realize same, and in default of sufficient distress that the defendant be imprisoned, the costs of the distress and of conveying the defendant to gaol are not in the discretion of the justice, but must be included in the formal conviction. R. v. Vantassel (No. 1) (1894), 5 Can. Cr. Cas. 128 (N.S.). The omission of that provision from the formal conviction will invalidate the conviction. R. v. Vantassel, (No. 2) (1894), 5 Can. Cr. Cas. 133 (N.S.).

But it is unnecessary for the justice to insert in the *minute* of conviction any provision that the defendant shall pay such costs of distress and conveying to gaol, as a pre-requisite to his discharge from custody before the end of the term of imprisonment. R. v. Vantassel (No. 1), supra.

The formal conviction may provide under sec. 872 (*a*) for the payment of the costs both of the distress and of conveying to gaol, although the minute of conviction does not include the costs of distress but merely directs imprisonment unless the penalty and costs and the costs of conveying to gaol are sooner paid. Ibid.

The expression "costs and charges" used in Code forms WW and FFF has the same meaning as the term "expenses" in sec. 872 (*a*). Ibid.

The Summary Conviction Act, R.S.C. ch. 178, sec. 66, contained a provision that the costs of conveying should be imposed "if the justice thinks fit so to order."

Under it it was held that such costs were discretionary with the magistrate; Ex parte Whalen, 29 N.B.R. 146; R. v. McDonald, 26 N.S.R. 94; but a different rule prevails under sec. 872 as it does not contain the words of limitation just quoted. R. v. Vantassel (No. 2) (1894), 5 Can. Cr. Cas. 133 (N.S.).

*False return to distress warrant.*]—The court cannot in certiorari proceedings try the truth of the return on affidavits. R. v. Sanderson (1886), 12 O.R. 178.

The magistrate is justified in acting upon the bailiff's return that sufficient distress cannot be found if it should subsequently appear that the return was untrue. R. v. Sanderson (1886), 12 O.R. 178; Hill v. Bateman, 2 Strange 710; Moffat v. Barnard, 24 U.C.Q.B. 498, 502. But the bailiff will be liable to an action if he makes an untrue return knowing it to be false. Ibid.

But in New Brunswick it has been decided that on a habeas corpus application under Consol. Stat., N.B., ch. 41, sec. 4, it may be shewn that the constable's return to the warrant of distress, that there was not sufficient property to satisfy it, is false, and that therefore the commitment based thereon, under which the party is imprisoned, was improperly issued. Ex parte Fitzpatrick (1893), 5 Can Cr. Cas. 191; 32 N.B.R. 182.

*Warrant of commitment.*]—If the warrant does not set forth that the magistrate had adjudicated on the matter of imprisonment it does not shew jurisdiction to direct imprisonment and is therefore void. Ex parte Taylor (1898), 34 C.L.J. 176 (P.E.I.).

The warrant of commitment on a conviction for an offence less than a felony must be in the possession of the police officer at the time of the arrest. Ex parte McManus (1894), 22 N.B.R. 481; Codd v. Cabe (1876), 1 Exch. D. 352. But the arrest need not be by the hand of the officer executing the warrant if he is near at hand and acting in the arrest, although not actually in sight. Ex parte McManus (1894), 22 N.B.R. 481; Blatch v. Archer, 1 Cowp. 63. It is not sufficient if the officer holding the warrant be in sight but too far away to be assisting. R. v. Patience (1837), 7 C. & P. 775. Nor will the possession of the warrant by the constable's superior officer at the police station suffice. Galliard v. Laxton (1862), 2 B. & S. 363.

The convicted party was arrested on Sunday on a warrant of commitment issued by the parish court commissioner for the parish of Chatham, in the county of Northumberland, in default of payment of fine for violation of the Canada Temperance Act, and was sent to gaol. Held, that the arrest being on Sunday, was void, and that prisoner must be forthwith discharged from custody. The order was made exempting the gaoler form liability. Ex parte Freeker (1897), 33 Can. Law Jour. 248.

*Imprisonment not exceeding three months.*]—The word "penalty," although generally applied to pecuniary punishment, as by fine, includes also punishment by imprisonment. A conviction awarding ninety days' imprisonment as an alternative punishment on non-payment of a fine where the statute authorized three months' imprisonment is bad, as ninety days may

possibly be more than three months. R. v. Gavin (1897), 1 Can. Cr. Cas. 59 (N.S.).

Unless there be sufficient distress to cover the penalty and costs, the return upon the warrant of distress should state that fact, and upon that a warrant of commitment may issue, but if a portion of the penalty has been paid the amount should be returned before the alternative punishment of imprisonment is resorted to. Sinden v. Brown (1890), 17 Ont. App. 173, 176, per Burton, J.A.

If the punishment be a penalty of $50 and costs, or, in the alternative, if there was no distress from which the penalty and costs could be made, imprisonment for thirty days; and if one-half of the penalty had been made by distress, the party convicted cannot be made to suffer imprisonment for thirty days in addition; and there is no provision in the law to graduate or reduce the term of imprisonment in proportion to the amount paid upon the penalty. Sinden v. Brown (1890), 17 Ont. App. 173, 176, per Burton, J.A.

*Hard labour.*]—Before the amendment of this section in 1900 it was held that it did not authorize an award of imprisonment with hard labour in default of payment of the fine, unless the Act or law under which the conviction is had provides the same in respect of the non-payment of the penalty; and this notwithstanding such Act or law authorizes a punishment in the first instance by imprisonment with hard labour. R. v. Horton (1897), 3 Can. Cr. Cas. 84 (N.S.).

*Costs of conveying to gaol.*]—Section 66 of the Summary Convictions Act R.S.C. ch. 178, from which Code sec. 872 is adopted, provided that in that case on a return of "no goods and chattels" whereon to levy, the justice might issue his warrant of commitment requiring the constable to convey the defaulter to the gaol and the keeper to receive and imprison him for the time directed unless "the sum or sums adjudged to be paid and all costs and charges of the distress and also the costs and charges of the commitment and conveying of the defendant to prison, *if such justice thinks fit so to order* . . . are sooner paid." Under it the power to award the costs of conveying the defendant to gaol was held to be discretionary with the magistrate and that he might direct the payment of them or not as he saw fit. R. v. Hamilton 1 Terr. L.R. 172, 175. Wetmore, J., in that case said: "The forms of conviction and warrant provided for these cases are in keeping with this discretionary power: the form of conviction is J 1, the words 'and of the commitment and conveying of the said A. B. to the said gaol,' are in brackets, thus indicating that they are to be inserted or left out accordingly as the justice in his discretion directs that they shall be paid or not. The form of the warrant of commitment provided for in these cases N 5 is similar, the same or similar words are in brackets, and the form of this warrant is in accordance with the provisions of sec. 66. When, however, imprisonment is awarded in the first instance in default, there is nothing to be found in the body of the Act, or elsewhere, expressly vesting in the justice a discretionary power to award the costs of conveying the defendant to gaol. In looking at the form of conviction provided for in that case, J 2, it will be seen that the words 'and the costs and charges of conveying the said A. B. to the said common gaol' are not in brackets, but upon looking at the form of commitment applicable to such case, O 1, we find that the words 'and costs and charges of carrying him to the said common gaol amounting to the further sum of ,' are in brackets. Now, these words must be in brackets for some purpose, and the only conceivable purpose for so putting them in brackets is that in some cases they are to be inserted in the warrant and in other cases they are not. When then are they to be inserted? The magistrate has no discretion as in the other cases mentioned to insert them or not. The only conclusion to arrive at is that they are to be inserted when the substantive Act, which creates the offence and the punishment, authorizes it, otherwise they are not to be

inserted. That being so, the words in the form of conviction J 2, authorizing imprisonment unless the costs and charges of conveying the defendant to gaol are paid, can only be inserted when the substantive Act authorizes such imprisonment."

A warrant of commitment by justices in 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 liberty, is invalid if the amount of such expenses are not stated therein. R. v. Thomas McDonald (1898), 2 Can. Cr. Cas. 504 (N.S.).

It has been held that where on a prosecution under provincial law the costs of conveying the defendant to gaol cannot be legally awarded against him on a conviction, and the sum of such costs is stated in the warrant of commitment, the improper inclusion of same cannot be treated as surplusage, and will invalidate the warrant. Re J. W. King (1901), 4 Can. Cr. Cas. 426 (N.S.); R. v. Doherty (1899), 3 Can. Cr. Cas. 505, distinguished.

Where in a summary conviction it was adjudged that in default of payment of the fine and of the amount taxed to the prosecutor for his costs, and in default of sufficient distress therefor, the defendant be imprisoned for a term specified, unless such fine and costs, etc., and the costs of the commitment, were sooner paid, the words "costs of the commitment" irregularly included therein may be treated as surplusage, and their inclusion will not invalidate the conviction, if, in fact, there are no costs of commitment apart from the costs taxed and allowed in the conviction and warrant of commitment. R. v. Doherty (1899), 3 Can. Cr. Cas. 505 (N.S.).

*Imprisonment without previous distress.*]—A conviction under the Canada Temperance Act may by virtue of the above sec. 872 (*b*) direct imprisonment in default of payment of the fine and costs, without any award of a distress upon the defendant's goods. Ex parte Casson (1897), 2 Can. Cr. Cas. 483. This alters the prior law, and the decision in R. v. Sullivan, 24 N.B.R. 149, is no longer of authority.

A magistrate trying a case under the summary convictions clauses may, under this section, award imprisonment in default of payment of the fine without directing that a distress shall first be made upon the defendant's goods and chattels. Ex p. Gorman (1898), 4 Can. Cr. Cas. 305 (N.B.).

Upon a summary conviction and fine for keeping a bawdy-house the powers of a magistrate for enforcing payment of the fine are limited to directing imprisonment for a period not exceeding three months under subsec. 1 (*b*), although he might impose imprisonment for six months in the first instance instead of a fine under sec. 208. R. v. Stafford (1898), 1 Can. Cr. Cas. 239 (N.S.).

It was held in R. v. Horton, 3 Can. Cr. Cas. 84, by the Supreme Court of Nova Scotia, that sec. 872, before the 1900 amendment, did not authorize an award of imprisonment with hard labour in default of payment of the fine unless the Act or law under which the conviction was made provided the same in respect of the non-payment of the penalty; and this notwithstanding that such Act or law authorized a punishment in the first instance by either imprisonment with hard labour or fine.

The amendment does away with that anomaly and makes the procedure in this respect under the Summary Convictions clauses of the Code (Part LVIII.) conform with the Procedure under the Summary Trials clauses (Part LV). See R. v. Crowell (N.S.), 2 Can. Cr. Cas. 34, and R. v. Burtress (N.S.), 3 Can. Cr. Cas. 536.

**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; and, in default of distress, a warrant of commitment in the form LLL may issue: Provided, that the term of imprisonment in such case shall not exceed one month. R.S.C. c. 178, s. 70.

FORM KKK.—

WARRANT OF DISTRESS FOR COSTS UPON AN ORDER FOR DISMISSAL OF AN INFORMATION OR COMPLAINT.

Canada,
Province of , }
County 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 the 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 His

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.)*

FORM LLL.—

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 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.)*

**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. R.S.C. c. 178, s. 63.

FORM HHH.—

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 nine hundred and

O. K.,
*J.P., (Name of County.)*

**875. Distress not to issue in certain cases.**—Whenever it appears 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.

Under a warrant of distress upon a conviction for an offence against the second part of the Canada Temperance Act, the defendant's property must be levied on, though it consists of intoxicating liquors only, and is in a place where the second part of the Act is in force. Ex parte Fitzpatrick (1893), 5 Can. Cr. Cas. 191 (N.B.).

The Canada Temperance Act does not prohibit judicial sales of intoxicating liquors. Ibid.

**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 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.

The prisoner was convicted on the 18th of February, 1895, for unlawfully keeping for sale intoxicating liquors in violation of the second part of the Canada Temperance Act, and he was adjudged to pay a fine of $50 and costs, and if not paid and in default of distress, that he should be imprisoned for eighty days. A warrant of commitment was issued on 19th July, 1895. On 17th June, 1895, he was convicted by the same justices for a second offence under the same Act, and fined $100 and costs, and in default of payment to be imprisoned for eighty days. A warrant of commitment was issued on 18th July, 1896. He was arrested on the 29th January, 1896, under the first warrant, and after eighty days imprisonment was discharged. On 8th September, 1896, he was arrested on the second warrant. An application was now made for his discharge on the ground that as the imprisonments were not expressed to be cumulative, they must be taken to have been concurrent by virtue of sec. 877 of the Code. Barker, J., in refusing the application, said there was an important distinction between the case of an offence for which the justice awards imprisonment as a punishment and one for which a penalty can only be imposed, and where the imprisonment is merely a means of enforcing payment of the penalty. Under sec. 100 of the C.T. Act any person violating the provisions of the second part of the Act is liable for the first and second offence to a fine, and it is only for the purpose of enforcing payment that imprisonment is awarded. In this respect the case was to be distinguished from R. v. Cutbush (1867), L.R. 2 Q.B. 379, and Castro v. R. (1881), 6 App. Cas. 229. He referred to secs. 872, 877 and 880 of the Code as recognizing this distinction. As the prisoner when in custody under the first warrant was not undergoing punishment, his imprisonment could not be said to refer to the second offence. R. v. Doherty (1896), 32 C.L.J. 595.

**878. Recognizances.**—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 recognizance, 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 prima facie evidence of the non-appearance of the said defendant.

*(Amendment of 1895).*

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.

FORM MMM.—

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.)*

"Acknowledge to A.B." is not equivalent to "acknowledge to owe to A.B." A recognizance taken before a police magistrate under 32 & 33 Vict., ch. 30, sec. 44, omitted the words "to owe"; it was held that the omission was fatal, and that an action would not lie upon the instrument as a recognizance. R. v. Hoodless (1881), 45 U.C.Q.B. 556.

*British Columbia.*]—In summary convictions under sec. 878 of the Cr. Code, the certificate of default of appearance, as in the preceding rule, shall be transmitted by the justice of the peace to the clerk of the County Court

having jurisdiction at the place wherein such recognizance is taken, and be proceeded upon by order of the County Court judge, if he thinks proper, in like manner as other recognizances. B.C. Rule 47.

**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 King'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 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.

*Right of appeal.*]—An appeal under 879, from a summary conviction in the Province of Quebec to the Court of Queen's Bench of that province can only be taken where the offence charged is one within the legislative authority of the Parliament of Canada, and not where the offence is against a provincial statute. Code sec. 840; Lecours v. Hurtubise (1899), 2 Can. Cr. Cas. 521.

The appeal to the Quebec Court of Queen's Bench, Crown Side, provided in sec. 879, does not apply to a conviction by the Harbour Commissioners, in their capacity of the pilotage authority, depriving a pilot of his license. Such a conviction is subject, in the Province of Quebec, to proceedings by certiorari to the Superior Court on proof of due cause for evocation. Arcand v. Montreal Harbour Commissioners (1897), 4 Can. Cr. Cas. 491 (Que.).

One D.M. having been on 27th August, 1862, convicted before justices of the peace for allowing card playing at his inn was fined $20 and costs. On judgment being pronounced he remarked that he would pay the fine, but he would see further about it. It was held that the facts as set out did not amount to the waiver of the right to appeal, as the money was paid under protest, and the court stated its opinion that a party should not, on any doubtful ground, be deprived of a right of appeal against a summary conviction. In re Justices of the Counties of York and Peel, ex parte D. Mason (1863), 13 U.C.C.P. 15.

Where there is a right of appeal from a summary conviction, and it appears upon an application for a certiorari to bring up the conviction to

be quashed that the ground alleged therefor is more properly the subject of an appeal, the discretion of the court should be exercised by refusing the certiorari. R. v. Herrell (No. 2) (1899), 3 Can. Cr. Cas. 15 (Man.), per Dubuc, J.

The appeal from a summary conviction under the Seaman's Act of Canada for harbouring and secreting a deserting seaman is under this section (879) and not under sec. 742 of the Code, and in the Province of Quebec the appeal should be taken to the Crown side and not to the appeal side of the Court of Queen's Bench of that Province. R. v. O'Dea (1899), 3 Can. Cr. Cas. 402 (Que.).

All the provisions of secs. 879-880 are to be taken as embodied in the Act as to frauds against cheese factories, 52 Vict. (Can.), ch. 43, sec. 9, except as varied by or inconsistent with the latter Act, and confer the power to award costs on an appeal taken under sec. 9 thereof. R. v. McIntosh (1897), 2 Can. Cr. Cas. 114 (Ont.).

An appeal lies under this section from a conviction made under the Fisheries Act, R.S.C., ch. 95, sec. 18, notwithstanding the special appeal provided by that Act. R. v. Townsend (1901), 5 Can. Cr. Cas. 143 (N.S.).

The special appeal, which under the Fisheries Act may be made to the Minister of Marine and Fisheries, may be taken after the disposal of an appeal to a county court. Ibid.

Convictions by two justices of the peace under paragraph 7 of sec. 782 may be appealed in the same manner as under sec. 879, but it in no way affects other convictions on summary trial which, under sec. 879, are not susceptible of appeal. R. v. Portugais (1901), 5 Can. Cr. Cas. 100 (Que.).

It will be observed that in this and the following sections relating to appeals from summary convictions, a distinction is drawn between the "court" and the "sittings of the court."

*Right of certiorari*]—In matters coming under the provisions of the Code, the right to certiorari is taken away in respect of any conviction or order had or made before any justice of the peace if the defendant has appealed therefrom to any court to which an appeal is authorized by law (sec. 887) and also in respect of any conviction or order made upon such appeal, or the conviction or order affirmed, or affirmed and amended, in appeal. Secs. 886, 887.

It is well established that a provision taking away the certiorari does not apply where there was an absence of jurisdiction. Ex parte Bradlaugh (1878), 3 Q.B.D. 511; but although the writ is allowed to issue, the order removed will not be quashed in such a case except upon the ground either of a manifest defect of jurisdiction or a manifest fraud in procuring it. Colonial Bank v. Willan (1874), L.R. 5 P.C. 417.

The power of a Superior Court to remove proceedings before justices of the peace is incident to the superintending authority which that court possesses over inferior jurisdictions and it was held that the direction of a statute (22 Car. 2, ch. 1, sec. 6) which gave an appeal to the sessions and enacted that "no other court whatsoever shall intermeddle with any cause or causes of appeal upon this Act but they shall be *finally determined* in the quarter sessions *only*" did not prevent the removal of the order by certiorari. R. v. Morley, 2 Burrows 1040. Unless the intention to do away with the writ is shewn by express mention of certiorari, it will be inferred that the "determination" referred to is in reference to matters of fact only. R. v. Plowright, 3 Mod. 95, 2 Hawkins Pleas of the Crown, 6th ed., ch. 27, sec. 23.

It has, however, been held in New Brunswick that where a statute makes provision for an appeal from a summary conviction, the discretion of the court as to granting a certiorari should be exercised by refusing the latter unless special circumstances are shewn therefor. Ex parte Ross (1895), 1 Can. Cr. Cas. 153 (N.B.).

**880. Conditions 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, 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 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 571, 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, includ-

ing 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 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 other 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.

FORM NNN.—

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 nine hundred and .

A. B.

MEMORANDUM.—*If this notice is given by several defendants, or by an attorney, it may be adapted to the case.*

FORM OOO.—

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 Lord the King, 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 on their several goods and chattels, lands and tenements respectively, to the use of our said Lord the King, his heirs and successors, if he, the said A. B., fails in the condition endorsed (*or* hereunder written).

Taken and acknewledged 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, etc.), (*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 nine hundred and .

*Appeal generally.*]—An appeal from a summary conviction to the General Sessions in a criminal case does not abate by the death of the informant. R. v. Fitzgerald (1898), 1 Can. Cr. Cas. 420.

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. R. v. Urquhart (1899), 4 Can. Cr. Cas. 256 (Ont.).

As to proceedings in certiorari see note to sec. 887.

*Notice within ten days.*]—It is not safe for the magistrates to assume, or for the court to require them to assume the responsibility of determining whether or not the appeal was in time; to adjudicate upon a question as to their own default, and to refuse to transmit the papers. The safe way is for the magistrate, upon the recognizance being furnished, to transmit the papers leaving the judge to determine whether any delay which may have arisen is attributable to them or to the appellant. R. v. Slaven (1876), 38 U.C.Q.B. 557.

A conviction having been made within twelve days (now fourteen days) of the next sessions, notice of appeal was given to such sessions, instead of to the second sessions after the conviction, contrary to the 33 Vict., ch. 27,

sec. 1, and the appeal was not heard. Held, that such notice being inoperative, there had, in effect, been no appeal, and the right of certiorari was therefore not taken away. See sec. 887. Held, also, that under the circumstances notice to the chairman of the sessions of defendant's intention to move for the certiorari was not required. R. v. Caswell (1873), 33 U.C.Q.B. 303.

In R. v. Crouch, 35 U.C.Q.B. 433, at p. 439, Richards, J., says: "If as a matter of fact the notice of appeal had not been given in time, or the recognizance entered into, or other matter required to be done before the appellant could proceed with his appeal, the objection could probably be taken at any time, for it would shew that the court had no jurisdiction to try the appeal."

In the case of Kent v. Olds, 7 U.C.L.J. 21, it was decided that an application to take the appellant's recognizance in court could not be entertained, on the ground that although the recognizance need not be entered into within ten days it must be entered into and filed before the sittings of the court in which the appeal is made. It was also decided in Re Myers & Wonnacott, 23 U.C.Q.B. 611, that a failure to comply with these conditions will not be waived by the respondent asking for a postponement after the appellant has proved his notice of appeal on the first day of the court.

After the court is opened for the hearing of the appeal, it is then too late for the appellant to file his recognizance. Bestwick v. Bell (1889), 1 Terr. L.R. 193.

A notice of appeal was addressed to the convicting magistrate only, and was served upon him only. The notice contained no intimation that it was served on the magistrate for the prosecutor or complainant, nor did it appear that the magistrate was otherwise notified to that effect. The notice of appeal was held to be insufficient. Keohan v. Cook (1887), 1 Terr. L.R. 125; In re Myers & Wonnacott, 23 U.C.Q.B. 611; Ex. p. Mason, 13 U.C.C.P. 159.

A notice of appeal from a summary conviction neither addressed to nor served upon the prosecutor, but addressed to and served upon one only of two convicting justices of the peace, is insufficient, though it appears that when the notice was so served the justice upon whom it was served was verbally informed that it was for the prosecutor. Hostetter v. Thomas (1899), 5 Can. Cr. Cas. 10 (N.W.T.).

In a recent British Columbia case, R. v. Jack (1902), 5 Can. Cr. Cas. 160, it was held by Bole, Co.J., that a notice of appeal from a summary conviction served upon the convicting justices is not invalid because it is not addressed to them. But the correctness of the decision is to be doubted. It was held by Bélanger, J., of the Quebec Court of the Queen's Bench, in Canadian Society v. Lauzon (1899), 4 Can. Cr. Cas. 354, that where a notice of appeal under the Summary Convictions clauses is served on the justice who tried the case, instead of on the respondent himself, such notice must shew on its face that it is so served on the justice *for* the respondent. The notice in that case had been directed to the justices alone, and did not specify on its face that it was intended for the respondent. Form NNN. begins as follows:—"To C. D., of , and , (the names and additions of the parties to whom the notice of appeal is required to be given)." In Cragg v. Lamarsh (1898), 4 Can. Cr. Cas. 246, referred to supra, the notice of appeal was not addressed to any person. The Supreme Court of the North-West Territories held (and it is submitted that their decision was correct) that the notice was invalid.

In Ex parte Doherty, 25 N.B.R. 38, the notice of appeal served on the justice was merely addressed to the justice, and not to the complainant or to the justice for the complainant, and it was held sufficient. The decision in R. v. Jack, supra, goes further, and holds that the notice is sufficient

although not addressed at all, and it is therefore directly contrary both to the decisions before mentioned in the Territories and to the case of Canadian Society v. Lauzon. The latter will probably not be generally followed, as it places an extreme construction on sub-section (*b*) which would make it equivalent to an enactment that the appellant should leave the written notice with the respondent or with the justice for delivery to him.

As the statute authorizes the giving of notice of appeal to the justice, it seems reasonable to suppose that the notice may be addressed to such justice and to him only, and that the words "for him," which follow, are intended to convey that such notice shall be good and sufficient notice to the respondent, who must necessarily become acquainted with the fact when the enforcement of the justice's decision is sought by him. There being no provision requiring the justice to deliver the notice to the respondent on demand or otherwise, it is submitted that the notice of appeal when served upon the justice becomes part of the record of the proceedings taken before him, and should be transmitted by him to the appellate court.

Where a notice is served personally upon the person required to be notified, a written direction or address is not usually necessary. Doe v. Wrightman, 4 Esp. 5; but Form NNN. is explicit in requiring the notice of appeal to be addressed. Sub-sec. (*b*) of sec. 880 is equally explicit in requiring that the notice shall be "in the form NNN." It is therefore submitted, with all deference, that where the address is omitted, the notice is no longer in a "form to the like effect" (sec. 982), nor can it be said that the omission is, in this instance, a variation "to suit the case," which sec. 982 allows. As was pointed out by Wetmore, J., in Cragg v. Lamarsh, the Imperial Act, under which R. v. Justices of Essex, [1892] 1 Q.B. 490, was decided, differs materially from the Code in that no form of notice is thereby prescribed.

Sub-sec. 44 of sec. 7 of the Interpretation Act, R.S.C. 1886, ch. 1, provides that "Whatever forms are prescribed slight deviations therefrom not affecting the substance or calculated to mislead shall not vitiate them." It is not a slight diviation, when the Act gives a form of notice and directs that it shall be addressed to certain persons, to issue a notice not addressed to any person. Cragg v. Lamarsh (1898), 4 Can. Cr. Cas. 246 (N.W.T.).

*Recognizance or deposit.*]—It is not necessary that the recognizance on an appeal from a summary conviction should be accompanied by affidavits of justification by the sureties, the sufficiency of the sureties being a matter entirely for the justice before whom the recognizance is given. Cragg v. Lamarsh, supra.

The question is quite different from that which arose in R. v. Richardson, 17 Ont. R. 729, and R. v. Petrie, 1 N.W.T.R., No. 2, p. 3. In those cases the statute and rule of court prohibited the court from entertaining a motion to quash a conviction unless the defendant was shewn to have entered into a recognizance with one or more sufficient sureties. That was held to be a provision that there must be affirmative evidence before the court in which the motion was made shewing the sufficiency of the sureties before the motion could be entertained. Cragg v. Lamarsh, supra.

Where on an appeal from a summary conviction the appellant does not make the deposit in lieu of recognizance until after the sittings of the appellate court at which he should have brought the appeal on for hearing, and for which notice was given, the appeal cannot be heard. McShadden v. Lachance (1901), 5 Can. Cr. Cas. 43 (B.C.).

It has been held that on an appeal to a court of general sessions in Ontario, a non-resident of the county for which such court is established is not a competent surety. R. v. Lyon, 9 C.L.T 6, per Jones, County Judge of Brant.

The failure of the magistrate to return into court the conviction appealed from or the deposit made by the appellant, if duly required to do so, has been held in British Columbia not to prevent the hearing of the appeal. Re Kwong Wo (1893), 2 B.C.R. 336, per Sir M. Begbie, C.J.

But in Toronto it has been decided that on an appeal from a summary conviction the appellant making a money deposit in lieu of recognizance must see to it that such deposit is returned by the justice into the court to which the appeal is taken, and in default, the appeal cannot be heard. The fact that the appellant had made such deposit is a matter of record and is not properly provable by affidavit. R. v. Gray (1900), 5 Can. Cr. Cas. 24. McDougall, Co. J.

The giving of a recognizance on an appeal from a summary conviction, operates as a stay of proceedings for the enforcement of any pecuniary penalty imposed by the conviction appealed from. Simington v. Colbourne (1900), 4 Can. Cr. Cas. 367 (N.W.T.).

*Parties to appeal.*]—Where an information is laid in the name of an individual describing himself as the agent of a society named, the society does not thereby become a party to the proceedings and it has no locus standi to appeal from the justices' order dismissing the charge. The notice of appeal must in such case be taken in the name of the agent personally, otherwise it may be quashed. Canadian Society v. Lauzon (1899), 4 Can. Cr. Cas. 354 (Que.).

*Adjournment of hearing.*]—Under Con. Stat. U.C. ch. 114, an appeal from a conviction could only be heard at the Court of Quarter Sessions appealed to. In re McCumber and Doyle (1867), 26 U.C.Q.B. 516. Sub-sec. (*f*) gives an express power to the court to adjourn the hearing if necessary, i.e., on cause being shewn for the adjournment, or on consent.

*Costs of appeal.*]—Where an order is made allowing 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 a distress warrant and imprisonment in default. R. v. Hawbolt (1900), 4 Can. Cr. Cas. 229 (N.S.).

Where an appeal to a Court of General Sessions of the Peace from a summary conviction is not proceeded with (see sec. 884), an order giving costs to the respondent can only be made at the same sittings for which notice of appeal was given; but where an appeal is heard, and determined against the appellant, the formal order need not be drawn up at the same sittings, and the respondent's costs may be taxed nunc pro tunc at the next sittings and included in a formal order then issued in pursuance of the direction therefor made at the previous sittings. Bothwell v. Burnside (1900), 4 Can. Cr. Cas. 450 (Ont.); and see McShadden v. Lachance (1901), 5 Can. Cr. Cas. 43 (B.C.).

Under sub-sections (*e*) and (*f*) there is no restriction of the power of the court to the same sittings of the court for which notice of appeal has been given, as there is in sec. 884. Ibid.

*Order for costs out of deposit.*]—Sub-section (*e*) 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. For, 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. Fenson v. New Westminster (1897), 2 Can. Cr. Cas. 52.

Where a statute directs the doing of a thing for the sake of justice or the public good, the word "may" is the same as the word "shall." R. v. Barlow, Salk. 609, Skin. 370, Carth. 293.

**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.

*Power of court on appeal.*]—This section gives the court power to deal with and consider the law as it affects the whole conviction, as well the validity of the conviction, as the admissibility of testimony and whether the evidence proves the offence charged, and the court may quash the conviction for defects or errors apparent on its face. R. v. Tebo (1889), 1 Terr. L.R. 196; but see contra McLellan v. McKinnon, 1 Ont. R. 219, 238, per Armour, J.

On an appeal to the Sessions the appellant may tender evidence and witnesses not heard on the trial before the magistrate, and if deprived of this right the order of Sessions should be quashed. R. v. Washington (1881), 46 U.C.Q.B. 221.

An appeal from a summary conviction is, in Ontario, to be taken to the Court of General Sessions of the Peace sitting without a jury; and sec. 881, constituting such court the absolute judge as well of the facts as of the law in respect of the conviction or decision appealed against, is intra vires of the Dominion Parliament. R. v. Malloy (1900), 4 Can. Cr. Cas. 116 (Ont.).

A statutory provision that the appellate court shall try the appeal without a jury is one relating to the procedure and not to the constitution of the court. Ibid.; R. v. Bradshaw (1876), 38 U.C.Q.B. 564.

**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 shewn 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.

See secs. 843-846 inclusive.

**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.

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.

Before this enactment, an amendment of a conviction was not allowed after the time for hearing the appeal had arrived. R. v. Smith (1874), 35 U.C.Q.B. 518.

The term "merits" applied to criminal proceedings must mean the justice of the case in reference to the guilt or innocence of the accused of the offence with which he is charged. R. v. Cronin (1875), 36 U.C.Q.B. 342.

The powers of amending a defective summary conviction conferred by sec. 883 on an appeal do not extend to or apply to convictions made under an Ontario statute. R. v. Lee (1901), 4 Can. Cr. Cas. 416, per McDougall, Co.J. But if the conviction is brought before a superior court on certiorari, secs. 889 to 896 inclusive will apply. 1 Edw. VII., (Ont.) c. 13, s 1.

The court of general sessions has no authority to order a person to pay any part of the costs of an appeal to them from a conviction, after he has been acquitted on such appeal. R. v. Orr (1854), 12 U.C.Q.B. 57.

If the court of general sessions give the proper judgment, so that nothing remains to be done to dispose of the appeal except the issuing of the order, that, as a ministerial act, may be done by the clerk of the peace after the close of the session, and tested of the first day of the session, but no subsequent session of the court can interfere with the judgment of the previous session by way of amendment or otherwise. In re Rush and the Corporation of Bobcaygeon (1879), 44 U.C.Q.B. 199.

On an appeal from a summary conviction had upon a plea of guilty the case should not be re-opened and witnesses called as to the merits for the purpose of revising the punishment imposed, if the magistrate has not acted oppressively. R. v. Bowman (1898), 2 Can. Cr. Cas. 89 (B.C.).

The court of quarter sessions at which the appeal is heard must determine, on quashing a conviction, whether costs are to be paid; secondly, what costs, that is, costs of the court below, or magistrate's court, or costs of the appeal, or both, and when such costs should be paid. The clerk of the peace may tax the costs at any time during the then sitting of the sessions, or at any adjourned sitting thereof, but the court must adopt his taxation, and an order made without such adoption would be invalid. In re Rush and the Corporation of Bobcaygeon (1879), 44 U.C.Q.B. 201.

This section applies to an appeal by the prosecutor from the justice's order dismissing the complaint; and 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 a distress warrant and imprisonment in default. R. v. Hawbolt (1900), 4 Can. Cr. Cas. 229 (N.S.).

All the provisions of the Criminal Code with respect to amendment of convictions or orders either on appeal or when removed by certiorari and (subject to sec. 12 of the Ontario Summary Convictions Act) of any other Act of Parliament of Canada authorizing the amendment of a conviction or order shall apply to convictions or orders made under the authority of any Statute of Ontario or under any by-law passed by virtue of such authority. 2 Edward VII., Ont., ch. 12, sec. 15.

*(Amendment of 1894.)*

**884. Costs when appeal not prosecuted.**—The court to which an appeal is made, upon proof of 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.

*Costs on want of prosecution.*]—Under this section the costs would have to be taxed and included in the order of the court during the sittings of the court, unless taxed out of sessions by consent, and the amount afterwards filled in the order. But in sec. 880 (*e*) and (*f*) there is no restriction of the power of the court to the same sittings of the court for which notice of appeal has been given. Bothwell v. Burnside (1900), 4 Can. Cr. Cas. 450, 459.

There is no jurisdiction to award costs against the appellant who defaults in proceeding with the appeal at any other sittings than the one for which notice was given. McShadden v. Lachance (1901), 5 Can. Cr. Cas. 43 (B.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.

*As if no appeal had been brought.*]—A defendant committed to custody under a warrant issued by the convicting magistrate gave bail for an appeal and was discharged from custody, and on the appeal being heard, was found guilty and the conviction affirmed, and the prisoner directed to be punished according to the conviction. No process was issued by the sessions for enforcing the judgment of the court, but a new warrant was issued by the convicting magistrate under which the prisoner was retaken. Writs of habeas corpus and certiorari were issued, and on the return thereof a motion was made for the discharge of the prisoner. It was held that the prisoner was not in custody or confined under the judgment of the sessions, but under the warrant of the convicting magistrate; and that under the circumstances the convicting magistrate was functus officio, and therefore could not legally issue the warrant in question, which should have been issued by the sessions. The latter court could possibly have directed punishment for the unexpired term; but if no bail had been given and the prisoner had remained in custody, no further order of commitment would have been necessary; or, if no warrant of commitment had been issued prior to appeal, the magistrate could have issued one thereafter. R. v. Arscott (1885), 9 O.R. 541.

**886. Conviction not to be quashed for defects of form.**—No conviction or order affirmed, or affirmed and amended, in appeal, 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.

An "order of dismissal" is not within this section. R. v. Laird (1889), 1 Terr. L.R. 179.

**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.

*When appeal bars certiorari.*]—In R. v. Starkey, 6 Man. R., p. 589, Taylor, C.J., said: "It is not necessary for the applicant to shew what has been done in the matter of the appeal. Even if an appeal is now pending and being proceeded with, his right to a writ of certiorari is not thereby affected. At all events, it is not so unless the question of jurisdiction is the one raised on the appeal." And in R. v. Starkey, 7 Man. R. 47, a case in which notice of appeal had been given before applying for the writ of certiorari

and abandoned, the same judge said: "By sec. 84 of the Summary Convictions Act, R.S.C., ch. 178, '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,' but it seems still open to the defendant to maintain the present proceeding upon any ground which impeaches the jurisdiction of the magistrates." See also R. v. Montgomeryshire, 15 L.T.N.S. 290; Paley on Convictions, 7th ed., pp. 358, 359.

An appeal is the creature of the statute law and never lies unless given by express terms, but the rule with respect to certiorari is the very reverse; it always lies unless expressly taken away. R. v. Todd, 1 Russ. & Ches. (N.S.) 66; R. v. Abbott, Doug. 553.

If the notice of appeal be void for irregularity, certiorari is not taken away. R. v. Caswell (1873), 33 U.C.Q.B. 303; R. v. Becker (1891), 20 Ont. R. 676.

Certiorari and not appeal is the appropriate remedy to raise the question of want of jurisdiction, ex. gr., whether proper service has been made and jurisdiction over the person acquired, or whether the justice was disqualified through interest. Re Ruggles (1902), 5 Can. Cr. Cas. 163 (N.S.).

A statutory provision taking away the right to a certiorari does not deprive the superior court of its power to issue the writ to quash a proceeding on the ground of want of jurisdiction; and when there is a defect in the jurisdiction of justices or inferior courts, the common law right of certiorari should not be refused merely because a new trial might be had by means of an appeal. Ibid.

Even where an appeal is pending, a certiorari for want of jurisdiction should not be refused unless the question of jurisdiction is being raised on the appeal. Ibid.

A writ of certiorari may be claimed by the Crown as a matter of right on application of the Attorney-General without the production of any affidavit; but except where applied for on behalf of the Crown, a certiorari is not a writ "of course," and the court must be satisfied that there is a sufficient ground for issuing it. Ibid.

No more latitude is given the court for the exercise of its discretion in granting or refusing a certiorari than in respect of other applications which are in the discretion of the court. Ibid.

Graham, E.J., in delivering the judgment of the court in Re Ruggles, supra, said: "I can find no English case in which the writ was ever refused when there was a want of jurisdiction in the inferior tribunal, whether an appeal was open to the applicant or not. There are cases of the other sort, namely, where there was an appeal and (in most of them, at least) the remedy by certiorari was taken away; then, when it was sought to review by way of appeal the merits of the case, the court has intimated that the writ was taken away, and there was an appropriate remedy by appeal. Such cases are R. v. Whitehead, Doug. 550; R. v. Cambridgeshire, 4 A. & E. 121; R. v. Middlesex, 9 A. & E. 548; and In re Blewett, 14 L.T.N.S. 598."

Semble, that, whether or not a conviction be good on its face, the court may on certiorari go into the facts, where the right of appeal to the General Sessions upon both law and fact has been taken away by statute. R. v. Hughes (1898), 2 Can. Cr. Cas. 5.

*Justice's findings of fact.*]—Findings of fact by the magistrate are not open to review on motion to quash conviction in certiorari proceedings, if there was evidence from which he might draw the conclusion he did. Ex parte Coulson (1895), 1 Can. Cr. Cas. 31 (N.B.).

But a conviction cannot be sustained without any evidence. The evidence required to support it is that which the court can see does and may

reasonably support it. If there be evidence which may support it, if considered in one view, the conviction will be maintained, although the magistrate has formed an opinion very different from that which the court would have formed, or although the court may think the magistrate has come to a wrong conclusion. Per Wilson, J., in R. v. Howarth (1873), 33 U.C.Q.B. 537, 549.

In Nova Scotia it is held that the court cannot entertain an objection that the magistrate erroneously found a fact which, though essential to the validity of his order, he was competent to try. R. v. Walsh (1897), 33 C.L.J. 537 (N.S.); R. v. McDonald, 19 N.S.R. 336, reversed.

In the Ontario case of R. v. Howarth, the defendant, a druggist of Toronto, sold five cents' worth of peppermint lozenges at his shop on a Sunday. The purchaser did not ask for them as medicine, he had no doctor's certificate, and he was asked no questions. It was shewn that peppermint lozenges were generally kept and sold by druggists as medicine. Defendant having been convicted on this evidence under C.S.U.C., ch. 104, and fined, the conviction was removed by certiorari. It was held that the finding of the magistrate as to whether the lozenges were or were not medicine was subject to review by the court. R. v. Howarth (1873), 33 U.C.Q.B. 537.

It was held by the Queen's Bench Division in Ontario that a conviction bad on its face for uncertainty should be amended by the court to which removed by certiorari, only when such court can conclude on the evidence that an offence is thereby proved. R. v. Coulson (1893), 1 Can. Cr. Cas. 114 (Ont.); 24 Ont. R. 246.

But in a subsequent case of R. v. Coulson (1896), 27 Ont. R. 59, the same defendant, coming before Meredith, C.J.C.P., and Rose, J., in 1896, sitting for the Common Pleas Division, dissent was expressed from the judgment above reported of the Queen's Bench Divisional Court. In the opinion of the Common Pleas judges the evidence should be looked at, when the proceedings are removed by certiorari, in order to see if there was any evidence whatever to sustain the magistrate's finding, even if no defect appeared on the face of the conviction; and if there was *any* evidence of that character the court should not review *all* the evidence or find as to the propriety of the magistrate's conclusion. R. v. Coulson (1896), 27 Ont. R. 59.

*Certiorari generally.*]—A certiorari is an original writ issuing out of chancery, or the King's Bench, directed in the King's name to the judges or officers of inferior courts, commanding them to return the records of a cause depending before them, to the end that the party may have the more sure and speedy justice before him, or such other justices as he shall assign to determine the cause. Bacon's Abr. "Certiorari" title (*a*).

A certiorari will not be granted where the applicant has been convicted, but not sentenced. Ex parte Collins (1899), 63 J.P. 809.

Unless there is express statutory warrant for the application of the remedy of certiorari in cases of mere administrative proceedings, there is no jurisdiction to entertain it, as certiorari is a proceeding ordinarily applicable to judicial acts alone. R. v. Watermen's Company, [1897] 1 Q.B. 659.

A town council which has passed a resolution to pay informers, other than the inspector, the costs and a proportion of the fine, when collected in prosecutions under the Canada Temperance Act, does not thereby exercise a judicial function. Such a resolution is a ministerial or legislative act which the court has no jurisdiction to review or quash. Re New Glasgow (1897), 1 Can. Cr. Cas. 22 (N.S.).

The record of conviction may be said generally to consist of two adjudications; the one, the adjudication of guilt, and the other the adjudication

of punishment. The adjudication of guilt is an entire adjudication and cannot be quashed in part and stand good for the residue. McLellan v. McKinnon, 1 O.R. 219; R. v. Dunning (1887), 14 O.R. 52, 58.

A conviction which varies from the minute of adjudication in omitting to provide for the payment of the costs and charges of the distress, in the event of the defendant being imprisoned for non-payment, may, however, be amended if the costs of the distress are not in the discretion of the magistrate. Ex parte Conway (1892), 31 N.B.R. 405.

On an application to quash a conviction for something done contrary to a by-law, the legality of the by-law may be questioned, though it has not been quashed. R. v. Osler (1872), 32 U.C.Q.B. 324.

Where there is a right of review by other process a certiorari should not be granted except under exceptional circumstances. Ex parte Young (1893), 32 N.B.R. 178.

Where there is a right of appeal from a summary conviction, and it appears upon an application for a certiorari to bring up the conviction to be quashed that the ground alleged therefor is more properly the subject of an appeal, the discretion of the court should be exercised by refusing the certiorari. R. v. Henell (No. 2) (1899), 3 Can. Cr. Cas. 15 (Man.), per Dubuc, J.

Where a defendant applying for a certiorari knows that the minute of adjudication purported to be signed by three magistrates he should ask that the writ be directed to all of them, for by directing it to one only he affirms that the conviction was made by one justice only, and is estopped from taking the objection that it was made by three. R. v. Smith (1881), 46 U.C.Q.B. 442.

Where there are several convictions for assault against the applicant and others the rule nisi should not be a joint rule against all jointly; a separate rule should be taken out in each case. Ex parte Landry (1900), 36 C.L.J. 169 (N.B.).

On a motion for a certiorari it is necessary to produce a copy of the proceedings sought to be removed. Ex parte Emmerson (1895), 1 Can. Cr. Cas. 156 (N.B.).

It is the duty of the party who obtains a rule to have the papers on which it was granted filed in the clerk's office; and where this had not been done an order nisi for a certiorari granted at Chambers was discharged by the court. Ex parte Ryan (1885), 24 N.B.R. 528.

So soon as the return to the certiorari has been filed the cause is in the court, and the motion paper and the rule must be entitled in the cause. R. v. Morton (1867), 27 U.C.Q.B. 132.

Objections on account of any omission or mistake in a conviction made by a magistrate must be set forth in the rule nisi in certiorari proceedings, or the same will not be allowed. R. v. Beale (1896), 1 Can. Cr. Cas. 235 (Man.).

A single judge sitting in court cannot in Ontario hear a motion to quash a conviction under the Code, but application must be made at a sittings of the court en banc. R. v. Beemer (1888), 15 O.R. 266.

*Certiorari for want of jurisdiction.*]—A statute enacting that no conviction shall be removed by certiorari does not deprive the court of jurisdiction to grant the writ where the magistrate acted without jurisdiction. R. v. Hoggard (1870) 30 U.C.Q.B. 152.

An erroneous finding on the evidence by the magistrate is not such a want of jurisdiction as warrants the issue of a certiorari. R. v. Wallace (1883), 4 O.R. 127. That case is a clear affirmance of the view that certiorari cannot issue merely for the purpose of examining and weighing the evidence which was before the magistrate. Per Osler, J.A., in R. v. Sanderson (1886) 12 O.R. 178.

When there has been a plain excess of jurisdiction, this remedy of certiorari would be accessible even if a statute had declared that certiorari should not issue, because that prohibition would not be held to apply where the justices had entertained a matter not within their jurisdiction. Hespeler v. Shaw (1858), 16 U.C.Q.B. 104.

Where certiorari is taken away by statute the court will not look into the evidence to see if the date of the offence proved is subsequent to the date stated in the conviction, provided the magistrate had jurisdiction by virtue of a good information and summons. Ex p. Sarah McKinnon (1897), 33 C.L.J. 503 (N.B.).

Even though a statute purports to take away the right to certiorari, it may be granted where there has been improper conduct of the magistrate or the fundamental principle entitling the party to a fair trial has been overlooked. Re Sing Kee (1901), 5 Can. Cr. Cas. 86 (B.C.).

*Notice to justices.*]—The Imperial Statute, 13 Geo. II., ch. 8, sec. 5, is in force in British Columbia as well as in Ontario, and six days previous notice of the motion for a certiorari must be given to the justices; and a rule nisi for a certiorari made returnable six days or more after service thereof is not a sufficient compliance with the statute. Re Plunkett (1895), 1 Can. Cr. Cas. 365.

By that Act it is provided as follows:

(5) And for the better preventing vexatious delays and expense, occasioned by the suing forth writs of certiorari, for the removal of convictions, judgments, orders and other proceedings before justices of the peace, be it further enacted by the authority aforesaid that from and after the twenty-fourth day of June, which shall be in the year of our Lord, one thousand seven hundred and forty, no writ of certiorari shall be granted, issued forth or allowed to remove any conviction, judgment, order or other proceedings had or made by or before any justice or justices of the peace of any county, city, borough, town-corporate, or liberty, or the respective general or quarter-sessions thereof, unless such certiorari be moved or applied for within *six calendar months* next after such conviction, judgment, order or other proceedings shall be so had or made, and unless it be duly proved upon oath that the said party or parties suing for the same hath or have given *six days' notice* thereof in writing to the justice or justices, or to two of them (if so many there be) by and before whom such conviction, judgment, order, or other proceeding shall be so had or made, to the end that such justice or justices or the parties therein concerned, may shew cause, if he or they shall so think fit, against the issuing or granting such certiorari.

The effect of the statute 13 Geo. II., ch. 18, sec. 5, is to imperatively require that six days' notice shall be given, and to make the giving of it a *condition precedent* to the issuing of the writ, and the convicting justices are not driven to make an independent application to quash the certiorari for the want of such notice, but can set up the defect in answer to the rule nisi obtained by the defendant to quash the conviction. R. v. McAllan (1880), 45 U.C.R. 402, 406.

The magistrate may however waive the right to take the objection and if a preliminary fact affirmed on one side is intended to be denied by the other, the objection should be taken promptly. It was therefore held, where a certiorari had issued to a court of sessions on an affadavit of due service of notice on two magistrates sworn to have been present at the making of the order, and a whole term had elapsed after the making of the return to the certiorari without objection being made, that it was then too late to bring in proof on an application to quash the certiorari, that one of the magistrates so served was not in fact present at the time of the making of the order. R. v. Inhabitants of Basingstoke (1849), 19 L.J.M.C. 28.

The reason for giving the magistrate notice of the application for a certiorari is that he is exposed to an action if the conviction should be quashed. R. v. Peterman (1864), 23 U.C.Q.B. 516.

Application for the certiorari must be made within six calendar months next after the conviction. Imp. Stat. 1739-40, 13 Geo. II., ch. 18, sec. 5.

It is not necessary to serve notice of motion for a certiorari to remove a conviction on the private prosecutor; he has nothing to do with this proceeding; if the writ be granted he will then be served with a rule nisi; it is that alone with which he is interested. Re Lake (1877), 42 U.C.Q.B. 206; R. v. Murray (1867), 27 U.C.Q.B. 134.

An affidavit of service of notice of motion for a certiorari to remove a conviction made by justices of the peace was held insufficient in that it did not identify the justices served as the convicting justices, but as the time for moving for the certiorari had not expired, the applicant was allowed to amend his affidavit in this respect. Re Lake (1877), 42 U.C.Q.B. 206.

*Quashing the certiorari.*]—Where it is desired to take objection to some irregularity in obtaining the allowance of the certiorari or to the issue of the writ itself, the proper course is to move to quash the writ or the allowance of it and not to shew the defect as cause against quashing a bad conviction. R. v. Hoggard (1870), 30 U.C.Q.B. 152. This is in order that the court may, if it sees fit, direct an amendment.

In shewing cause to a rule nisi to quash a conviction, objection may be taken to the regularity of the certiorari, and a separate application to supersede it need not be made. Where, therefore, on an application made after notice to the convicting justices for a rule for a certiorari the rule was refused, and on a subsequent ex parte application on the same material the rule was obtained, it was held that the notice of the first application would not enure to the benefit of the defendant on his second application, and that the certiorari was irregularly obtained for want of notice to the convicting justices; and a rule to quash the conviction was therefore discharged. R. v. McAllan (1880), 45 U.C.Q.B. 402.

When a whole term has elapsed without objection being made after the case has been brought up, a preliminary objection is then too late. R. v. Basingstoke (1849), 19 L.J.M.C. 28; R. v. Whittaker (1894), 24 Ont. R. 437.

Where the objection to the allowance of the certiorari is a substantial one, and the conviction not manifestly bad, there is no reason why the party should be precluded from raising it on the return of the rule to quash the conviction, instead of being driven to incur the expense of a special motion to quash the allowance. Where, on the other hand, the objection is of a trivial or merely technical character (R. v. Hoggard, 30 U.C.Q.B. 152), the party may well be told that he would not be heard to raise it except in a strictly formal and technical way; and a fortiori of the conviction was clearly bad and must inevitably be quashed, for in that case the recognizance would be of no avail to the respondent. Per Osler, J. R. v. Cluff (1882), 46 U.C.Q.B. 565.

In Nova Scotia where no step has been taken within a year a rule absolute in the first instance will be granted to quash a certiorari. R. v. Renes (1884), 17 N.S.R. 87 (following City of Halifax v. Vibert, 3 R. & C. 54).

Where a party obtaining an order nisi for a certiorari was directed by the judge to serve the prosecutor with copies of his affidavits and grounds on which the order was granted but neglected to do so, the order was discharged. Ex parte Doherty (1887), 26 N.B.R. 390.

A writ of certiorari not signed by the prothonotary will be quashed. R. v. Ward (1888), 21 N.S.R. 19.

*Return to certiorari.*]—The return to the court by a convicting magistrate under a certiorari is conclusive, and the court cannot go behind it. In a case where defendant was convicted for selling liquor without license the depositions returned to the court by the convicting magistrate under a certiorari shewed that there was no evidence of a license produced before him, while the affidavits filed on the application to quash the conviction stated that the party had a license in fact and produced evidence of it before the magistrate, who, moreover, himself swore that he believed a license was produced, but that it was not either proved, or given in evidence; it was held that the return to the certiorari was conclusive, and that the court could not go behind it. R. v. Strachan (1870), 20 U.C.C.P. 182.

Where the first conviction drawn up and filed with the clerk of the peace was thought to be erroneous, and the justices drew up and returned an amended one, such amendment not being an amendment of the adjudication of punishment, but merely of the proceeding by which the payment of the fine adjudicated was to be enforced, it was held that the first conviction was amendable and that the amended conviction ought not to be quashed. R. v. Menary (1890), 19 Ont. R. 691.

A summary conviction which illegally imposes imprisonment *with hard labour* in default of payment of the fine, may be amended at any time before it is acted upon, by the return of an amended conviction omitting the words "with hard labour" but in other respects conforming to the adjudication. Such an amended conviction may be returned in answer to certiorari process although the first conviction has been transmitted by the magistrate, pursuant to a statutory requirement, to the court to which an appeal might be taken therefrom. R. v. McAnn (1896), 3 Can. Cr. Cas. 110 (B.C.).

*Recognizance on certiorari.*]—See sec. 892.

*Lapse of proceedings.*]—Where an order nisi to quash a conviction has been issued, but before service of same upon the informant prosecutor the latter died, the proceedings do not lapse and can be properly continued by serving the magistrates. R. v. Fitzgerald (1898), 1 Can. Cr. Cas. 420 (Ont.).

The informant in certiorari proceedings in criminal matters is not a party to the record although his name appears and although he is under liability for costs and has given a recognizance for same, and, semble, upon quashing a conviction in such a case, no cause of action in respect of its illegality survives against the representatives of the deceased informant. Ibid.

*Habeas corpus with certiorari.*]—In Ontario a single judge, sitting as a court in banc and exercising the powers of the court in banc, may issue a writ of habeas corpus, accompanied by a writ of certiorari, and may alone quash the conviction. In such cases it is no excess of jurisdiction in the court to look at the depositions regularly before it and see if there is any evidence of the offence charged, not rehearing the case, as on appeal, for, no matter how strong the evidence may be for the prisoner, no matter what the preponderance of evidence may be against the prosecution, if there is any evidence whatever, the court will refuse to interfere with the conviction. Per Strong, J., in Re Trepanier (1885), 12 Can. S.C.R. 111, 129.

Where it appears, on the return to a certiorari, that the convicted person is in close custody, the court may order a habeas corpus and hear together the motion to quash the conviction and the motion for the prisoner's discharge. R. v. Spooner (1900), 4 Can. Cr. Cas. 209 (Ont.).

The object of the statute of the late Province of Canada, which gave power to a judge in chambers in Ontario to issue a writ of certiorari, was to enable the judge to issue that writ together with the writ of habeas corpus, which enabled him, in the case of commitment for trial or for extradition, to have the depositions brought before him, or in the case of a summary commitment by a magistrate, to have the commitment brought before him, and if

the conviction was erroneous to release the prisoner as being in illegal custody, not, however, to quash the conviction. The courts in Ontario having, however, the general jurisdiction to quash convictions returned under writs of certiorari issued by judges at chambers, have exercised the power, and rightly enough, because they had power to do so without especially defining where the express statutory power ended and the common law jurisdiction conferred by the 31st Geo. III. began. Per Strong, J., in Re Trepanier (1885), 12 Can. S.C.R. 111, 128. The latter statute conferred upon the Court of King's Bench of Upper Canada the like jurisdiction as was exercised by the Court of King's Bench at Westminster.

If there was some evidence before the magistrate which would support a conviction unless he gave credence to the evidence given on behalf of the accused, the conviction will be sustained, the weight to be attached to the evidence not being a question reviewable upon habeas corpus and certiorari. R. v. St. Clair (1900), 3 Can. Cr. Cas. 551 (Ont.).

*Costs on quashing conviction.*]—Costs were refused where the defendant filed no affidavit denying his guilt, or casting doubt upon the correctness of the magistrate's conclusion upon the facts. R. v. Steele (1895), 26 Ont. R. 540. The Ontario practice is not to give costs on quashing a conviction. R. v. Somers, 1 Can. Cr. Cas. 46; R. v. Crandall (1896), 27 Ont. R. 63.

Costs of quashing a conviction by certiorari proceedings are not awarded except in cases of misconduct of the informant or of the justice. R. v. Banks (1895), 1 Can. Cr. Cas. 370 (N.W.T.).

Costs of quashing a conviction are recoverable by action where no order of protection is made. R. v. Somers (1893), 1 Can. Cr. Cas. 46 (Ont.).

If with the notice of motion for a certiorari, a notice is served by the defendant upon the prosecutor that unless the prosecution is forthwith abandoned so as to save the necessity for a further application to the court to be relieved therefrom, the costs of all the proceedings necessary to obtain relief will be asked—then the defendant will be in a better position to ask for costs in cases where the putting of the defendant to such costs is unjust and unfair. R. v. Westgate (1892), 21 O.R., p. 622.

*Costs of unsuccessful application.*]—Where the only record of conviction produced before the institution of certiorari proceedings to quash the same is bad, and a valid amended conviction is produced in such proceedings, the costs of opposing the motion to quash should not be awarded against the applicant. R. v. McAnn (1896), 3 Can. Cr. Cas. 110 (B.C.); R. v. Whiffin (1900), 4 Can. Cr. Cas. 141 (N.W.T.).

*Procedendo.*]—Where a conviction has been removed by certiorari and afterwards affirmed, the proper course is to send the record of the proceedings back to the magistrate in order that he may cause it to be enforced in the same way that he would have done if it had not been removed into the court. R. v. Grimmer (1886), 25 N.B.R. 480. It is not necessary to take out a rule to take the return off the file before applying for a procedendo, it being sufficient that leave has been granted to remove the return from the file. R. v. White & Perry (1886), 25 N.B.R. 483. Where a conviction has been removed by certiorari and affirmed, the court will not on an application for a procedendo to the convicting justice examine into the validity of the conviction on grounds not taken on the motion to quash it. Ibid.

After the quashing of a writ of certiorari and the issue of a writ of procedendo, and the return of the conviction to the magistrate, a second writ of certiorari will not be granted. R. v. Nichols (1889), 21 N.S.R. 288.

If the writ of certiorari issued to remove a summary conviction into the High Court of Justice was served only upon the clerk of the peace with whom the conviction was filed, and not upon the convicting magistrate, and the magistrate, having no knowledge that certiorari had been directed,

thereafter enforced the conviction, he is not guilty of contempt of court in so doing. R. v. Woodyatt (1895), 3 Can. Cr. Cas. 275 (Ont.).

*Appeals from certiorari orders.*]—An ex parte order made by a judge of the High Court of Justice (Ontario) in a certiorari proceeding in a criminal matter is not subject to review or to be set aside by another judge sitting in "weekly court," but is appealable to a Divisional Court of the High Court sitting en banc. R. v. Graham (1898), 1 Can. Cr. Cas. 405 (Ont.).

In Ontario there is no right of appeal to the Court of Appeal from a judgment quashing or affirming a summary conviction for an offence against a Dominion law. R. v. Eli (1886), 13 Ont. App. 526.

The constitution or continuation by statute of a court with jurisdiction to hear appeals in criminal cases does not involve the creation of the right of appeal. Ibid.

*Order of protection to justices.*]—See sec. 891.

*British Columbia.*]—Every application for a writ of certiorari at the instance of any person, other than the Attorney-General on behalf of the Crown, shall be made to a judge of the Supreme Court by summons to shew cause; unless, in the opinion of the judge, the writ should issue forthwith, in which case the order may be made absolute; or an order be made in the first instance either ex parte, or otherwise, as the judge may direct. B.C. Rule 2.

No writ of certiorari shall be granted, issued, or allowed, to remove any judgment, conviction, order, or other proceeding had or made before any justice or justices of the peace, unless such writ be applied for within six calendar months after such judgment, conviction, order, or other proceeding shall be so had or made, and unless it be proved by affidavit that the party suing for the same has given six days' notice thereof in writing to the justice or justices, or to two of them if more than one, by and before whom such judgment, order, conviction, or other proceedings shall be so had or made, in order that such justice or justices, or the parties therein concerned, may shew cause, if he or they shall so think fit, against the party issuing or allowing such writ of certiorari. The writ shall be in the Form No. 9. Appendix J., of the "Supreme Court Rules, 1890." B.C. Rule 3.

No order for the issuing of a writ of certiorari to remove any order, conviction, or inquisition, or record, or writ of habeas corpus ad subjiciendum shall be granted where the validity of any warrant, commitment, order, conviction, inquisition, or record, shall be questioned, unless at the time of moving a copy of any such warrant, commitment, order, conviction, inquisition, or record, verified by affidavit, be produced and handed to the officer of the court before the motion be made, or the absence thereof accounted for to the satisfaction of the court. B.C. Rule 4.

No writ of certiorari shall be allowed to remove any judgment, order, or conviction given or made by justices, unless the party (other than the Attorney-General acting on behalf of the Crown) prosecuting such certiorari before the allowance thereof, shall enter into a recognizance with one or more sufficient sureties before one or more justices, or before any judge of the Supreme Court or County Court, in the sum of $100, with condition to prosecute the same, at his own costs and charges, with effect without any wilful or affected delay, and to pay the party in whose favour or for whose benefit such judgment, order or conviction shall have been given or made within one month after the said judgment, order or conviction shall be conferred; his full costs and charges to be taxed according to the practice of the court; and in case the party prosecuting such certiorari shall not enter into such recognizance, or shall not perform the conditions aforesaid, it shall be lawful for the said justices to proceed and make such further order for the benefit of the party for whom such judgment shall be given, in such manner as if no certiorari had been granted. B.C. Rule 5.

Every such recognizance, with affidavit of justification and of due execution, shall be filed with the registrar of the court before the issue of any writ of certiorari. B.C. Rule 6.

When cause is shewn against an order nisi for a certiorari to remove any judgment, order or conviction upon which no special case has been stated, given, or made by justices of the peace for the purpose of quashing such judgment, order or conviction, the court, or a judge thereof, if it shall think fit, may make it part of the order absolute for the certiorari that the judgment, order or conviction shall be quashed on return without further order, and in such case, no such recognizance as is required by the last preceding rule, shall be necessary, and a memorandum to that effect shall be endorsed by the proper officer upon the issuing of the writ of certiorari. B.C. Rule 7.

No objection on account of any omission or mistake in any judgment or order of any justice of the peace or court of summary jurisdiction brought up upon a return of a writ of certiorari and filed in the Supreme Court, shall be allowed, unless such omission or mistake shall have been specified in the order for issuing the certiorari. B.C. Rule 8.

*Offences under provincial jurisdiction in Ontario.*]—By R.S.O. 1897, ch. 90, sec. 7, it is provided that any party who considers himself aggrieved by a conviction or order made by a justice of the peace, or by a police or stipendiary magistrate under the authority of any statute in force in Ontario and relating to matters within the legislative authority of the legislature of Ontario may, unless it is otherwise provided by the particular Act under which the conviction or order is made, appeal therefrom to the general sessions of the peace. But this is subject to the following limitation added as sub-sec. (2) to said sec. 7 by the provincial statutes of 1902:—

(2) No such conviction or order as aforesaid shall be removed into the High Court of Justice by writ of certiorari except upon the ground that an appeal to the court of general sessions of the peace as herein provided would not afford an adequate remedy. 2 Edw. VII. (Ont.), ch. 12, sec. 14.

**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 shewn.

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.

*Transmitting the conviction.*—The conviction may be proved at any time during the hearing of an appeal therefrom to the general sessions, or, in the discretion of the chairman, even during an adjournment for judgment. In

re Ryer and Plows (1881), 46 U.C.Q.B. 206. And the discretion of the chairman will not be reviewed. Ib. But if a conviction has already been returned duly sealed, the justice cannot return another and more formal one. R. v. Smith, 35 U.C.Q.B. 518; Chaney v. Payne, 1 Q.B. 712; Re Ryer and Plows (1881), 46 U.C.Q.B. 206.

In R. v. Whelan, 45 U.C.R. 396, it was held that a conviction once regularly brought into and put upon the files of the court is there for all purposes. In that case Armour, J., states: "It is the fact of the conviction being on the file of this court regularly brought there that gives the right to move to quash it; how or at whose instance it was brought there so long as it was brought there regularly cannot in my opinion affect that right." He also agrees with the view expressed by Wilson, J., in R. v. Levecque, 30 U.C.R. 509, to the effect that the court might still be obliged to consider the conviction as upon a certiorari issued at common law if the conviction were found in court, however brought there, so long as it was regularly there.

But in the Territories the Supreme Court was equally divided on the point in R. v. Monaghan (1897), 2 Can. Cr. Cas. 488, Scott and Rouleau, JJ., holding that a conviction returned by justices in compliance with a statutory requirement to the office of a superior court is regularly before the court and can be dealt with on a motion to quash, without the necessity of a writ of certiorari.

Richardson and Wetmore, JJ., held the contrary view, i.e., that the conviction was not regularly before the court, and a writ of certiorari to bring it before the court was necessary before a motion to quash the conviction could be properly entertained. See also decision of Rouleau, J., in R. v. Asheroft (1899), 2 Can. Cr. Cas. 385.

*Deposit to be returned into appellate court.*]—In Ontario it has been held that the appellant making a money deposit in lieu of recognizance must see to it that such deposit is returned by the justice into the court to which the appeal is taken, and in default, the appeal cannot be heard. And that the fact that the appellant had made such deposit is a matter of record and is not properly provable by affidavit. R. v. Gray (1900), 5 Can. Cr. Cas. 24 (McDougall, Co. J.). But the contrary has been held in British Columbia. Re Kwong Wo (1893), 2 B.C.R. 336, per Begbie, C.J.

When a public duty is imposed, and the statute requires that it shall be performed in a certain manner, or within a certain time, or under specified conditions, such prescriptions may well be regarded as intended to be directory only, when injustice or inconvenience to others who have no control over those exercising the duty, would result, if such requirements were essential and imperative. R. v. Read (1889), 17 O.R. 185.

**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 s. 883 conferred upon the court to which an appeal is taken under the provisions of s. 879. R.S.C. c. 178, s. 87; 53 V., c. 37, s. 27.

*Insufficiency of conviction cured by the evidence.*]—An omission to state scienter of the accused will not invalidate a conviction if the court upon perusal of the depositions is satisfied that an offence of the nature described in the conviction has been committed. R. v. Crandall (1896), 27 Ont. R. 63.

Where it does not appear upon the face of the conviction that the offence was committed within the territorial jurisdiction of the convicting justices but it is clear upon the depositions that such was the fact, the defect will be cured by this section. R. v. Perrin (1888), 16 O.R. 446.

But the powers of amendment conferred by this section do not apply where there is an inherent defect in procedure which has deprived the accused of a fair trial, ex gr., a view of the locus in quo taken by the magistrate in the absence of the parties. Re Sing Kee (1901), 5 Can. Cr. Cas. 86 (B.C.).

A commitment is not void on the face of it by reason of a variance between the original information and the conviction made after hearing evidence. If the prisoner had been charged with the information, and on being called on to answer had confessed the information, and then had been convicted of matter not contained in the information, the conviction could be quashed, but even in that case, while the conviction stood unreversed, it would warrant a commitment following its terms. R. v. Munro (1864), 24 U.C.Q.B. 44.

*Amendment.*]—To authorize the amendment of a conviction under this section the court or judge must from the depositions be satisfied that, if trying the defendant in the first instance, the court or judge would have convicted upon that evidence. R. v. Herrell (1898), 1 Can. Cr. Cas. 510 (Man.).

The provisions of this section respecting amendment in cases of summary convictions do not apply to cases of summary trial under part 55.

Nor do the provisions of sec. 800 as to amendments, etc., apply where there is the same infirmity in both the conviction and the commitment. R. v. Randolph (1900), 4 Can. Cr. Cas. 165 (Ont.).

An "order of dismissal" does not come within this section or sec. 886. R. v. Laird (1889), 1 Terr. L.R. 179.

Notwithstanding that the conviction is irregular, the court may adjudicate de novo on the evidence given before the magistrate; but the court should not amend a conviction if in so doing it has to exercise the discretion of the magistrate. R. v. Whiffin (1900), 4 Can. Cr. Cas. 141 (N.W.T.); Ex. p. Nugent (1895), 1 Can. Cr. Cas. 126.

*Provincial offences in Ontario.*]—Sections 889 to 896 inclusive are made applicable to convictions under Ontario statutes by 1 Edw. VII. (Ont.), ch. 13, sec. 1, and 2 Edw. VII. (Ont.), ch. 12, sec. 15. The latter statute (1902) enacts that all the provisions of the Criminal Code with respect to

amendment of convictions or orders either on appeal or when removed by certiorari and (subject to sec. 12 of the Ontario Summary Convictions Act) of any other Act of the Parliament of Canada authorizing the amendment of a conviction or order shall apply to convictions or orders made under the authority of any statute of Ontario or under any by-law passed by virtue of such authority.

*Upon perusal of the depositions.*]—Semble, the "depositions," upon perusal of which the court may be satisfied that an offence has been committed over which the justice has jurisdiction, and may, under this section, decline to quash a conviction for insufficiency, etc., will include the caption to the depositions; and if such caption states that the "charge" was read over to the accused, the court may refer to the statement of the charge contained in the "warrant to apprehend," in order to ascertain whether or not the evidence taken related to an alleged offence committed within the district for which the magistrate acted. R. v. McGregor (1895), 2 Can. Cr. Cas. 410 (Ont.).

If on the return to a certiorari the court is satisfied upon a perusal of the depositions that an offence of the nature described in the summary conviction has been committed, the court may hear and determine the charge upon the merits as disclosed by the depositions, and may vary, confirm, reverse or modify the decision of the justice. R. v. Murdoch (1900), 4 Can. Cr. Cas. 82 (Ont.).

Where the original conviction directed payment of a fine and the levy of same by distress and in default of sufficient distress adjudged imprisonment, the court exercising the power of amendment conferred by secs. 883 and 889 may substitute in lieu of the distress, etc., an award of imprisonment forthwith in case of non-payment of the fine. Ibid.

The court has power to so amend a summary conviction returned on certiorari whether the certiorari is one preliminary to a motion to quash the conviction or is in aid of a writ of habeas corpus. Ibid.

**890. Irregularities within the preceding section.**—The following 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.**—This 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 shewn 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.

*Recognizance or deposit on certiorari.*]—On November 17th, 1886, the High Court of Justice of Ontario passed the following general order under the authority of sec. 6 of 49 Viet. (Can.), ch. 49, [R.S.C., 1886, ch. 178, sec. 90, which on the codification of the criminal law was re-enacted as sec. 892 of the Code]:

"Whereas, by the Act passed in the 49th year of Her Majesty's reign, chaptered 49, and intituled, 'An Act to make further provision respecting summary proceedings before justices and other magistrates,' it is enacted as follows:

"SEC. 8.—The second section of the Imperial Act, passed in the fifth year of the reign of His Majesty King George II., and chaptered nineteen, shall no longer apply to any conviction, order or other proceeding by or before a justice of the peace in Canada, but the sixth section of this Act shall be substituted therefor, and the like proceedings may be had for enforcing the condition of a recognizance taken under this Act as might be had for enforcing the condition of a recognizance taken under the said Imperial Act."

"It is therefore ordered, under the authority of the said section, and in pursuance of the terms of the sixth section of the said Act, that no motion

shall be entertained by this court, or by any division of the same, or by any judge of a division sitting for the court, or in chambers, to quash a conviction, order, or other proceeding which has been made by or before a justice of the peace [as defined by the said Act] and brought before the court by certiorari, unless the defendant is shewn to have entered into a recognizance with one or more sufficient sureties in the sum of $100 before a justice or justices of the county, or place, within which such conviction or order has been made, or before a judge of the County Court of the said county, or before a judge of the Superior Court, and which recognizance with an affidavit of the due execution thereof, shall be filed with the registrar of the court in which such motion is made or is pending, or unless the defendant is shewn to have made a deposit of the like sum of $100 with the registrar of the court in which such motion is made, with or upon the condition that he will prosecute such certiorari at his own costs and charges and without any wilful or affected delay, and that he will 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 in case such conviction, order or proceeding is affirmed."

This rule of court remains in force as a rule under the Code without being re-passed. R. v. Robinet (1894), 2 Can. Cr. Cas. 382 (Ont.).

In Ontario a surety upon a recognizance filed on a motion to quash a summary conviction, must justify in the sum of $100 over and above any amount for which he may be surety as well as over and above his debts. R. v. Robinet (1894), 2 Can. Cr. Cas. 382.

This decision was not followed in the Territories, it being there held that a rule made under sec. 892 is complied with if the sureties justify as being possessed of property of the amount specified in the rule, and swear that they are worth the amount over and above all their just debts and liabilities, and over and above all exemptions allowed by law. R. v. Asheroft (1899), 2 Can. Cr. Cas. 385.

A rule of court required that no motion to quash a conviction should be entertained unless the defendant were shewn to have entered into and deposited a recognizance in $300 with one or more sufficient sureties, or to have made a deposit of $200. On a motion to make absolute a rule nisi to quash a certain conviction, a recognizance had been entered into and deposited, but without an affidavit of justification of the sureties or other evidence of their sufficiency. It was held following R. v. Richardson, 17 O.R. 729, that the rule of court had not been complied with and that therefore the rule nisi must be discharged. But $200 having been deposited a day or two before the return day of the rule nisi, with the view of complying with the rule of court, the applicant was allowed to take a new rule nisi in the terms of the one discharged. R. v. Petrie (1889), 1 Terr. L.R. 191; R. v. Abergele (1836), 5 A & E. 795.

Where there is a rule of court that no motion "shall be entertained" to quash a conviction unless the defendant is shewn to have entered into a recognizance with one or more sufficient sureties to prosecute the certiorari (B. C. Rules 1890, p. 145), there must be an affidavit of justification before the court upon which it can judge of the sufficiency of the sureties or the court cannot even adjourn the motion. R. v. Ah Gin (1892), 2 B.C.R. 207.

In the absence of an affidavit of justification to the recognizance the court cannot entertain motions to quash convictions. "The sufficiency of the suretyship is not shewn by the mere production of the recognizance; the court must have some evidence upon which it can say that there were sufficient sureties." R. v. Richardson and R. v. Addison (1889), 17 O.R. 729.

**893. Imperial Act, 5 Geo. II., c. 19, s. 2, 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.

See Canada Evidence Act secs. 7-11 inclusive.

**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.

Where the court granting the certiorari to remove the record from an inferior court has the power to execute the judgment of the inferior court, the record will not be remanded to the inferior court. R. v. Neville, 2 B. & Ad. 299. But where the superior court cannot enforce the execution of the judgment or cannot administer the same justice to the parties as the court below, or where it appears that there was no good cause for removing it the practice formerly was that the court ordered a writ of procedendo to issue to send the case back to the inferior court. R. v. Ziekriek (1897), 11 Man. R. 452; R. v. Rushworth, 9 Jur. 161.

This section dispenses with the necessity of that writ when the conviction is affirmed but not otherwise. R. v. Ziekriek (1897), 11 Man. R. 452. It is limited also to convictions, orders or proceedings in criminal matters

under Dominion jurisdiction (sec. 840), and applies to offences under provincial laws only in so far as provincial legislation has directed. Where a conviction was quashed on the ground that service of the summons had not been legally effected or waived, the information cannot be returned to the justice under this section to enable him to issue another summons even where it is too late for the prosecutor to lay a second information. R. v. Zickrick (1897), 11 Man. R. 452.

**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. c. 178, s. 95.

Proceedings by way of certiorari against a summary conviction do not constitute an "appeal" under this section. R. v. Graham (1898), 1 Can. Cr. Cas. 405 (Ont.).

Where a prosecution is instituted by a police officer in his own name as informant, in respect of an offence against a municipal by-law, the police officer is personally a party both to the proceedings before the magistrate and to the appeal from his decision, and the municipal corporation is not properly named as a party to such appeal, nor can costs be awarded in favour of the corporation. Bothwell v. Burnside (1900), 4 Can. Cr. Cas. 450.

**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.

FORM PPP.—

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 nine hundred and .

G. H.,
*Clerk of the Peace.*

FORM QQQ.—

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 (*etc., 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 nine 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 His 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 proceeding 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.)*

FORM RRR.—

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 (*etc., 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 officer, 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 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.)*

*Recovery of costs on appeal.*]—The proceedings for enforcement of an order for costs provided by sec. 898 apply only to costs dealt with by a Court of General Sessions on affirming or quashing a conviction or order on appeal to that court, and not to costs in certiorari proceedings. R. v. Graham (1898), 1 Can. Cr. Cas. 405 (Ont.).

Sec. 880 (*c*) and sec. 898 seem somewhat in conflict, as did sec. 27 of the Imperial Act, 11 & 12 Viet., ch. 43, and sec. 5 of the Imperial Act, 12 & 13 Viet., ch. 45; but in Freeman v. Read (1860), 9 C.B.N.S. 301, the court held that the clerk of the peace might grant his certificate that the costs had not been paid whether the person ordered to pay the same had been bound by any recognizance conditioned to pay such costs or not.

Where an appeal to a court of general sessions of the peace from summary conviction is not proceeded with, an order giving costs to the respondent can only be made at the same sittings for which notice of appeal was given; but where an appeal is heard, and determined against the appellant, the formal order need not be drawn up at the same sittings, and the respondent's costs may be taxed nunc pro tunc at the next sittings and included in a formal order then issued in pursuance of the direction therefor made at the previous sittings. Bothwell v. Burnside (1900), 4 Can. Cr. Cas. 450 (Ont.).

Where an appeal from a summary conviction has been heard and determined and a minute made by the chairmain of the sessions dismissing the same with costs and directing the clerk to tax the same, but no formal order was ever drawn up, the clerk's certificate of taxation and a subsequent order of the court of general sessions directing a distress for the costs taxed are irregular, and will be quashed. Ibid.

**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 sitting 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.

The party who originally made the complaint need not always continue to be the party respondent to the appeal taken against the conviction; and some other person may take up the prosecution upon the complainant's death and may be held liable to pay costs if the appeal should be successful. Per Lush, J., R. v. Truelove (1880), 5 Q.B.D. 336, 340.

**900. Statement of case by justices 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 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 s. 533 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 His 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 shew 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 conclusive 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 detemination 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 s. 878 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 s. 879 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 following proposed amendment is now before Parliament (session of 1902) in a bill introduced by Mr. Russell, M.P.:

Sub-section 3 of sec. 900 of the Cr. Code, 1892, is repealed, and the following is substituted therefor:

"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. In default of any such rule or order, and until one is made, the application shall be in writing to the justice and a copy thereof left with him, and may be made at any time within seven clear days from the date of the proceeding to be questioned, and the case shall be stated within three calendar months after the date of the application, and after the recognizance hereinafter referred to has been entered into. The applicant shall within three days after receiving the case transmit it to the court named in the application, first giving notice in writing of such appeal, with a copy of the case as signed and stated, to the other party to the proceeding in which the determination was given."

*Stated case.*]—Section 900 of the Code makes provision for the review by way of "stated case" of a justice's decision in respect of error of law or excess of jurisdiction, and by its own terms is limited to the questioning of "a conviction, order, determination or other proceeding of a justice *under this part*," i.e., under Part LVIII. of the Code, which part deals with the subject of "summary convictions."

Then by the last section of Part LV., relating to "summary trials," it is enacted that the provisions of Part LVIII. shall not apply to any proceedings under Part LV. This indicates that the procedure by "stated case" does not apply to a conviction made under the "summary trials" procedure of Part LV., notwithstanding the dictum of the court in R. v. Hawes (1900), 4 Can. Cr. Cas. 529 (N.S.).

In R. v. Egan (1896), 1 Can. Cr. Cas. 112 (Man.), it was held by Killam, J., that a person convicted under sec. 783 (*a*) on a similar charge had no right of *appeal*, as the effect of sec. 808 is to prevent the application of any of the provisions of Part LVIII. in which are found the sections as to appeals from summary convictions, to convictions under Part LV. The decision of Wurtele, J., in R. v. Racine (1900), 3 Can. Cr. Cas. 446 (Que.), is to the same effect. The sections as to stating a case being likewise within Part LVIII., the same result would follow.

If, however, the summary trial takes place before *two justices* sitting together a right of appeal is given by sec. 782 (*a*) as amended by 58-59 Vict., ch. 40, "in the same manner as from summary convictions under Part LVIII." and sections 879 et seq. are by it expressly made applicable in that event. This was held in R. v. Nixon (1899), 35 C.L.J. 636 (Ont.), per Ferguson, J., to be an additional reason for holding that there is no right of appeal in other cases of summary trial.

It is to be observed that, although there is no appeal where the proceedings are taken under sec. 783, an appeal by way of reserved case may be had when the magistrate's jurisdiction is dependent upon sec. 785, which now applies to police magistrates of cities and towns in all the provinces (amendment of 1900), but was formerly limited to Ontario.

A person "appeals" when he formally gives notice to the opposite party of his intention to appeal, although he does not in fact comply with the conditions precedent required to bring the appeal on for hearing. Cooksley v. Toomaten Oota (1901), 5 Can. Cr. Cas. 26 (B.C.).

The procedure by way of "stated case" under this section 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, ch. 90, sec. 2,) not to affect "procedure on 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 Provincial Acts are involved. R.S.O. 1897, ch. 91. The appeal whether of the prosecutor or of the accused is, as regards such offences, to the Court of General Sessions under the provisions of the Ontario Summary Convictions Act. R. v. Robert Simpson Co. (1896), 2 Can. Cr. Cas. 272.

Defendant was convicted before a stipendiary magistrate under sec. 337 of stealing seven trees, the property of the plaintiff. The parties owned and occupied adjoining farms, in the rear of which the lands were covered with wood and the dividing line was not distinct. Defendant, while cutting wood on his own lot, cut seven trees over the line claimed by the plaintiff but within a line which he (defendant) alleged to be the dividing line, and hauled them away. The magistrate found that the criminal intent was proved and that the title to land did not bona fide arise. On a stated case under this section it was held that the conviction was "erroneous in point of law," if the title to land was bona fide in issue, and there was consequently no criminal intent. Robichaud v. La Blanc (1898), 34 C.L.J. 324 (N.B.).

A justice ought not to be ordered to state a case upon the ground that his decision was erroneous in point of law, when he has decided in accordance with a previous decision of the superior court upon the same point which was binding upon him, although it is desired to question such decision from which there was no right of appeal by an appeal to a higher tribunal in the proceedings by stated case. R. v. Shiel (1900), 19 Cox C.C. 507.

*Recognizance on stated case.*]—A cash deposit cannot be accepted in lieu of a recognizance on an appeal by way of "stated case" from a summary conviction. R. v. Geiser (1901), 5 Can. Cr. Cas. 154 (B.C.).

The recognizance required by Code sec. 900 is a condition precedent to the jurisdiction of the court to hear the appeal. Ibid.

*British Columbia.*]—All appeals from the verdict, judgment, or ruling of any court or judge having jurisdiction in criminal cases, or from the conviction, order or determination of a justice under Part LVIII. of the Criminal Code shall be by case stated, except where otherwise provided by statute. B.C. Rule 56.

Order XXXIV. of the Supreme Court Rules, as far as the same are applicable, shall apply to a special case under these rules. B.C. Rule 57.

If any justice of the peace declines for the space of one week after being requested, in writing, to state a case, the person aggrieved may apply to the court for an order requiring the case to be stated. B.C. Rule 58.

Every application by a party aggrieved to a justice to state a case shall be made within four days after the order, determination or other proceeding has been made or rendered. B.C. Rule 59.

The appellant at the time of making such application and before a case is stated by the justice, shall enter into a recognizance before some justice of the peace, with or without sureties, in the sum of $100, conditioned to prosecute his appeal without delay and to submit to judgment and pay such costs as shall be awarded by the court, and in default thereof the justices

may proceed and make any such order as if no application for a special case had been made. B.C. Rule 60.

*Rules as to time and manner of application.*]—The English Summary Jurisdiction Act of 1879, giving a right of appeal by way of stated case, provided that "the application shall be made and the case stated within such time and in such manner as may be from time to time directed by rules under this Act." 42 & 43 Vict. (Imp.), ch. 49, sec. 33. The rule made under it (S. J. Rules, 1886, No. 18), directed that "an application to a court of summary jurisdiction, under sec. 33 of the Summary Jurisdiction Act, 1879, to state a special case shall be made in writing, and a copy left with the clerk of the court." It was held by Lord Coleridge, C.J., and Denman, J., that where an oral application had been made to the justices at the hearing and granted by them, and afterwards a notice was served on the clerk, the justices had no power to state the special case, and the preliminary objection to its being heard was allowed. South Staffordshire Waterworks v. Stone (1887), L.R. 19 Q.B.D. 168.

This decision was approved and followed in Lockhart v. Mayor of St. Albans (1888), 21 Q.B.D. 188, in which no notice had been given to the magistrates themselves, although notice had been served on the magistrate's clerk. The Court of Appeal (Lord Esher, M.R., Lindley, and Lopes, L.JJ.,) held that compliance with the provisions of the rule was a condition precedent to the right of appeal, and that there had been a failure to comply with it, which barred the appeal.

Trimble v. Hill (1879), 5 App. Cas. 342, decides that where a colonial legislature has passed an Act in the same terms as an Imperial statute, and the latter has been authoritatively construed by a Court of Appeal in England, such construction should be adopted by the courts of the colony. See also, on the latter point, Paradis v. R., 1 Can. Exch. R. 191; Hollender v. Ffoulkes, 26 O.R. 61; Butler v. McMicken, 32 O.R. 422.

*No other appeal allowed where case stated.*]—Under a provincial enactment, similar to sub-sec. (14) of Code sec. 900, providing that a person appealing by way of stated case to a superior court shall be taken to have abandoned his right of appeal to a county court, it was held that the appellant by obtaining a case to be stated elects that mode of appeal and cannot revert to an appeal to the county court on the stated case being dismissed for non-compliance with statutory conditions. Cooksley v. Toomaten Oota (1901), 5 Can. Cr. Cas. 26 (B.C.).

In the case of R. v. Caswell (1873), 33 U.C.Q.B. 303, a notice of appeal to the sessions was given, but was irregular because given for the then next sessions instead of the second sessions thereafter, the conviction having been made within twelve days (now fourteen days, sec. 880 (*a*)) of the next sittings. The statute 33 Vict., ch. 27, sec. 1 (now Code sec. 887), prohibited the allowance of a certiorari if the defendant had appealed from such conviction or order to any court to which an appeal from such conviction or order was authorized by law. The appeal was in consequence not heard, the notice of appeal being held to be inoperative. It was held that there had, in effect, been no appeal and that the right to certiorari had not been taken away. In Cooksley's Case, supra, the granting of the application for a case stated took the place of a notice of appeal; and, in addition, the recognizance was entered into. But if the application for a stated case had been refused, quære whether the application alone would constitute an "appeal" under the provisions of sec. 900. Sub-sec. 6 seems to indicate that the recognizance is operative only upon a case being stated.

Where the grounds taken on a motion in certiorari proceedings to quash a conviction are the same as those taken and disposed of by a single judge on a stated case, the matter is res judicata. R. v. Monaghan (1897), 2 Can. Cr. Cas. 488 (N.W.T.).

**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 SSS in schedule one to this Act.

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.

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 His Majesty, for the public uses of Canada.

FORM SSS.—

RETURN of convictions made by me (*or* us, *as the case may be*), during the quarter ending , 19 .

| 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*).

**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 section 902.**—All actions for penalties arising under the provisions of section 902 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 508 of this Act it may be alleged that "the defendant unlawfully did cut, break, root up and otherwise destroy and 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.

A charge of stealing "in or from" a building is for one offence only. R. v. Patrick White (1901), 4 Can. Cr. Cas. 430.

As to informations and complaints in matters of summary conviction under Part LVIII., sec. 845, sub-sec. (3), provides that 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. See note to that section, ante p. 728.

**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.

*Preserving order in justices' court.*]—Justices of the peace as such have no power to commit for contempt. Stone's Justices' Manual (1902), 733; Ex parte Hyndman, 2 Times L.R. 345. But a justice may order that a person disturbing the proceedings in his court, and refusing to desist, be removed from the court. Clissold v. Machell, 26 U.C.Q.B. 422; R. v. Webb, ex parte Hawker (1899), referred to in Stone's Manual, p. 734; R. v. Brompton, [1893] 2 Q.B. 195; R. v. Lefroy, L.R. 8 Q.B. 134. If a person uses any disrespectful or unmannerly expressions in the face of the court, or uses any words which directly tend to a breach of the peace, he may be

required to find sureties for his good behaviour. 1 Lev. 107. And if more than one justice is sitting the proceedings against the offender should not be taken by the one specially attacked, but by one of the other justices. R. v. Lee, 12 Mod. 514.

In default of the offender finding sureties for his good behaviour the justice may commit him to prison, but it must clearly appear on the warrant that the committal is for want of sureties and not merely for contempt. Dean's Case, Cro. Eliz. 689.

The power given by sec. 908 to police magistrates and other named officials does not extend to proceedings for contempts committed out of court. Re Scaife, 5 B.C.R. 153.

A barrister and solicitor while acting as counsel for certain persons charged with a misdemeanour before a justice of the peace, holding court under the Summary Convictions Act, was arrested by a constable by the order of the justice, without any formal adjudication or warrant, excluded from the court room, and imprisoned for an alleged contempt and for disorderly conduct in court.

In an action by the counsel against the justice and the constable for assault and false arrest and imprisonment, it was held that the justice had no power summarily to punish for contempt in facie curiæ, at any rate without a formal adjudication and a warrant setting out the contempt. Armour v. Boswell, 6 U.C.O.S. 153, 352, 450, followed; Young v. Saylor, 20 Ont. App. R. 645.

He had the power to remove persons who, by disorderly conduct, obstructed or interfered with the business of the court; but, upon the evidence, the plaintiff there was not guilty of such conduct, and had not exceeded his privilege as counsel for the accused; and the proper exercise of such privilege could not constitute an interruption of the proceedings so as to warrant his extrusion. Ibid.

If the justice had issued his warrant for the commitment of the plaintiff and had stated in it sufficient grounds for his commitment, the court could not have reviewed the facts alleged therein; but, there being no warrant, the justice was bound to establish such facts upon the trial, as would justify his course. Ibid.

*(Amendment of 1893).*

**909. Resistance to execution of process.**—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.

PART LIX.

## RECOGNIZANCES.

SECT.



---

**910. Render of accused by surety.**—Any surety for any person charged with an 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.

As to the right of Speedy Trial under Part LIV. of persons surrendered by their sureties, see sec. 765.

**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.

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 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 the accused fails to appear after judgment is given on the reserved case quashing the conviction and ordering a new trial. The conviction having been set aside, the accused

was entitled to presume that he would not be called for sentence, and the sureties were not bound for his appearance for any other purpose than to receive sentence. R. v. Hamilton (1899), 3 Can. Cr. Cas. 1 (Man.).

**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 the record and recovery thereof.**—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.

*(Amendment of 1900.)*

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 King'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, 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 and 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:

"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, inserted "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 received by me, either in court or otherwise, without "any wilful discharge, omission, misnomer or defect what- "soever. 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.

FORM TTT.—

WRIT OF FIERI FACIAS.

Edward the Seventh, 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*).

See sec. 926 making special provisions as to the Province of Quebec. By that section sec. 916 is declared not to apply to that Province.

Where a convicted person, instead of being sentenced is discharged from custody upon entering into a recognizance with sureties to appear and receive judgment when called on, it is only on motion of the Crown that the recognizance can be estreated, or judgment moved against him. R. v. Young (1901), 4 Can. Cr. Cas. 580 (Ont.).

**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 the 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 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 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 on order of judge, &c.**—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.

*Estreating recognizance.*]—This section applies only to recognizances to appear and prosecute, or to give evidence, etc., (see sec. 917), and does not apply to a recognizance whereby the bail became bound for the appearance of their principal to stand his trial upon an indictment other than for common assault. Re Talbot's Bail (1892), 23 O.R. 65.

The proceedings to collect a debt due to the Crown under a recognizance after estreat are civil and not criminal proceedings. Re Talbot's Bail (1892), 23 O.R. 65.

*British Columbia.*]—No recognizance shall henceforth be forfeited or estreated without the order of the court or a judge, nor unless an order or notice shall have been previously served upon the parties by whom such recognizances shall have been given, calling upon them to perform the conditions thereof, and no default shall be considered to be made in performing the conditions of a recognizance by reason of the trial of any indictment or presentment, or the argument of any order or conviction or other proceeding having stood over, where such conviction has been made a remanet, or such indictment or order has stood over by order of the court, or by consent in writing of the parties. B.C. Rule 43.

Every recognizance to appear and answer to any indictment found in the Supreme Court or in the County Judges' Criminal Court, or to any ex-officio or criminal information shall, unless the court or a judge shall by order dispense therewith, contain besides any other condition which may be imposed, a condition that the defendant shall personally appear from day to day on the trial of such indictment or information and not depart until he shall be discharged by the court before whom such trial shall be had. B.C. Rule 44.

Whenever it has been made to appear to the court or a judge, that a party has made default in performing the condition of the recognizance into which he has entered, the court or a judge, upon notice to the defendant and his sureties, if any, may order such recognizance to be estreated without issuing any writ of scire facias. B.C. Rule 45.

In proceedings under sec. 589 of the Cr. Code, for breach of recognizance on remand, the certificate of the justice of the peace of non-appearance

of the accused, indorsed on the back of the recognizance, shall be transmitted by the justice of the peace to the registrar of the court where if committed the accused would be bound to appear, and be proceeded upon by order of the judge presiding at the assizes, if he thinks proper, in like manner as other recognizances. B.C. Rule 46.

In summary convictions under sec. 878 of the Cr. Code, the certificate of default of appearance, as in the preceding rule, shall be transmitted by the justice of the peace to the clerk of the County Court having jurisdiction at the place wherein such recognizance is taken, and be proceeded upon by order of the County Court judge, if he thinks proper, in like manner as other recognizances. B.C. Rule 47.

**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 recognizances 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 916, 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 recognizance 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.

By sec. 926 it is enacted that the provisions of secs. 916 and 919 to 924, both inclusive, shall not apply to the province of Quebec, and in lieu thereof the provisions of sec. 926 shall apply to that province.

**920. Sale of lands by sheriff under estreated recognizance.**—If upon any writ issued under section 916 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 maks 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 sec. 922 for the discharge of a forfeited recognizance is a civil and not a criminal proceeding. The discretionary order for the discharge of a forfeited recognizance authorized by this section to be made by the court into which any writ of fieri facias and capias issued under part LIX. of the Code is returnable, must be made by the court en banc, and not by a single judge. Re McArthur's Bail (1897), 3 Can. Cr. Cas. 195 (N.W.T.).

**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 919. 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. In Quebec Province.**—The provisions of sections 916 and 919 to 924, 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 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.

*(Amendment of 1894.)*

(*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 præcipe 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 gaol of the district until satisfaction is made, or until the court which issued such warrant, upon cause thereon, 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.

*(Amendment of 1894.)*

(*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.

Where there are several cognizors the goods and lands of all of them must be proceeded against before enforcing the default by personal arrest of any of them. R. v. Ferris (1895), 9 Que. S.C. 376.

It is not essential to the validity of a recognizance that it should be signed by the cognizor. R. v. Corbett (1894), 7 Que. S.C. 465.

PART LX.

## FINES AND FORFEITURES.



---

*(Amendment of 1900.)*

**927. Application of fines, etc.**—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 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 His 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 His Majesty as for himself, to the moiety of any fine, penalty or forfeiture recovered in his suit.

Secs. 806 and 827 which made partial provision in regard to the application of fines were repealed on the passing of this amendment, and this general provision is inserted to cover all fines, penalties and forfeitures in respect of any laws of Canada.

**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 His Majesty only, or of any private party suing as well for His 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 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 His 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 His Majesty. R.S.C. c. 180, s. 1.

**930. Limitation of actions, &c.**—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.

SECT.



---

**931. Punishment 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.

*Procedure by habeas corpus.*]—The very name and tenor of the writ of habeas corpus indicates what, and what only, can be done under it. The writ is called the writ of habeas corpus cum causâ, that is to say, its tenor is to direct the officer to produce before the judge or court the body of the prisoner, together with the cause which he has for detaining him. Therefore, the only consideration which, on the return to the writ of habeas corpus, can be entered upon by the court or judge is the sufficiency of the commitment. If the officer returns to the writ a good commitment, whether it is in pursuance of a sentence of a common law court, that is a sentence following a conviction by a jury, or whether it is a commitment following a summary adjudication by a magistrate under a statutory jurisdiction, in either case that is conclusive. Re Trepanier (1885), 12 Can. S.C.R. 111, 125, per Strong, J.

In the absence of an affidavit by the prisoner or evidence shewing that he is so coerced as to be unable to make an affidavit, the application for the writ cannot be entertained. Re Parker, 5 M. & W. 32; Re Ross, 3 Ont. Pr. R. 301; R. v. Black, 18 March, 1899, per Street, J.

On a petition for habeas corpus complaining of an illegal commitment, there should be produced a copy of the commitment or an affidavit that it was applied for and refused. Ex p. Pollock (1881), Ramsay's Cas. (Que.) 187.

Affidavits used in applications on the Crown side of the court must not be sworn before the prosecutor or his attorney. R. v. Marsh (1886), 25 N.B.R. 370; Gude's Crown Prac. 1.

It is a usual, convenient and established practice that a rule nisi to shew cause why a writ of habeas corpus should not issue should also require cause to be shewn why, in the event of the rule being made absolute, the prisoner should not be discharged without the actual issue of the writ of habeas corpus and without his being personally brought before the court, but, in order that the rule may be made absolute in this form, the magistrate, the keeper of the prisoner, and the prosecutor should all be served with the rule nisi, or at least be represented on its return. R. v. Farrar (1890), 1 Terr. L.R. 306; Ex parte Jacklin (1844), 13 L.J.M.C. 159; Re Bull (1846), 1 Saunders & Cole 141; Ex parte Eggington (1854), 2 E. & B. 717.

A person imprisoned may make fresh application for a writ of habeas corpus to every judge or superior court in turn, who are each bound to consider the question independently. Re George Bowack (1892), 2 B.C.R. 216, per Walkem, J.; Ex parte Partington 13 M. & W. 679.

Habeas corpus proceedings do not lie to inquire into the validity of a conviction made at a County Judge's Criminal Court as the latter is a court of record. R. v. Murray (1897), 1 Can. Cr. Cas. 452 (Ont.).

A habeas corpus will not be granted to bring up a prisoner who is under sentence upon a conviction for a criminal offence at the sessions. R. v. Crabbe (1854), 11 U.C.Q.B. 447.

The court cannot on a writ of habeas corpus revise on its merits the decision of the judge who has pronounced the conviction, nor adjudge on the culpability of the petitioner. R. v. Bougie (1899), 3 Can. Cr. Cas. 487 (Que.).

If the record of a superior court, produced on an application for a writ of habeas corpus, contains the recital of facts requisite to confer jurisdiction, such recital is conclusive and cannot be contradicted by extrinsic evidence. Re R. E. Sproule (1886), 12 Can. S.C.R. 140.

A return made by a sheriff to a writ of habeas corpus need not necessarily be made over the sheriff's signature and is sufficient if actually written by him or under his direction. Re Sproule (1886), 12 Can. S.C.R. 140.

If the defendant is remanded upon the first commitment when brought up on habeas corpus, and nothing has taken place equivalent to quashing the conviction, an amended conviction may be returned by the magistrate, and it may, if valid in itself, be used as a defence to an action brought against the magistrate for false imprisonment. Charter v. Graeme (1849), 13 Q.B. 216, 234.

The corrected statement must be conformable to the facts as they really took place, and the magistrates are liable, if they make a false return. Paley on Convictions, 7th ed., 235; R. v. Simpson, 10 Mod. 382.

Where the warrant of commitment recited a conviction for an alleged offence in January, 1888, and the conviction returned under a writ of certiorari in aid of habeas corpus proceedings, properly recited that it was for an offence committed in January, 1887, it was held to be the proper procedure to enlarge the habeas corpus proceedings so as to enable the magistrate to file a fresh warrant in conformity with the conviction returned. R. v. Lavin (1888), 12 Ont. Prac. 642 (MacMahon, J.). It is to be assumed prima facie that the commitment correctly recites the conviction, and those alleging it to be different are to bring the conviction into court. Ex parte Reynolds, 8 Jurist 192; Arscott v. Lilley, 11 Ont. R. 153, 165, 14 Ont. App. 297. So, if the magistrates are served with notice of motion for a prisoner's discharge from custody on the ground that the commitment set out in the return to a writ of habeas corpus was bad on the face of it, and although appearing by counsel do not produce the conviction, it is said that the defendant should not be held in custody under a commitment bad upon its face, nor the motion adjourned to give an opportunity to return a valid

conviction to accord with which the commitment might be amended. R. v. Timson (1870), L.R. 5 Exch. 257.

Where the warrant of arrest embodied in the return to a habeas corpus, on its face shews jurisdiction in the magistrate, affidavits are not admissible to controvert such fact if the offence charged be a criminal one. R. v. Defries (1894), 1 Can. Cr. Cas. 207 (Ont.).

Affidavits are not receivable which merely go to sustain objections as to the conduct of the magistrate in dealing with the case before him over which he had jurisdiction. R. v. Munro (1864), 24 U.C.Q.B. 44.

But a collateral extrinsic fact, confessing and avoiding the disputed order may be proved on affidavit to shew want of jurisdiction. Re Clarke (1842), 2 Q.B. 619, 634; R. v. Justices of Somersetshire, 5 B. & C. 816.

Proof by affidavit is admissible in habeas corpus proceedings to shew that the commitment took place on a Sunday, as proving an extrinsic fact in confession and avoidance of, but not contradicting, the return. R. v. Cavelier (1896), 1 Can. Cr. Cas. 134 (Man.).

A prisoner in custody under a verbal remand of a justice of the peace on a preliminary examination for an alleged offence, may be discharged on habeas corpus by a superior court if the information be so uncertain in its terms that it cannot be said to charge an offence known to the law, ex. gr. that the accused did counsel and procure a person named to violate the Liquor License Act (or the Customs Act or the Criminal Code) without further specifying the offence. R. v. Holley (1893), 4 Can. Cr. Cas. 510 (N.S.).

The 6th sec. of the Habeas Corpus Act, 31 Car. II., ch. 2, has no application to a case in which the prisoner is confined upon a warrant in execution. Arscott v. Lilley (1886), 11 O.R. 153, 179.

In Ontario it has been held that the fact that in the margin of the writ of habeas corpus it was marked "per 33, Car. II." does not prevent the judge from acting under either the Ontario Habeas Corpus Act or at common law. R. v. Arscott (1885), 9 O.R. 541.

The Ontario Habeas Corpus Act (originally 29-30 Vict. (1866), ch. 45), was taken from the Habeas Corpus Act of 56 Geo. III., ch. 100 (1816). R. v. St. Clair (1900), 3 Can. Cr. Cas. 551; In re Melina Trepanier (1885), 12 Can. S.C.R. 111, and R. v. Mosier (1867), 4 Ont. Pr. 64, and it is doubted whether it applies to criminal matters. Ibid; Carus Wilson's Case (1845), 7 Q.B. 984, 1010.

An application to the court to quash a writ of habeas corpus as improvidently issued may be entertained in the absence of the prisoner. Re R. E. Sproule (1886), 12 Can. S.C.R. 140.

Under ch. 95 of the Revised Statutes of Lower Canada of 1861, which is still in force in the province of Quebec the Superior Court has jurisdiction to issue a writ of habeas corpus, and decide upon it upon the petition of a person kept in jail in virtue of a conviction in a criminal matter. The court cannot on a writ of habeas corpus revise on its merits the decision of the judge who has pronounced the conviction, nor adjudge on the culpability of the petitioner. R. v. Bougie (1899), 3 Can. Cr. Cas. 487.

The jurisdiction of the Superior Courts of law in England to issue a writ of habeas corpus to Canada, was held not to have been taken away by the creation of an independent legislature in Canada. Ex parte Anderson (1860), 3 E. & E. 487, cited by Adam Wilson, J., in R. v. Amer (1877), 42 U.C.Q.B. at p. 395.

The court may on certiorari amend a summary conviction under the powers conferred by secs. 883 and 889 whether the certiorari is one preliminary to a motion to quash the conviction or is in aid of a writ of habeas corpus. R. v. Murdock (1900), 4 Can. Cr. Cas. 82 (Ont. C.A.).

*Discharge upon terms.*]—The court may as a condition to a prisoner's discharge impose the term that he shall undertake that no action shall be

brought by him against any person in respect of the prosecution and conviction or of his imprisonment thereunder. R. v. Horton (1897), 3 Can. Cr. Cas. 84 (N.S.).

A warrant having been issued for the arrest of Mrs. Quirke for non-payment of a fine, for breach of the Canada Temperance Act, her daughter disguised herself as her mother. The officer being deceived, arrested the daughter and lodged her in gaol. A writ of habeas corpus having been obtained, an order was granted discharging prisoner and exonerating those implicated in her arrest. Ex p. Quirke (1896), 32 C.L.J. 779.

In discharging a prisoner in habeas corpus proceedings under ch. 181, Revised Statutes of Nova Scotia, an order of protection in respect of a civil action by the prisoner, can be made only in favour of the gaoler and not in favour of the magistrate and prosecutor. R. v. Keeping (1901), 4 Can. Cr. Cas. 494 (N.S.).

*Habeas Corpus jurisdiction of the Supreme Court of Canada.*]—By sec. 23 of the Supreme Court Act R.S.C. 1886, ch. 135, it is provided that the Supreme Court of Canada shall have, hold and exercise an appellate, criminal as well as civil jurisdiction. And by sec. 32 of the same statute "Every judge of the court shall have concurrent jurisdiction with the courts or judges of the several Provinces, to issue the writ of habeas corpus ad subjiciendum, for the purpose of an inquiry into the cause of commitment, in any criminal case under any Act of the Parliament of Canada, but such judge shall not have such jurisdiction in habeas corpus matters arising out of any claim for extradition made under any treaty. If the judge refuses the writ or remands the prisoner, an appeal shall lie to the court."

In any habeas corpus matter before a judge of the Supreme Court, or on any appeal to the Supreme Court, in any habeas corpus matter, the court or judge has the same power to bail, discharge or commit the prisoner or person, or to direct him to be detained in custody or otherwise to deal with him as any court, judge or justice of the peace having jurisdiction in any such matters in any Province of Canada. R.S.C., ch. 135, sec. 33.

Nor shall an appeal be allowed in any case of proceedings for or upon a writ of habeas corpus arising out of any claim for extradition made under any treaty. Sec. 31 S. C. Act.

A judge of this court, Supreme Court of Canada, sitting in chambers, on the return to a writ of habeas corpus, if a proper commitment is returned, may remand the prisoner, or, if the prisoner appears to be only committed for trial, and if the depositions can be got before him without a writ of certiorari (which there is no jurisdiction to issue to bring up the proceedings before a single judge), may order the prisoner to be bailed, but that is the limit of the jurisdiction under a writ of habeas corpus so issued. Per Strong, J., in Re Trepanier (1885), 12 Can. S.C.R. 111, 129.

The jurisdiction of a judge of the Supreme Court of Canada in matters of habeas corpus in any criminal case under any statute of Canada is limited to an inquiry into the cause of commitment as disclosed by the warrant of commitment. Ex parte Macdonald (1896), 3 Can. Cr. Cas. 10 (Can.).

Its jurisdiction in matters of habeas corpus is not an appellate jurisdiction over provincial courts, nor does it extend further than to give such judge equal and co-ordinate power with a judge of the provincial court. R. v. Patrick White (1901), 4 Can. Cr. Cas. 430, per Sedgewick, J. (S.C. Can.).

Where the only ground is that the magistrate erred on the facts and that the evidence did not justify the conclusion as to the guilt of the prisoner arrived at by the magistrate, the Supreme Court of Canada has no jurisdiction to go behind the conviction and inquire into the merits of the case by the use of the writ of habeas corpus. Re Trepanier (1885), 12 Can. S.C.R. 113. But if the conviction shews a want of jurisdiction, or if it be

shewn that the magistrate had no jurisdiction, it would be a nullity, and the court would discharge the prisoner, because, in such a case he could not be held by process of any legal tribunal. Ibid.

**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.

This provision was first enacted in 1869 by sec. 1 of the Statute 32-33 Viet., ch. 29, and no similar enactment is to be found in the English or in the American statutes. Under this provision where a statute prescribes as the punishment for an offence both fine and imprisonment, the court which convicts has the right in its discretion to impose either a fine alone or an imprisonment alone or both, unless the statute declares a contrary intention and expressly overrides the general rule contained in this section. R. v. Robidoux (1898), 2 Can. Cr. Cas. 19 (Que.).

**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.

When a statute makes that unlawful which was lawful before, and appoints a specific remedy, that remedy may be pursued and no other; and where an offence is not so at common law, but made an offence by act of parliament an indictment will lie where there is a substantive prohibitory clause in such act of parliament, though there be afterwards a particular provision and a particular remedy. When a new offence is created by an act of parliament, and a penalty is annexed to it by a separate and substantive clause, it is not necessary for the prosecutor to sue for the penalty, but he may proceed on the prior clause, on the ground of its being an indictable offence. R. v. Mason (1867), 17 U.C.C.P. 534.

**934. Fine imposed shall be in discretion of 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.

SECT.



---

**Punishment to be the same on conviction by verdict or 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 exe-

cution 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.

The report although made in pursuance of a statutory duty is considered to be of a confidential nature, and is not a public report.

**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 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. R.S.C. c. 181, ss. 13 and 14.

FORM UUU.—

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 .

FORM VVV.—

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.

*(Amendment of 1900.)*

**943. Deputy sheriffs, gaolers, etc.** — 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.

The amendment corrects an error whereby the preceding two sections were referred to instead of three.

**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, 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 proceedings 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.

SECT.



---

**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.

*(Amendment of 1893.)*

**951. Imprisonment in cases not specially provided for.**—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.

If a statute merely directs imprisonment as the punishment of an offence, no court of justice can, in the absence of any general discretionary power to that effect, award hard labour in addition. It is an additional substantive punishment. Hard labour is in fact a statutable addition to imprisonment, generally to be found enacted in the Act creating the offence, sometimes in statutes giving it as a discretionary power to a court in awarding imprisonment. R. v. Frawley (1881), 46 U.C.Q.B. 153.

**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 a 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.

Where a statute of Canada imposes a fine and also imprisonment the punishment is in the discretion of the court, which is not bound to inflict both, but may inflict either one or the other of the two kinds of punishment by virtue of sec. 932. R. v. Robidoux (1898), 2 Can. Cr. Cas. 19 (Que.).

**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.

A prisoner convicted *at the one time* of two offences and sentenced on each to three months' imprisonment without specification as to the terms being concurrent or otherwise, is not entitled to a discharge on a habeas corpus after three months' imprisonment. There is no presumption that sentences passed at the one time are to be concurrent. Ex parte Bishop (1895), 1 Can. Cr. Cas. 118 (N.B.).

**955. Imprisonment in penitentiary, &c.**—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.

*(Amendment of 1901.)*

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.

(*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.

*(Amendment of 1900.)*

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.

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 sub-section 2 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.

The proviso at the end of sub-sec. 3 is intended to provide for cases of escapes, attempts to escape, assaults on officers, etc., so that a person may be condemned to imprisonment in the same penitentiary after the expiration of his sentence, for a further term in respect of the escape, etc., although such further term is less than two years, the limit of punishment under sec. 159. Under the general law imprisonments for terms of less than two years are made in the common gaols and in prisons other than penitentiaries. See. 955 (2).

The judges of the Supreme Court of New Brunswick have the exclusive right to issue writs of habeas corpus to enquire into the legality of the imprisonment of a person confined in the Dominion penitentiary at Dorchester (within that province) though he was committed there by a Nova Scotia court. Ex parte Strather (1886), 25 N.B.R. 375.

The Penitentiary Act, 46 Viet., ch. 37, sec. 40, now R.S.C., 1886, sec. 42, directs that a copy of the sentence taken from the minutes of the court by which the prisoner was tried, certified by the judge or clerk of the court, shall be delivered to the warden of the penitentiary with any prisoner committed to his custody. The warrant in Stather's case was as follows:—"Whereas R. S., of H., was, during the March sittings of the Supreme Court at Halifax, indicted for making fraudulent entries and fraudulent returns, and was found guilty upon said indictment, and thereupon sentenced by the court to be imprisoned at hard labour in the penitentiary of Dorchester for the space of four years. Now, therefore, these are to require and command you to receive the said R. S. into your custody and him to detain in the said penitentiary for the said period of four years, in conformity with the terms of his said sentence, and for which this shall be your sufficient warrant. Dated at H. this —— day of ——, 1884." It was held that the warrant was not a compliance with the statute, there being other counts in the indictment not mentioned in the warrant, and the date when the prisoner was sentenced not being mentioned; and that the prisoner should be discharged on a habeas corpus issued in New Brunswick. Ex parte Strather (1886), 25 N.B.R. 375.

**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 pro-

visions 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.

SECT.



---

*(Amendment of 1900.)*

**957. Sentence of whipping.**—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 number 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.

PART LXV.

## SURETIES FOR KEEPING THE PEACE AND FINES.

SECT.



*(Amendments of 1893 and 1900.)*

**958. Imprisonment and fine.**—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.

The first part of the former section read "any person convicted of an indictable offence punishable, etc," and this is now varied to read "any person convicted by any such court or magistrate of an indictable offence punishable, etc." The court referred to is a court of criminal jurisdiction, and the word "magistrate" has the meaning given to it by Part LV. re-

lating to Summary Trials of indictable offences. See sec. 782. This amendment is intended to remove a doubt as to whether a magistrate under the Summary Trials (Part LV.), could impose a fine in lieu of imprisonment in a case within sec. 787.

The second sub-section is new and is designed especially for the Yukon Territory where the expense of maintaining long term prisoners is large.

*(Amendment of 1893.)*

**959. Recognizance to keep the peace.**—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 behaivour, 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 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.

FORM WWW.—

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.

FORM XXX.—

FORM OF RECOGNIZANCE FOR THE SESSIONS.

Canada,
County of , )
Province 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 Lord the King 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 Lord the King, his 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, etc.,) * 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 His Majesty and his liege people, and specially towards C. D. (of, etc.), 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 or such other court.

FORM YYY.—

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 (etc.), on the day of , at aforesaid, did threaten (*etc., 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 His Majesty and his 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.

The justice of the peace must fix the amount of the recognizance to be given. A justice's order that the accused give security to keep the peace for one year, but not fixing any amount nor a term of imprisonment, in default, will not support a commitment thereunder. A warrant of commitment under this section and Form YYY can only be issued after the defendant's refusal or neglect to furnish the required security, proved and recorded subseqently to the order requiring the security, and it must recite such refusal or neglect. Re John Doe (1893), 3 Can. Cr. Cas. 370 (Que.).

A warrant of commitment by a justice under sub-section 4 for default in finding sureties to keep the peace must shew on its face that the complainant feared bodily injury because of the defendant's threat, 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. Code Form WWW; R. v. John McDonald (1897), 2 Can. Cr. Cas. 64.

Threats verbally made to burn the complainant's buildings are not indictable under the Code, and give rise only to proceedings to force the offender to give security to keep the peace. Ex parte Welsh (1898), 2 Can. Cr. Cas. 35 (Que.).

**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 imprisoned 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 complainant 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.

SECT.



---

**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 His 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 His 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.

PART LXVII.

## PUNISHMENTS ABOLISHED.

SECT.



---

**962. Outlawry.**—Outlawry in criminal cases is abolished.

**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.

**965. Attainder.**—From and after the passing of this Act no confession, verdict, inquest, conviction or judgment of or for 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.

PART LXVIII.

## PARDONS.

SECT.



---

**966. Pardon by 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 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.

*Pardon.*]—There is an essential difference between pardons, as universally understood, and the remission or commutation of a term of imprisonment, or of a pecuniary mulct. The discharge of a prisoner from further endurance of his sentence, which may occur for various cogent reasons, cannot properly be looked upon or described as a pardon. Per Hagarty, C.J.O., in Attorney-General for Canada v. Attorney-General of Ontario (1892), 19 Ont. App. 31, 35.

The term of imprisonment in pursuance of any sentence runs from the day of the passing of such sentence, without interruption, except when especially provided otherwise by law. Sec. 955 (7).

The license issued under the authority of the Ticket of Leave Acts, and by which a convict while undergoing a term of imprisonment in penitentiary is conditionally allowed at large, may be revoked by the Governor-General either with or without cause assigned. R. v. Johnson (1901), 4 Can. Cr. Cas. 178 (Que.).

But the revocation by the Crown, without cause assigned, of such license works no interruption in the running of the sentence, which shall terminate at the same time as if such license had never been granted. Ibid.

*Ticket of leave.*]—The Ticket of Leave Acts, Statutes of Canada, 1899, ch. 49, and 1900, ch. 48, providing for the conditional liberation of convicts in certain cases, enact as follows:—

(1) *License to be at large.*]—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 imprisonment 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 at large according to the terms of such license.

(3) *Effect of revocation and proceedings thereon.*]—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 the 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 sec. 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) *Conviction to forfeit license.*]—If any holder of a license under this Act is convicted of any indictable offence his license shall be forthwith forfeited.

(6) *Holder of license to notify his address and all changes thereof.*]—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 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) *Arrest without warrant in certain cases.*]—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) *Conviction and sentence to remain in force.*—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) *Further imprisonment when license forfeited.*]—When any such license as aforesaid is forfeited by a conviction of an indictable offence 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) *Administration of statute.*]—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.

*Form A.*

LICENSE.

OTTAWA,..... day of.....19....

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 ..... ..... 19....

*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.*

FORM OF 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.....

The Ticket of Leave Amendment Act, 1900 (Statutes of Canada, 63-64 Vict., ch. 48), is as follows:

(1) *Convicts in gaols.*—The provisions of ch. 49 of the statutes of 1899, intituled an Act to provide for the conditional liberation of penitentiary convicts, shall apply to all persons convicted of any offence and being under sentence of imprisonment in any gaol or other public or reformatory prison; and the Governor-General may grant to any person so convicted and being under imprisonment in any gaol 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.

(2) The said Act and this Act may be cited respectively as the Ticket of Leave Act, 1899, and the Ticket of Leave Amendment Act, 1900, and may be cited collectively as the Ticket of Leave Acts.

*Release of first offenders in certain cases.*]—See Code, sec. 971.

**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.

The power of commuting and remitting sentences for offences against the laws of the Province (Ontario), or offences over which the legislative authority of the Province extends, which by the terms of the Act 51 Vict., ch. 5 (Ont.), is included in the powers which were vested in or exercisable by the governors or lieutenant-governors of the several provinces before Confederation, and are now by that Act vested in and exercisable by the Lieutenant-Governor of this Province, does not affect offences against criminal laws which are the subject of Dominion legislation, but refers only to offences within the jurisdiction of the Provincial Legislature, and in that sense the Act is intra vires the Provincial Legislature. Attorney-General for Canada v. Attorney-General for Ontario (1892), 19 Ont. App. 31; 23 Can. S.C.R. 458.

**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 His Majesty's royal prerogative of mercy. R.S.C. c. 181, s. 43.

*(Amendment of 1900.)*

**971. Release on suspended sentence.**—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 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.

The former sec. 971 enacted that in the case of an offence "punishable with not more than two years' imprisonment" (that is, two years being the maximum punishment for the offence) the court might under certain circumstances and on certain conditions, instead of sentencing the offender at once, direct his release on probation of good conduct. Previous to the statutory enactment the court had this power in the case of offences with-

out the restriction as to two years. The power of releasing on a suspended sentence in the case of an offence punishable (as a maximum) with more than two years' imprisonment is reinstated by the addition of sub-sec. 2, but with the proviso that the prosecuting counsel concur.

Sub-sec. 3, supra, is the former sub-sec. 2 re-numbered.

Another change made is the substitution in the first sub-section of the word "age" for "youth" in the recital of the circumstances having regard to which the power of conditional release is to be exercised.

See also sec. 966 and the note to same.

**972. Conditions of release.**—The court, before directing 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.

Where the jury convicted the defendant and the verdict was recorded and the offender was, by order of the court, released on bail to appear for judgment, it is only upon motion by the Crown that the recognizance of the defendant and his bail can be estreated in Ontario or that judgment can be moved against the offender. R. v. Young (1901), 4 Can. Cr. Cas. 580 (Ont.).

A contract by the accused to indemnify a surety against liability under his recognizance is illegal; but where a deposit of money is made by the accused with the surety by way of indemnity, the accused cannot recover it back. Herman v. Jenehner, 15 Q.B.D. 561.

**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.

# TITLE IX.

## ACTIONS AGAINST PERSONS ADMINISTERING THE CRIMINAL LAW.

SECT.



---

**975. Time and place of 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.

The statute, 13 Geo. II., ch. 18, sec. 5, imperatively requires that notice of an application for a certiorari be given to the justice or justices by or before whom a conviction has been made, to the end that such justice or the parties therein concerned may shew cause against the granting of such certiorari, and makes the giving of it a condition precedent to the issuing of the writ. R. v. McAllan (1880), 45 U.C.Q.B. 402.

The affidavit of service of notice of motion for a certiorari to remove a conviction made by justices of the peace must identify the justices served as the convicting justices. Re Lake (1877), 42 U.C.Q.B. 206.

Where an order nisi to quash a conviction has been issued, but before service of same upon the informant prosecutor the latter died, the proceedings do not lapse and can be properly continued by serving the magistrates, and upon quashing a conviction in such a case, no cause of action in respect of its illegality survives against the representatives of the deceased informant. R. v. Fitzgerald (1898), 1 Can. Cr. Cas. 420 (Ont.).

**977. Defence.**—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 into court.**—No plaintiff shall recover in any such action if tender or 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.

Where the justices have a general jurisdiction over the subject matter upon which they have issued a warrant of commitment to a gaoler, the gaoler is not liable to an action, though their proceedings are erroneous; but it is otherwise if the justices were acting wholly out of their jurisdiction. Ferguson v. Adams (1848), 5 U.C.Q.B. 194.

A conviction made by a magistrate protects him from an action of trespass in respect to the enforcement of the same, so long as it has not been set aside. Gates v. Devenish (1849), 6 U.C.Q.B. 260.

In an action against a magistrate for trespass and illegal seizure of goods, in order to shew a good justification it is necessary that the defendant should give in evidence a conviction not illegal on the face of it, and a warrant of distress supported by the conviction, and not on the face of it an illegal warrant. In a case where a magistrate's conviction was for "wilfully damaging, spoiling and taking away six bushels of apples of A.B., whereby C.D. committed an injury to the said goods and chattels of the said A.B." and the warrant recited that "judgment was given against C.D. in *a suit* of A.B. v. C.D. for a *misdemeanour* in taking apples by force and violence off and from the presence of A.B.," it was held that the conviction did not support the warrant; and also that neither the conviction nor the warrant contained *a statement of an offence* for which such a conviction could take place. Eastman v. Reid (1850), 6 U.C.Q.B. 611.

# TITLE X.

## REPEAL, ETC.

SECT.


---

**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.

*(Amendment of 1893.)*

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.

By an express provision contained in sec. 2 the Code did not come in force until the 1st of July, 1893.

## 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. | Secs. 70 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. | Secs. 106 (s.s. 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. | Secs. 1 & 2. |
| " 145 | An Act respecting Accessories. | The whole Act. |
| " 146 | An Act respecting Treason and other offences against the King'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 Convenience. | The whole Act, except Sec. 8, (s.s. 4, thereof). |
| " 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. |

| ACTS REPEALED. | | TITLE. | EXTENT OF REPEAL. |
|---|---|---|---|
| " | 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. |
| " | 173 | An Act respecting Threats, Intimidation and other offences. | The whole Act, except Sec. 12 (s.s. 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 His Majesty's Ships in Canadian Waters. | The whole Act. |
| " | 48 | An Act to amend the Act respecting offences against Public Morals and Public Convenience. | 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, 18 & 22, 16 & 23. |
| " | 42 | An Act respecting gaming in Stocks and Merchandise. | The whole Act. |

| ACTS REPEALED. | | TITLE. | EXTENT OF REPEAL. |
|---|---|---|---|
| " | 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. |
| " | 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. |

**982. Forms in schedule 1 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.

A similar provision was contained in the statute 32-33 Vict., ch. 30, and it was held by Taylor, J., of the Manitoba Court of Queen's Bench that they were not imperative. R. v. Connor (1885), 2 Man. R. 235, 1 Terr. L.R. 4.

The several forms referred to will be found distributed under the sections to which they respectively relate. See title "Forms" in Index.

**983. Application of Act.**—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 His 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 Acts 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.

APPENDIX.

The following are the Acts and parts of Acts which are not affected by the Criminal Code, 1892, set forth in the Appendix thereto. (Reference is made in this treatise to the more important of those Acts under the respective sections of the Code which deal with their subject matter):—

Of R.S.C. (1886), ch. 50 (respecting the North-West Territories), sec. 101.

Of R.S.C. ch. 146 (Treason, etc.), secs. 6 and 7.

Of R.S.C. ch. 148 (Firearms), sec. 7.

Of R.S.C. ch. 149 (Seizure of Arms), secs. 5 and 7.

Of R.S.C. ch. 151 (respecting the Peace near Public Works), secs. 1 to 24 inclusive.

Of R.S.C. ch. 152 (respecting the Peace at Public Meetings), secs. 1, 2 and 3.

Of R.S.C. ch. 153 (Prize-fighting), secs. 6, 7 and 10.

Of R.S.C. ch. 154 (Perjury), sec. 4.

Of R.S.C. ch. 157 (Public Morals), sub-sec. 4 of sec. 8.

Of R.S.C. ch. 167 (Coin Offences), secs. 29 to 34 inclusive.

Of R.S.C. ch. 169 (Army and Navy), sec. 9.

Of R.S.C. ch. 172 (Cruelty to Animals), sec. 7.

Of 51 Vict., ch. 41 (Merchandise Marks), secs. 15, 16, 18, 22, 23.

Of 52 Vict., ch. 41 (Trade Combinations), secs. 4 and 5.

Of 53 Vict., ch. 37 (Criminal Law Amendment), sec. 1; (Escapes and Rescues), sec. 2, and 32 to 40 inclusive; (Industrial Schools and Reformatories).

END OF CODE.

# THE CANADA EVIDENCE ACT.

An Act respecting Witnesses and Evidence. (56 Vict. (Can.), c. 31, as amended.)

*(Original Act assented to 1st April, 1893.)*

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

[N.B.—Where in the original Act passed in the reign of Her late Majesty Queen Victoria, reference was made to the Queen, the word "King" is now substituted in the text.]

**1. Short title.**—This Act may be cited as *The Canada Evidence Act*, 1893.

**2. Application.** — This Act shall apply to all criminal proceedings, and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction in this behalf.

A coroner's court is a criminal court and is, therefore, one in which the evidence would be subject to this Act. A deposition made at a coroner's inquest after objection taken under sec. 5 would, therefore, not be admissible in a subsequent criminal proceeding against the witness other than a charge of perjury in giving such evidence. See R. v. Hendershott, 26 O.R. 678; R. v. Hopkins (1896), 32 C.L.J. 592, Desnoyers, P.M., Montreal.

In a civil action brought to recover from the constable and clerk of the peace moneys seized in a common gaming house under the powers conferred by sec. 575 of the Code, it was held that the rules of evidence in force in the province in civil matters applied and not the Canada Evidence Act. O'Neil v. Attorney-General (1896), 1 Can. Cr. Cas. 303 (Can.), affirming (s.c.), O'Neil v. Tupper, R.J.Q. 4 Q.B. 315. But it was held also that a judgment of forfeiture in a criminal proceeding is not subject to collateral attack in a civil action brought to recover the moneys. Ibid.

WITNESSES.

**3. No incompetency from crime or interest.** — A person shall not be incompetent to give evidence by reason of interest or crime.

**4. Competency of accused and of wife and husband.** —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.

*Defendant as a witness.*]—The result of this section is to empower (but not to compel) one of two persons jointly indicted to give evidence incriminating the other without the necessity of resorting to the old procedure of either taking a plea of guilty or pardoning the prisoner to be called.

When a person on trial claims the right to give evidence on his own behalf he comes under the ordinary rule as to cross-examination. He may be asked all questions pertinent to the issue, and cannot refuse to answer those which may implicate him. R. v. Connors (1893), 3 R.J.Q., 3 Q.B. 100, 5 Can. Cr. Cas. 70 (Que.).

*Comment on failure to testify.*]—Comment by the prosecuting counsel before the jury in respect of the failure of prisoner's wife to testify is error entitling the prisoner to a new trial. R. v. Corby (1898), 1 Can. Cr. Cas. 457 (N.S.).

The rule is to be applied, notwithstanding a subsequent withdrawal of the comment and notwithstanding the judge's direction to the jury to disregard it. The objection is not waived, because not taken at the time, and it is sufficient if drawn to the attention of the trial judge after the jury have retired to deliberate. Ibid.

It is the duty of the court to carefully protect the accused from damaging insinuations, cunningly devised, which may not in terms invite a consideration of prisoner's failure to testify but make indirect and covert allusion to the defendant's silence. Dawson v. State (1893), 24 S. W. Rep. 414 (Texas App.). So where counsel for the prosecution stated a conversation between defendant and a witness, to which the latter had testified, and then exclaimed, "Who has denied it?" such was held to be a comment on defendant's failure to testify, for the defendant was the only person who could deny it. Dawson v. State, Ibid. But comment on the failure to contradict testimony, where it does not appear that the accused is the only person who can contradict it, is not prohibited. State v. Weddington, 103 N. Car. 372.

Where the prosecuting counsel, in his address to the jury, after referring to evidence of the prisoner's whereabouts at the time of the offence, turned to the prisoner, and said, "Now, where does he say he was, if he was not there?" such was held good ground for reversing the conviction, although the prosecuting counsel was promptly admonished by the presiding judge to refrain from remarks of that nature, and the jury instructed not to consider them. Brazell v. State (1894), 26 S. W. Rep., 723 (Tex. App.).

*Husband and wife.*]—A letter written by the accused to his wife and intrusted to but opened by a constable was held inadmissible. R. v. Pamenter (1872), 12 Cox C.C. 177. Conversations between husband and wife at which a third party was present or which he overheard may be proved by such third person. R. v. Smithie, 5 C. & P. 332; R. v. Simons (1834), 6 C. & P. 540; R. v. Bartlett, 7 C. & P. 832.

*(Amendment of 1898.)*

**5. Incriminating answers.** — No witness 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.

*(Amendment of 1901.)*

2. The proviso to sub-section 1 of this section shall in like manner apply to the answer of a witness to any question which pursuant 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 sub-section, and which, but for the enactment, he would upon such ground have been excused from answering.

The fifth section of the Canada Evidence Act, 1893, as amended by 61 Viet., ch. 53, removes the ground for the differences of opinion, which prevailed as to the proper construction of the section as it originally stood. See R. v. Hendershott and Welter (1895), 26 Ont. R. 678; R. v. Williams, 28 Ont. R. 583; R. v. Hammond (1898), 29 Ont. R. 211, 1 Can. Cr. Cas. 373.

If when called upon to testify, that witness does not object to do so on the ground that his answers may tend to criminate him, his answers are receivable against him, except in the case the section provides for) in any criminal trial or other criminal proceeding against him thereafter. If, on the other hand, he does object, he is protected. R. v. Clark (1901), 5 Can. Cr. Cas. 235 (Ont.); R. v. McLinehy, 2 Can Cr. Cas. 416 (Que.).

A person accused of the offence, whether indicted and tried alone or jointly with others, cannot be required to give evidence although he may do so of his own accord. R. v. Connors (1893), R.J.Q. 3 Q.B. 100, 5 Can. Cr. Cas. 70. But on an indictment for theft, a witness who is not a party to the indictment being tried but who is indicted as a receiver of the stolen goods, is not excused from answering, but if he takes objection his evidence cannot be used against him on his trial. R. v. McLinehy, 2 Can. Cr. Cas. 416 (Que.).

Before the amendment made to this section by the addition of sub-sec. (2) it had been held that evidence given in a civil proceeding, whether under compulsion or not, might be used against the witness in a subsequent

criminal proceeding. R. v. Douglas (1896), 1 Can. Cr. Cas. 221 (Man.); R. v. Chisholm (1896), 32 C.L.J. 591 (Que.).

Under the old law an admission of guilt made by a witness on his examination was admissible only if made freely and voluntarily and after proper caution that he was not bound to criminate himself. R. v. Garbett (1847), 1 Den. C.C. 236; R. v. Mercerон (1812), 2 Stark. N.P. 366.

**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.

**6A.** See page 881

**7. Judicial notice of statutes, etc.** — 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.

Under this section it was held in a Quebec case that the court should take judicial notice of the Ontario Companies' Act in proof that the accused charged as a director of a trading company with fraudulently publishing a false statement of its affairs, was in fact a director because he was the president of the company, and by the Ontario Companies' Act, under which the company was incorporated, the president must be chosen from the directors. R. v. Gillespie (1898), 1 Can. Cr. Cas. 551 (Que.)

**8. Proof of proclamations, etc.** — 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:—

(*a*) By the production of a copy of the *Canada Gazette* or a volume of the Acts of 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 King'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 King's Privy Council for Canada,—and in the case of any order, regulation or appoint-

ment 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. Proof of proclamations, etc.** — 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 King'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, etc.**—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 in the United States of America, or of any state of the United States of America, or 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. Proof of Imperial Acts, etc.** — 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 King's Printer for Canada.

**12. Proof of official or public 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 or documents admissible in evidence.**—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 it 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 handwriting, etc., not requisite.**—No proof shall be required 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 notices, etc., 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 books of government departments.**— 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. Proof of notarial acts in Quebec.** — Any document purporting to be 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 be given to adverse party.** — No copy of any book or other document, as provided in sections 10, 12, 13, 14, 17 and 18 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.

**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 of evidence.** — 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.

In the Province of Quebec, relationship must be established by the production of extracts from the registers of civil status, as required by the provincial laws of evidence made applicable to criminal proceedings by this section unless the absence of such registers is proved; and it is not too late for the accused to object that oral evidence is insufficient proof, after the case for the prosecution has been closed. R. v. Garneau (1899), 4 Can. Cr. Cas. 69 (Que.).

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. Affirmation of witness instead of oath.** — 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. Affirmation instead of oath.** — 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 nexf preceding section shall be liable to indictment and punishment for perjury in all respects as if he had been sworn.

**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.

STATUTORY DECLARATIONS.

**26. Statutory declaration.** — Any judge, notary public, justice of 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.

The permission granted by this section to receive the declaration includes an authorization to the declarant to make the same, and the declarant is consequently a person "authorized by law to make a solemn declaration" under sec. 147 of the Code. R. v. Skelton (1898), 4 Can. Cr. Cas. 467 (N.W.T.).

**27. Affidavits required by insurance companies.** — 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 or other person 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.**— The 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. 19 .

## 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. |

## STATUTES OF CANADA, 1902.

(2 Edw. VII., chapter 9).

An Act to further amend the Canada Evidence Act, 1893.

HIS Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. *The Canada Evidence Act, 1893*, is amended by inserting, after section 6 thereof, the following section:—

"6. **Expert witnesses.**—Where, in any trial or other proceeding, criminal or civil, it is intended by the prosecution or the defence, or by any party, to examine as witnesses professional or other experts entitled according to the law or practice to give opinion evidence, not more than five of such witnesses may be called upon either side without the leave of the court or judge or person presiding, such leave to be applied for before the examination of any of the experts who may be examined without such leave."

# INDEX.